The State of Transgender Litigation:

EEOC v. R.G. & G.R. Harris Funeral Homes

By Thomas P. Brandt and Laura O'Leary

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Fanning Harper Martinson Brandt & Kutchin

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The Supreme Court has the opportunity to determine whether Title VII's prohibition on employment discrimination on the basis of sex prohibits discrimination on the basis of transgender status or the expression of a transgender gender identity. On November 30, 2018, the Supreme Court will consider whether to grant review of the appellate court's decision in *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018), in which the Sixth Circuit held that discrimination on the basis of transgender and transitioning status violates Title VII. Because the Sixth Circuit's reasoning in *Harris Funeral Homes* echoes the reasoning many courts apply in lawsuits involving transgender students and arrestees, review by the Supreme Court could have a profound impact on the trajectory of transgender litigation in employment, in schools, and in jails.

Background

A. Title VII and Sex Stereotyping Under *Price Waterhouse v. Hopkins*

Title VII prohibits discrimination in employment because of an individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2. The statute does not explicitly define the term sex in such a way as to include transgender or transitioning status.

However, the Supreme Court has found that evidence of sex stereotyping can support a claim under Title VII for discrimination based on sex. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court addressed the burdens applicable to each party with respect to establishing causation in a Title VII sex discrimination claim. The lawsuit arose after a female manager was denied a promotion due, at least in part, to her being perceived as overly aggressive and as not behaving femininely. The Court objected to the employer's use of sex stereotypes,

pursuant to which aggressive men were promoted, but aggressive women were criticized. A plurality of the Supreme Court explained,

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Price Waterhouse, 490 U.S. at 251 (citations omitted).

In his dissent, Justice Kennedy stated, "I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm." *Id.* at 294 (Kennedy, J. dissenting).

B. Circuit Courts' Use of *Price Waterhouse* in Cases Involving Transgender Workers

Some circuit courts of appeals have applied the sex stereotyping language from *Price Waterhouse* to claims of employment discrimination by transgender individuals. They generally reason that, because transgender people transgress sex stereotypes in their behavior, discrimination against an individual based on that person's transgender status necessarily constitutes an improper imposition of sex stereotypes, in violation of Title VII or the Equal Protection Clause.

The Fourth, Sixth, and Eleventh Circuits have found that discrimination against a transgender individual based on that person's transgender status is discrimination "because of sex" based on their reading of *Price Waterhouse*. *See, e.g., G.G. v. Gloucester County Sch. Bd.*,

654 Fed. App'x 606, 607 (4th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (equal protection case); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004). District Courts in Florida, Nevada, Connecticut, Michigan, Texas, and the District of Columbia have adopted this reasoning, finding that a transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex stereotyping theory.

The Tenth Circuit rejected this argument, stating, "[h]owever far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224–25 (10th Cir. 2007). The Tenth Circuit also explained in *Etsitty* that "The critical issue under Title VII 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed'" and that an employer's requirement that employees use restrooms matching their biological sex does not expose employees of one sex to disadvantageous conditions of employment.

EEOC v. Harris Funeral Homes

A. District Court Opinion

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) involves Title VII claims by a male funeral director, Stephens, who intended to transition to living as a woman. Harris Funeral Homes is a closely held, for-profit funeral home which has a dress code requiring men to wear suits and ties and women to wear skirts and business jackets. When Stephens notified the owner, Mr. Rost, of Stephens' desire to present as a woman at work, and to follow the dress code for women while at work, the owner terminated Stephens.

Rost believes that God has called him to serve grieving people and that his purpose in life is to minister to the grieving. Rost testified that he sincerely believes that the Bible teaches that a person's sex is an immutable God-given gift and that he would be violating God's commands if he were to permit one of the funeral home's male funeral directors to wear the uniform for female funeral directors while at work. Rost claimed that requiring him to permit Stephens to present himself as female at work would force Rost to be complicit in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift. Rost was also concerned that permitting Stephens to dress as a woman at work, in violation of the Funeral Home's dress code, would have disrupted the grieving and healing process of clients mourning the loss of their loved ones.

During the Obama administration, the EEOC brought this lawsuit, asserting that Harris Funeral Homes violated Title VII by discriminating on the basis of sex when it terminated Stephens. Stephens intervened in the lawsuit after the Trump administration took office. Because the EEOC brought the lawsuit, Harris Funeral Homes asserted a defense to the Title VII discrimination claims based on the Religious Freedom Restoration Act ("RFRA").[1]

The district court held that, although Title VII does not provide a claim based solely on a person's transgender status, the EEOC stated a claim for sex discrimination by alleging that Harris Funeral Homes terminated Stephens for failing to conform to sex stereotypes. *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015), *rev'd in part sub nom. Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). The district court subsequently held in favor of the Funeral Home on its RFRA defense, finding that the Funeral Home "met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed

[1] RFRA applies only to suits in which the government is a party.

under it, would impose a substantial burden on the ability of the Funeral Home to conduct business in accordance with its sincerely-held religious beliefs." *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 856 (E.D. Mich. 2016), *rev'd and remanded sub nom. Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). The district court held that the EEOC did not meet its burden of showing that application of this substantial burden to Harris Funeral Homes was the least restrictive means of furthering a compelling governmental interest. *Id.*

B. Sixth Circuit Opinion

On March 7, 2018 the Sixth Circuit Court of Appeals reversed the district court's grant of summary judgment to the Funeral Home. The Sixth Circuit explained that in *Price Waterhouse,* the Supreme Court identified discrimination based on sex stereotypes as a violation of Title VII's prohibition against discrimination on the basis of sex. Consequently, the Sixth Circuit held that discrimination on the basis of transgender and transitioning status violates Title VII because this is always based on gender-stereotypes. *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018). The Court reasoned that, "'[i]t 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." *Id.*, at 575. "Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the woman's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens' sex impermissibly affected Rost's decision to fire Stephens." *Id.* The Court explained that the question before it was not whether an employer can have sex-specific dress codes, but whether an employer can reject the employee's notion of his or her own sex. *Id.* at 573.

The Sixth Circuit reversed the district court's holding with respect to the Funeral Home's assertion of a defense under RFRA, finding that the Funeral Home's religious exercise would not be substantially burdened by enforcement of Title VII in such a way as to require the Funeral Home to permit Stephens to present as a woman at work. *Id.* at 581. The court held that no substantial burden on the Funeral Home's religious exercise was created by the choice either: (1) to permit Stephens to dress in female attire while representing the Funeral Home; or (2) to leave the funeral industry and end the Funeral Home's ministry to grieving people. *Id*. at 586. Additionally, the court held that the EEOC satisfied its burden of showing that enforcing Title VII in this case is the least restrictive means of furthering the compelling government interest in combating sex discrimination in the workforce. *Id*. at 591.

C. Petition for Writ of Certiorari

On July 24, 2018 Harris Funeral Homes filed a petition for writ of certiorari to the Supreme Court. *R.G. & G.R Harris Funeral Homes, Inc. v. Equal Opportunity Employment Commission*, No. 18-107, 2018 WL 3572625 (July 24, 2018). In its petition, the Funeral Home asked the Supreme Court to consider two questions: (1) whether the word "sex" in Title VII's prohibition of discrimination based on sex means gender identity and includes transgender status; and (2) whether *Price Waterhouse* prohibits employers from applying sex-specific policies according to employees' sex, rather than gender identity.

The Funeral Home argued that the Sixth Circuit Court of Appeals departed from its proper role of applying, not amending, the work of the legislature when it judicially amended the word "sex" in Title VII to mean gender identity. Congress included the term "sex" in Title VII to address a lack of equal opportunities for women in employment and to ensure that men and women would be treated equally. The Funeral Home explained that both in 1964, when Title VII

was enacted, "and today, the word 'sex' refers to a person's status as male or female as objectively determined by anatomical and physiological factors, primarily those involved in reproduction." *Id.* at *7. Congress has rejected numerous proposals to add the term "gender identity" to Title VII, even though it has enacted other nondiscrimination provisions which list "sex" alongside "gender identity." Congress is capable of prohibiting discrimination based on gender identity, but in the context of Title VII, it has not done so. *Id.* at *7-8.

The Funeral Home argued that the Sixth Circuit misread *Price Waterhouse*, in which a plurality of the Supreme Court found that Title VII forbids disparate treatment of men and women resulting from sex stereotypes. The Sixth Circuit relied only on the sex stereotyping language of *Price Waterhouse* but ignored its requirement of a showing of disparate treatment. Additionally, the Sixth Circuit denounced as stereotyping all sex-specific policies administered according to sex rather than gender identity. Thus, the Sixth Circuit joined other circuit courts of appeals which have used the sex stereotyping language from *Price Waterhouse* in order to compel employers or institutions, including primary and secondary schools, to administer sex-specific policies, such a policies regarding restroom or locker room access, on the basis of gender identity rather than physiological attribute of sex.

The Funeral Home identified a split among the circuit courts of appeals concerning whether the term "sex" in Title VII means gender identity and includes transgender status. The petitioner also noted that the federal government appears to be divided on this point, as the EEOC argued in 2012 that a complaint of discrimination based on gender identity or transgender status is cognizable under Title VII, but the Attorney General announced in October of 2017 that the Department of Justice takes the position in all pending and future matters that Title VII's

prohibition on discrimination on the basis of sex does not encompass discrimination based on gender identity per se, including transgender status.

Multiple amici briefs in support of the Funeral Home have been filed. The States of Nebraska, Alabama, Arkansas, Kansas, Louisiana, Oklahoma South Carolina, Tennessee, Texas, Utah, West Virginia, Wyoming and the Commonwealth of Kentucky submitted an Amicus Brief in support of the notion that "sex' under Title VII does not mean anything other than biological status.

D. The EEOC's Response to the Petition for Writ of Certiorari

On October 24, 2018, the EEOC filed a response in opposition to the Funeral Home's petition. In a stark departure from its prior position, the EEOC stated "[t]o be sure, the United States disagrees with the court of appeals' decision…the court's analysis of whether petitioner engaged in improper sex stereotyping reflects a misreading of *Price Waterhouse*…[t]he court's further conclusion that gender-identity discrimination necessarily constitutes discrimination because of sex in violation of Title VII…is also inconsistent with the statute's text and this Court's precedent." Response Brief, p. 12. The EEOC argued that proper statutory construction leads to the conclusion that Title VII "does not apply to discrimination against an individual based on his or her gender identity." *Id*., p. 17.

The EEOC explained that Supreme Court precedent identifies the critical issue in determining whether an employer has violated Title VII's prohibition against discrimination because of sex as "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id*., p. 18 (*quoting Oncale v. Sundowner Offshore Servs. Inc*., 523 U.S. 75, 80 (1998)). Thus, Title VII does not proscribe employment practices which take into account the sex of employees but

which do not impose different burdens on similarly situated members of each sex, such as sex-specific dress codes or restrooms. Because the Sixth Circuit did not identify any way in which the Funeral Home's application of its sex-specific dress code based on an employee's biological sex results in disparate treatment of similarly situated male or female employees, the court erred in its determination that the Funeral Home violated Title VII.

Because the ordinary definition of "sex" does not include gender identity, the EEOC also disagreed with the Sixth Circuit's conclusion that gender-identity discrimination categorically constitutes sex discrimination in violation of Title VII. The EEOC rejected the Sixth Circuit's reasoning that Stephens' termination was impermissibly based on sex because the Funeral Home necessarily considered Stephens' sex in determining whether to terminate Stephens for wishing to comply with the women's dress code, as Stephens would not have been terminated for this reason if Stephens had been a woman. The EEOC explained that "[t]he application of any sex-specific policy, by definition, turns in part on the employee's sex. But that does not constitute '*discrimination*' unless, as a result of the policy's application, 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed….Otherwise, every sex-specific policy—from dress codes for certain occupations to sex-specific employee restroom—would automatically violate Title VII.'" *Id.*, p. 22 (*quoting Oncale*, 523 U.S. at 80).

However, the EEOC asked the Supreme Court to delay determining whether to grant the Funeral Home's petition for writ of certiorari until the Court decides whether to grant review of two appeals which address a related issue: whether discrimination because of an individual's sexual orientation constitutes discrimination based on sex in violation of Title VII. The EEOC contends that a deeper and more fully developed split exists among the circuit courts of appeals

with respect to the issue of whether discrimination on the basis of sexual orientation violates Title VII. The EEOC believes that if the Supreme Court were to grant review in those cases, their resolution of the issue would bear upon the Sixth Circuit's opinion in the *Harris Funeral Homes* appeal, as the Sixth Circuit relied heavily upon the reasoning from appeals involving discrimination based on sexual orientation. Alternatively, if the Supreme Court were to deny review of the sexual orientation appeals, the EEOC argues that the Court should also deny review in *Harris Funeral Homes*.

The Supreme Court Could Greatly Clarify the Law

On November 30, 2018, the Supreme Court is set to consider whether to grant review of both of the appeals concerning whether Title VII prohibits discrimination based on sexual orientation, as well as the *Harris Funeral Homes* appeal. If the Court were to accept any, or all, of these cases for review, the Court would be able to clarify the proper application of the sex stereotyping language used in *Price Waterhouse*, which has provided the foundation on which many courts have held that employers or schools discriminate on the basis of sex, in violation of Title VII, Title IX, or the Equal Protection Clause, unless they enforce sex-specific requirements on the basis of gender identity, rather than biological sex. Thus, the Court is in the position to issue guidance which would significantly affect the many lawsuits throughout the country involving questions concerning dress-codes, access to restrooms and locker rooms, housing in jails, use of preferred pronouns, and participation in sex-segregated sports and extra-curricular activities.