

# Title VII Anti-Discrimination Protection Covers Transgender Employee, Appeals Court Rules

By Michelle E. Phillips &

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The Equal Employment Opportunity Commission may pursue claims that an employee was discriminated against on the basis of transgender status in violation of Title VII of the Civil Rights Act, the federal appeals court in Cincinnati has ruled in a landmark decision. [\*EEOC v. R.G. & G.R. Harris Funeral Homes\*](#), No. 16-2424 (6th Cir. Mar. 7, 2018). The Court rejected the employer's argument that it was protected by the Religious Freedom Restoration Act (RFRA).

The Court remanded the case to the lower court with instructions to consider the merits of the claims. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

Not all courts are in line with the Sixth Circuit on Title VII's coverage of transgender status. The protections afforded will vary depending on the locality of a case. The issue likely will have to be decided by the U.S. Supreme Court.

Employment protections for people who identify as transgender and gender non-conforming are evolving. In its [Strategic Enforcement Plan for FY 2013-2016](#), the EEOC propelled the issue into the spotlight by stating that Title VII protection for lesbian, gay, bisexual, and transgender individuals is an agency priority. (See our article, [Targeting Class-Based Discrimination Tops EEOC's Ambitious 2013-2016 Strategic Enforcement Plan](#)). Over the last decade, courts have started to find that Title VII prohibits employment discrimination based on gender identity, gender expression, and gender non-conformity.

In addition, these decisions may affect how employers administer the health insurance they provide their employees. In a Texas case discussed below, for example, the court considered whether there may be limits on the services an employer's health plan must cover to treat gender dysphoria.

### Sixth Circuit Case

Aimee Stephens was a funeral director at R.G. & G.R. Harris Funeral Homes. She was fired by the owner (the Rost family own and operate a multi-generation, religious-based, funeral home) within two weeks of informing the company in an impassioned letter that she was planning to transition from male to female (and present as a female at work).

Stephens subsequently filed a charge with the EEOC. The EEOC filed a complaint against the company, alleging it violated Title VII by terminating Stephens "on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes" and for having a discriminatory clothing allowance policy (only cisgender males were granted a clothing allowance).

The district court granted summary judgment to the company, mainly on the basis of religious protections it claimed under the RFRA. (For more on the district court decision, see our article, [Court Dismisses on Religious Freedom Grounds EEOC's Title VII Suit on](#)

### Behalf of Fired Transgender Employee.)

The Sixth Circuit reversed and granted summary judgment to the EEOC. The Court found Stephens was terminated because of her failure to conform to sex-based stereotypes, which violates Title VII. This is in line with the Court's decision in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). In that decision, the Court allowed a transgender plaintiff to pursue a Title VII sex discrimination claim because Title VII prohibits employment discrimination based on stereotypical gender norms. The Court found that this would include discriminating against someone who is transgender for not conforming to stereotypical gender norms. In *Smith*, however, the Court did not expressly hold that discrimination based on an individual's transgender status violates Title VII.

In *R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit took the next step by expressly holding that "discrimination on the basis of transgender and transitioning status violates Title VII." Furthermore, the Court said, transgender status is protected under Title VII because it constitutes a trait that is inherently related to gender non-conformance. The Court provided two reasons for its conclusions.

First, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." Second, "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping." This is because discrimination against a transgender individual is based on stereotypical notions of how biological sex and gender identity should align. The Court saw no need to disaggregate discrimination based on transgender status from discrimination based on gender non-conformity.

The Court found the company's religious protection arguments unavailing. It held the company's religious freedom would not be substantially burdened by continuing the employee's employment. Further, as a matter of law, a company claiming religious protection under RFRA cannot rely on customers' presumed biases to establish such a burden, the Court said. The Court also held as a matter of law that a company having to tolerate an employee's beliefs as to her own sex and gender is not the same thing as supporting it, so it would not amount to a substantial burden under RFRA.

Furthermore, the Court found the EEOC's enforcement of Title VII was the least restrictive way for the agency to achieve its compelling interest of ensuring the company complies with Title VII. Finally, the Court ruled the company did not satisfy the "ministerial exception" to Title VII, which would preclude application of Title VII to employment claims between a religious institution and its ministers.

### Texas Case

A case in the Northern District of Texas discusses the extent to which an employer's health plan must cover services related to treatment of gender dysphoria. *Baker v. Aetna Life Insurance Co.*, No. 3:15-CV-3679-D (N.D. Tex. Jan. 26, 2018).

The plaintiff, a transgender female, was denied coverage from her employer's health plan for breast augmentation surgery. Previously, she was provided coverage for hormone replacement therapy through which she had developed B-C size female breasts.

The employee sued the employer and the third-party administrator for the plan, contending her employer violated Title VII because the plan covered female-to-male

mastectomies, but not the male-to-female breast augmentation she requested.

The court granted summary judgment in favor of the employer. (In previous opinions, the court dismissed the plaintiff's other theories and dismissed the case against the third-party administrator.) It found the plan provided an alternative method (hormone replacement) for achieving breasts in a person transitioning from male-to-female. The plaintiff's hormone replacement was covered, and she provided no authority on why denial for a surgical method was discriminatory when the hormone replacement was available.

Furthermore, the court noted that there was no categorical ban in the plan on breast surgery to treat gender dysphoria. The plan covered surgery that was medically necessary and, in certain cases, that could include breast surgery to treat gender dysphoria. However, the plan did not cover cosmetic procedures (such as breast augmentation). The plan had the discretion to determine whether the requested procedure met the criteria to be considered medically necessary or whether it was cosmetic in nature. The court appeared to draw a distinction between a procedure that *creates* breasts for a person being treated for gender dysphoria and a procedure that *enhances* the breasts of someone being treated for gender dysphoria.

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As the laws in this area continue to change and evolve, employers should regularly review their policies and practices with employment counsel. Employers should consider revising employment policies, conducting training that addresses LGBTQ discrimination, and implement a Transgender Employment Policy, as well as Gender Transition Guidelines. Please contact a Jackson Lewis attorney if you have any questions.

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