
EEOC Landmark Transgender Discrimination Case to Proceed

By Anne-Marie V. Welch / Apr 30, 2015

The United States District Court for the Eastern District of Michigan issued a decision permitting the Equal Employment Opportunity Commission ("EEOC") to proceed to trial on a claim of sex stereotyping brought on behalf of a transgendered employee. This decision comes on the heels of the EEOC achieving a \$150,000 settlement in its only other transgender discrimination case.

Background: The EEOC's Strategic Enforcement Plan

The EEOC adopted its current Strategic Enforcement Plan (SEP) in December of 2012. As a top EEOC enforcement priority, the SEP includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply." The "as they may apply" language was necessary because Title VII currently does not protect against discrimination on the basis of sexual orientation or gender identity alone.

In *Price Waterhouse v. Hopkins*, the Supreme Court held that discrimination because of "sex" includes sex stereotyping. The Court explained that discrimination because an individual failed to act in conformance with his/her gender violated Title VII. Relying mainly on this prohibition against sex-stereotyping, the EEOC's litigators have filed lawsuits and *amicus curiae* briefs in various courts addressing a multitude of LGBT discrimination related issues.

On September 25, 2014, the EEOC filed two cases alleging discrimination on behalf of transgendered individuals, Lakeland Eye Clinic in Florida and R.G. & G.R. Funeral Home in Michigan. A week prior, the EEOC obtained a \$150,000 settlement in the Florida case.

Michigan Case Facts

The EEOC brought an action on behalf of the Funeral Home's former Funeral Director/Embalmer Stephens, who was transitioning from male to female. The Complaint alleged that the Funeral Home hired Stephens in 2007, and that she satisfactorily performed her duties. Stephens informed her employer and co-workers that she was undergoing a gender transition from male to female and intended to dress in appropriate business attire at work. She asked for their support and understanding. The EEOC asserted that, in response, the Funeral Home fired Stephens two weeks later, stating that what Stephens was proposing to do was "unacceptable."

The EEOC claimed that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, including that the Funeral Home fired Stephens because: (a) Stephens was a transgendered woman; (b) Stephens was transitioning from male to female; and/or; (c) Stephens failed to conform to the Funeral Home's sex or gender based preferences, expectations, or stereotypes.

On November 19, 2014, the Funeral Home filed a Motion to Dismiss the Complaint, arguing that the EEOC failed to state a claim.

Decision

On April 22, 2015, the court held that the EEOC's Complaint stated a Title VII claim against the Funeral Home. The court explained that transgender status was not a protected class under Title VII. If the EEOC's Complaint had alleged that the Funeral Home fired Stephens solely based upon Stephens' status as a transgender person, then the court would have agreed with the Funeral Home that the EEOC failed to state a claim. The Complaint, however, also asserted that the Funeral Home fired Stephens "because Stephens did not conform to the Funeral Home's sex or gender based preferences, expectations, or stereotypes." The court held that the EEOC stated a claim based on sex-stereotyping:

"binding Sixth Circuit precedent establishes that any person *without regard to labels such as transgender* can assert a sex-stereotyping gender-discrimination claim under Title VII, under a *Price Waterhouse* theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination." (Emphasis added.)

Employer Takeaways

While there is currently no protected class for transgender persons, employers should still make sure their workplace is free from discrimination and harassment against transgendered persons. The EEOC and plaintiff attorneys will continue to bring cases of sex stereotyping against employers on behalf of transgendered persons.

When an employee is in transition, employers should:

- Designate a human resource official to oversee the transition process as necessary in the workplace.
- Recognize that no two transitions are exactly alike, so treat each transition individually.
- Set up a time to talk with the employee about what the company can expect during the transition.
- Set up separate meetings with the employee's supervisor and immediate co-workers to inform them of the transition and what to expect. Remind them of the company's respect and non-discrimination and non-harassment policies (supervisors have a responsibility to enforce observed policy violations).
- Maintain confidentiality; share only limited/necessary information with those that need to know (i.e., treat like an ADA/FMLA issue).

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- Consider which company records must reflect the employee's name and sex at birth, and which records can be modified to assist the employee in the transition, such as email addresses, name plates, business cards and security badges.
 - Remind managers and co-workers to use appropriate pronouns consistent with the employee's gender presentation.
 - All employees should be expected to follow company policy and maintain respectful behavior to everyone in the workplace.
 - Discuss with the employee his/her preference regarding the use of restrooms/changing facilities. Often, the employee will prefer to use a gender-specific facility that matches the employee's current gender presentation. Consider creating or making available a single-use, unisex restroom facility for all employees to use in an addition to gender-specific facilities. Alternative changing area can be made available to all employees and/or allowing use of locker room corresponding to gender identity before or after other employees.

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