Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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DEPARTMENT OF JUSTICE REAFFIRMS FUNDAMENTAL IMPORTANCE OF RELIGIOUS LIBERTY

Edward H. Trent...

"The issue is often how to balance one's right to religious free exercise when it comes into conflict with another's right to employment, commerce, or personal, private behavior."

The United States Supreme Court has a rich history of protecting individual religious liberty from intrusion by the state. The Court has defended a person's ability to not only believe and worship, but to live according to one's faith. Over the last 50 years, with changing cultural views on sexuality in particular, conflicts between faith and culture have more often turned into conflicts between one person's religious convictions and another's right to sexual freedom. From contraception, to homosexuality, to the definition of marriage, to gender identity, the conflicts between religious views and societal acceptance of more liberal views of human sexuality have pitted the government against business, employer against employee, and employee against employee, with vocal advocacy groups on all sides. Not surprising, the courts have been asked to balance these competing interests.

On June 30, 2014, the United States Supreme Court issued its opinion in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), declaring that the religious liberty rights of privately held businesses trumped the government's desire to provide free contraception through employer health care plans. On December 5, 2017, the Supreme Court heard oral arguments in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Case No. 16-111. The issue before the Court is whether private business owners must provide services in support of same-sex wedding ceremonies/celebrations when doing so would violate the business owner's religious beliefs regarding marriage. Here, the Court must determine how to properly balance individual religious liberty interests and federal and state interests in prohibiting and eradicating discrimination.

On October 6, 2017, the Department of Justice issued a Memorandum to all Executive Departments and Agencies requiring that the First Amendment's protection of the Free Exercise of Religion be given the broadest possible protections; including in the application and interpretation of Title VII. The purpose of the Memorandum is evident from the introduction.

> Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law. . . . Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law.

Memorandum Principle No. 1 The Memorandum also notes:

> The Free Exercise Clause protects not just the right to believe or the right to worship; ***it protects the right to perform or abstain from performing certain physical acts in accordance with one's beliefs.*** . . . [T]he exercise of religion [is broadly defined] to encompass all aspects of observance and practice, whether or not central to, or required by, a particular religious faith.

Memorandum Principle No. 2 (emphasis added).

Against this backdrop is a section in the EEOC's Proposed Enforcement Guidance on Unlawful Harassment issued in January 2017, that when read in context with other provisions of the proposed Guidance highlights the growing tension between religious beliefs and individual sexual autonomy.

> Special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression: Because Title VII requires that employers accommodate employees' sincerely held religious practices and beliefs in the absence of undue hardship, employers may violate Title VII if they try to avoid potential coworker objections to religious expression by preemptively banning all religious communications in the workplace. Employers, however, also have a duty to protect workers against religious harassment. ***Employers would not be required to***

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accommodate religious expression that creates, or threatens to create, a hostile work environment.

Guidance p. 65 (emphasis added). The EEOC does not clarify when or what type of religious expression would create a hostile work environment other than possible persistent, unwelcome proselytizing. However, one other example is found in the Guidance, namely when an employee makes "derogatory" comments concerning sexual orientation. The EEOC's example, however, fails to place the presumably offensive comments in context, fails to give any examples of comments that would be considered derogatory (unlike its numerous other examples of harassing behavior), and specifically states that the comments need not be directed at any employee at all but may simply be overheard. Guidance Example 3 (describing "facially discriminatory" conduct). In short, the EEOC's proposed Guidance suggests that sexual orientation takes precedence over an overheard religious discussion disapproving of the behavior.

This conflict between religious beliefs and the EEOC's position on what constitutes sex discrimination or sexual stereotyping creates an issue for employers on what to do when employees discuss their religious beliefs about sexual morality, specifically when it concerns sexual orientation or gender identity, and another employee finds such religious beliefs offensive. Employees also have questions on whether they must leave their religious convictions at the door of their employer. Likewise, business owners who operate their business in accordance with their religious beliefs have questions on when, or if, they can decline services in support of particular causes, events, or functions or whether they can establish work rules consistent with their religious beliefs. The issue is often how to balance one's right to religious free exercise when it comes into conflict with another's right to employment, commerce, or personal, private behavior. The Memorandum attempts to address these and other concerns when it comes to the application of federal law and the constitutionally mandated protections for religious free exercise.

In the employment context, Title VII is clear that employees are entitled to reasonable accommodation for their religious beliefs and practices. Memorandum Principle 16 and 17. The EEOC upheld this requirement in *EEOC v. Star Transport, Inc.*, Case No. 13-cv-1240 (C.D. Ill) when it filed suit on behalf of two Muslim truck drivers who refused to transport alcohol as part of their jobs. The EEOC argued and the court determined the employer's decision to terminate the employees rather than accommodate their beliefs violated Title VII. Employers must take requests for religious accommodation seriously and work with the employee to determine if an accommodation is available, particularly when job duties conflict with sincerely held religious beliefs.

With the EEOC's expanded interpretation of "sex" under Title VII - going beyond biological sex (male or female) to also prohibit discrimination on the basis of sexual orientation and gender identify - some employees are discovering that holding traditional religious views on sexual behavior can get them in trouble with their employer. One instance that remains in litigation involves the former Fire Chief for the City of Atlanta, *Kelvin Cochran v. City of Atlanta*, et. al., Case No. 1:15-cv-00477-LMM, pending in the U.S. District Court for the North District of Georgia. There, Chief Cochran asserts he was terminated after the City learned he had written a short book for a men's Bible study at his church in which he discusses Biblical teaching on sexual morality, including the prohibition on sexual relations between people of the same-sex and any sexual relations outside of marriage. Although there was no evidence he had treated anyone unfairly due to sexual orientation or religion, he was nevertheless terminated because, he asserts, he had the audacity to publish his personal, Christian beliefs on sexual morality, views the City found to be derogatory on the basis of sexual orientation.

There are occasions when an employer's operation of its business consistent with the employer's religious beliefs conflicts with non-discrimination laws. Under federal law, when a law of general applicability, such as Title VII, creates a substantial burden on one's religious free exercise, the law can only be upheld if it is narrowly tailored to support a compelling governmental interest and is the least restrictive means available. Memorandum Principle 14. One example where this principle is being considered is a case pending in the U.S. Court of Appeals for the Sixth Circuit, *EEOC v. RG and GR Harris Funeral Home*, Case No. 16-2424. The EEOC claimed sex discrimination when the plaintiff, a biological male, was terminated after telling the employer that he was transgender and would be presenting as female going forward. The trial court found that not allowing the plaintiff to dress according to the female dress code was sexual stereotyping, but granted summary judgment in favor of the employer because to allow a male to dress and appear as a female violated the employer's sincerely held religious beliefs regarding a person's sex as an immutable characteristic not subject to change.

The court of appeals will have to determine the proper balance between the employer's religious liberty and the individual employee's rights under Title VII. The Memorandum notes that just because a third party may be affected that does not mean that an exemption based on religious liberty should be unavailable. Memorandum Principle 15. How the courts will strike that balance, however, remains to be seen.

With the Memorandum, the current administration is directing that greater emphasis be placed on protecting individual religious liberty when applying and enforcing

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CONFLICT OVER SEX, STEREOTYPES, AND/OR STATUS

Ann Elizabeth Sartwell

"More than 50 years have passed since 'sex' was abruptly incorporated into the Title VII framework. Several more may very well pass before clarity on this particular issue emerges."

Hear the prophetic opening words of "Let's Talk About Sex," one of Salt-n-Pepa's biggest hits:

I don't think we should talk about this

(Come on, why not?)

People might misunderstand what we're tryin' to say, you know?

(No, but that's a part of life)

On October 4th, Attorney General Jeff Sessions issued a Memorandum[i] that garnered headlines as a major reversal of fortune for workplace protections for transgender workers. In practical terms, the DOJ's Memorandum means it will continue to be in conflict with the EEOC's position[ii] (at least in the short term) and that local and state government employees will not benefit from its litigation assistance. The Memorandum has been introduced to support the recent oral argument of a private employer seeking to defeat a claim of discrimination by a transgender former employee before the Sixth Circuit Court of Appeals, but its power in that case is limited to the persuasiveness of its arguments.[iii]

The breadth of the Memorandum's actual impact remains to be seen, and it does not make sense at the moment for any employer (public or private) to consider "rolling back" approaches to gender nonconforming behavior in the workplace.

By way of background: the U.S. Department of Justice (DOJ) and the Equal Employment Opportunity Commission share enforcement authority for state and local government employers under Title VII of the Civil Rights Act of 1964. While the EEOC investigates (and attempts to conciliate) charges, other than the charging individual, it is the DOJ, rather than the EEOC, that has authority to sue those employers. Likewise, only the DOJ can institute an independent investigation against those entities for potential Title VII violations.

Since 1989, discrimination based on gender stereotyping has fallen within Title VII's prohibitions. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In the Sixth Circuit, which includes Tennessee, this prohibition includes failure to conform with gender norms, including behavior associated with gender transitions. *Smith v. City of Salem*, 355 F.3d 566, 575 (2004). In 2012, the EEOC adopted the position that discrimination based on an individual's transgender status (as opposed to failure to conform to gender-based stereotypes) is prohibited under Title VII. *Macy v. Holder*, No. 0120120821 (EEOC, Apr. 20, 2012). Macy was an applicant for a federal job. The EEOC and federal agencies share responsibility for resolving federal applicant and employee complaints. One of the issues in the *Macy* case was the different procedural rights afforded to the claimant depending upon how the underlying charge was framed.

In 2014, then Attorney General Eric Holder issued a Memorandum indicating the DOJ would no longer assert that Title VII does not encompass protection against discrimination based on an individual's transgender status. Relying in part on *Price Waterhouse* language stating that a plaintiff need only show that an employer relied on sex based considerations in coming to a decision, 490 U.S. at 241-242, the DOJ's position moving forward would be that discrimination based on an individual's gender identity is sex discrimination "because of … sex" under Title VII. Internally, that meant a simplification in the approach to handling the administration of federal applicant and employee complaints. Externally, it signaled a shift as well. Shortly after the publication of the Holder Memorandum, the DOJ filed suit on behalf of Rachel Tudor, a Southeastern Oklahoma University English professor who was allegedly denied tenure and later fired because of a gender transition.

Attorney General Sessions rescinded the Obama-era Holder Memorandum, concluding that "sex" in the context of Title VII means biologically male or female and that an individual's gender identity is not in and of itself a protected category under the Act. In part, the Memorandum relies on the dissent in *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362 (7th Cir. 2017)(en banc)(Sykes, J, dissenting)(citing dictionaries). The *Hively* decision, finalized in April of 2017, marked the first time a federal Court of Appeal held that Title VII prohibits discrimination based on sexual orientation. It set up a "split of authority" that may lead to resolution of the issue the U.S. Supreme Court.

The Memorandum also emphasizes that Congress has expressly prohibited discrimination based on gender identity in addition to other forms of discrimination under other statutes, such as the Hate Crimes Act. The Memorandum notes that transgender individuals are still entitled to protection under Title VII, but only in cases where sex stereotyping results in disparate treatment of men and women.

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"DOJ REAFFIRMS IMPORTANCE OF RELIGIOUS LIBERTY" continued from page 2

federal law, but it remains to be seen how this directive will be implemented by the various federal agencies and how the courts will resolve conflicts between religious beliefs and non-discrimination laws. For employers, it is important to be aware of what is taking place in the workplace. When conflicts arise over personal beliefs, employers and supervisors need to address the matter and return the focus to the work at hand, which may require updated training for supervisors and Human Resources managers. Just as the courts will struggle with balancing various interests, so must employers when dealing with their employees. The Department of Justice has taken a step to remind all parties that it is fundamental to all basic rights that we protect and defend individual religious liberty even when culture appears to be rejecting traditional religious values.

"CONFLICT OVER SEX" continued from page 3

Rachel Tudor did not allege discrimination for failure to conform to stereotypically male norms. To the contrary, Tudor alleged discrimination based on hostility or dislike toward her as a non-conforming (transgender) woman. Tudor presented as male when hired and was not terminated until several years after publicly presenting as female.

The 10th Circuit, where Tudor's claim arose, had concluded that an individual's transgender status was not a protected category; however, it had, like the 6th Circuit, concluded that plaintiffs could move forward with Title VII claims based on failure to conform to gender stereotypes. See *Ettsity v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007).

After the Sessions Memorandum was issued, the DOJ swiftly withdrew from Tudor's case, but Tudor survived a motion for summary judgment and proceeded to trial. The result? A whopping $1.165 million jury verdict against the employer.[iv] It did not immediately appear that the university would appeal the decision. While one case does not a "sea change" make, it is worth noting that this case arose in a small town of 15,000 people in Oklahoma, not in a large urban center.

In short, neither the Memorandum nor this lower court decision resolves the host of thorny questions related to the future of discrimination claims by individuals whose gender nonconformity is at the heart of workplace conflict. If the U.S. Supreme Court does take up the "split of authority" over sexual orientation discrimination and Title VII, it may very well not answer all the questions employers have about "sex." More than 50 years have passed since "sex" was abruptly incorporated into the Title VII framework. Several more may very well pass before clarity on this particular issue emerges. In the meantime, prudent employers focus on policies and procedures that create productive, mission-focused environments.

[i] https://www.justice.gov/ag/page/file/1006981/download

[ii] President Trump's EEOC nominees Janet Dhillon and Daniel Gade were non-committal in confirmation hearings regarding whether they would adopt the DOJ's position that sexual orientation and gender identity discrimination are not prohibited under Title VII when confirmed.

[iii] *EEOC v. R.G. & G.R. Harris Funeral Homes*, No. 16-2424, Doc 85 – Harris Funeral Homes Supplemental Authority: Attorney General October 4, 2017 Memorandum "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964"

[iv] *Rachel Tudor v. Southeastern Oklahoma State Univ. & Reg. Univ. Syst. of Oklahoma*, Case No. 5:15-CV-033324-C, Document #262, November 20, 2017.

KNOW YOUR ATTORNEY
BECKY MURRAY

REBECCA BRAKE MURRAY is Of Counsel in the Knoxville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in March 2010. Becky has been a litigation attorney in private practice since 1985, practicing in the area of civil litigation with an emphasis in employment law and commercial litigation in state and federal courts. Becky received her undergraduate degree from the University of Michigan. She attended Case Western Reserve University where she obtained a Masters Degree in Health Sciences Education. Becky worked as a physical therapist in Detroit and Harrisburg, Pennsylvania before entering law school. She attended Cleveland-Marshall College of Law in Cleveland, Ohio, where she was an editor of the *Cleveland State Law Review*. Becky moved to Knoxville in 1983 and received her law degree from the University of Tennessee in 1985. Becky is a past president of the Tennessee Defense Lawyers Association and served on the Board of Governors for the Knoxville Bar Association for three years. She has an *AV Preeminent*® Rating - which is the highest possible rating given by Martindale-Hubbell, the leading independent attorney rating entity.