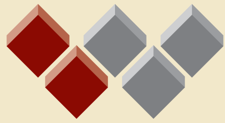

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Briefly

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SIXTEEN STATES ASK U.S. SUPREME COURT TO CLARIFY TITLE VII'S PROHIBITION ON DISCRIMINATION "BECAUSE OF . . . SEX"

Edward H. Trent

"[T]he scope of Title VII's prohibition on discrimination "because of ... sex" is hotly contested, and the legal standard for reviewing such claims varies widely across the country."

Sixteen States, including Tennessee, have filed a brief with the United States Supreme Court asking the Court to review and reverse a recent decision of the United States Court of Appeals for the Sixth Circuit (covering Kentucky, Michigan, Ohio, and Tennessee) on the interpretation and application of Title VII's prohibition of discrimination "because of . . . sex." On March 7, 2018, the Sixth Circuit issued its ruling in *EEOC v. R.G. & G.R Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) in which the court held: "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait." *Id.* at 577. The States support the funeral home's request that the Supreme Court review and reverse that holding.

In their brief, which only addresses the issue of whether the Supreme Court should review the case, not the merits of the parties' various arguments, the States focus on the plain meaning of the words in Title VII prohibiting discrimination "because of . . . sex." In encouraging the high court review, the States argue:

The Sixth Circuit's reasoning [in finding that "transgender or transitioning status" is discrimination "because of . . . sex" under Title VII] . . . utterly fails simple canons of statutory interpretation. Under the ordinary meaning canon, by all measures available, "sex" refers to one's biological status as male or female, not to a changeable psychological view of one's gender. The Sixth Circuit's holding also fails to overcome the fixed-meaning canon. At the time Congress enacted Title VII, both the common and academic definitions of "sex" did not include "gender identity" or "transgender."

Harris v. EEOC, Case No. 18-107, Brief for the States of Nebraska, et. al, p. 11. Accordingly, the States contend, the Supreme Court should review the case because "the Sixth Circuit not only ignored the will of Congress, but bestowed upon itself (an unelected legislature of three) the power to rewrite congressional enactments in violation of the separation of powers. The role of the courts is to interpret the law, not to rewrite the law by adding a new, unintended meaning." Brief p. 12.

Harris Funeral Home – The Background

The case arose after Harris Funeral Home terminated Anthony Stephens in August 2013. Stephens had worked for the funeral home since October 2007, and as a Director/Embalmer since April 2008. The funeral home maintained a dress code requiring suits and ties for men and skirts and business jackets for women. On July 31, 2013, Stephens provide the funeral home owner with a letter stating that he has struggled with "a gender identity disorder" his "entire life" and informed the owner the he had "decided to become the person that [her] mind already is." Stephens wrote in the letter that he "intend[ed] to have sex reassignment surgery," and that he must first "live and work full-time as a woman for one year." Accordingly, Stephens stated that upon return from vacation on August 26, 2013, he would appear "as [her] true self, Amiee Australia Stephens, in appropriate business attire." 884 F.3d at 568-69.

The funeral home terminated Stephens two weeks later because "he was no longer going to represent himself as a man. He wanted to dress as a woman." The funeral home also maintained that to allow Stephens to appear, dress, and act as a woman would violate its sincerely held religious beliefs regarding human sexuality, specifically by rendering the funeral home owner "complicit 'in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.'" *Id.* at 569.

The Sixth Circuit held that the funeral home violated Title VII by discriminating against Stephens on the basis of sex. The court based its ruling in favor of the EEOC and Stephens on its earlier decision in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), and the Supreme Court's decision in *Price*

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Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion). The Sixth Circuit held it was settled law in the circuit that "Title VII proscribes discrimination both against women who 'do not wear dresses or makeup' and men who do. Under any circumstances, '[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.'" *Id.* at 572. The court held that any sex stereotyping was impermissible, even if it had no impact on the person's job performance. *Id.* at 574. The court found that because the funeral home expected Stephens, a biological male, to appear and dress and behave has a male, it engaged in impermissible sex stereotyping. *Id.* As the court explained: "[b]ecause an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex – no matter what sex the employee was born or wishes to be." *Id.* at 578.

With regard to the funeral home's argument that "a person's sex cannot be changed; it is, instead, a biologically immutable trait," the court held "[w]e need not decide that issue; even if true, the Funeral Home's point is immaterial." *Id.* at 576. The reason it is "immaterial" what the person's actual sex is, the court explained, is because "Title VII requires 'gender [to] be irrelevant to employment decisions.' Gender (or sex) is not being treated as 'irrelevant to employment decisions' if an employee's attempt to or desire to change his or her sex leads to an adverse employment decision." *Id.* (quoting *Price Waterhouse*, 490 U.S. at 240). In short, under Sixth Circuit precedent, Title VII automatically covers "transgender or transitioning status" because "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Id.* at 577 (quoting *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016)).

Other Courts View Standard Under Title VII Differently

The Sixth Circuit's interpretation of whether gender non-conforming behavior is protected under Title VII's prohibition on discrimination "because of . . . sex," is contrary to other courts' reading and application of Title VII. In *Evans v. Ga. Reg'l Hosp*., 850 F.3d 1248 (11th Cir. 2017), Judge William Pryor of the United States Court of Appeals for the Eleventh Circuit (Alabama, Florida, and Georgia), noted in his concurring opinion rejecting the argument that Title VII should cover discrimination on the basis of sexual orientation that "[t]he doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support her argument that an employer discriminated on the basis of the enumerated sex category by holding males and females to different standards of behavior." *Id.* at 1260 (Pryor, J. concurring). Judge Pryor's analysis follows clear Supreme Court precedent issued after *Price Waterhouse*. Most notably, Justice Ginsburg, in her concurring opinion in *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993) (holding that sexual harassment is a form of sex discrimination under Title VII), stressed: "The critical issue, Title VII's text indicates, 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." *Id.* at 25 (Ginsburg, J. concurring).

In *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 80 (1998), where the Supreme Court held that male on male harassment could violate Title VII if the harassment was because of the victim's sex, the Supreme Court relied on Justice Ginsburg's synthesis of "the critical issue" in determining whether discrimination was "because of...ex," namely that the person's status as being male or female was a determining factor in the harassment or discrimination experienced in the workplace. *See also*, *Id.* at 82 (Thomas, J. concurring). Such precedent is consistent with Justice Kennedy's dissent in *Price Waterhouse* where he stated, "Title VII creates no independent cause of action for sex stereotyping." 490 U.S. at 294 (Kennedy, J. dissenting). No wonder other courts, such as the United States Court of Appeals for the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina, and South Carolina), had no trouble after *Price Waterhouse* in holding that "[i]t follows that in prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman, Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability" and discrimination based on other characteristics, in that case sexual orientation, did not violate Title VII because the alleged discriminatory conduct was "not [based on] the fact that the employee is a man or a woman." *Hopkins v. Baltimore Gas & Elec. Co*., 77 F.3d 745, 751-52 (4th Cir. 1996) (Niemeyer, J. concurring).

The Sixth Circuit rejected this reading of Title VII. Rather, the Sixth Circuit held that gender non-conformity itself was specifically protected under Title VII regardless of whether it resulted in disadvantageous terms and conditions for women vis-à-vis men or vice versa because the consideration of any sex stereotype on how men or women are to behave, present, or dress is inherently discrimination because of sex. 884 F.3d at 577-78. The court then recognized that "a transgender person is someone who 'fails to act and/or identify with his or her gender' – i.e., someone who is inherently 'gender non-conforming.'" *Id.* at 576 (citation omitted). Thus, the Sixth Circuit concluded that "sex" and "gender identity" were effectively one and the same under Title VII.

So What is Sex Stereotyping?

In *Price Waterhouse*, the Supreme Court was faced with a situation where a female accountant, Ann Hopkins, was up for partnership, but her candidacy was placed "on hold" due to concerns over her "interpersonal skills." The evidence at trial demonstrated that she was highly competent and respected by clients, but she had a history of issues with co-workers and staff to the point the trial court noted "that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." 490 U.S. at 235. Of concern to the trial court was that some of the criticisms of Ms. Hopkins' workplace behavior were expressed in a manner that suggested that the partners were only concerned about the behavior because she was a

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woman (e.g., comments such as Ms. Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" as well as a suggestion that she attend "charm school"). *Id.* The issue for the Supreme Court was "to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate [harsh treatment of co-workers and staff] and illegitimate motives [behavior only unacceptable because coming from a woman]." *Id.* at 232.

In evaluating the notion of sex stereotyping, a term used by the plaintiff's expert at trial, adopted by the plurality (four Justices), but not used by any concurring Justice, the Court noted that the application of the stereotype, in this case "aggressive" behavior or "using foul language" not acceptable "for a lady" but okay for the men, put the plaintiff in an "impermissible catch 22," an inherently disadvantageous position when compared to her male colleagues. *Id.* at 251. The Court noted it was perfectly acceptable to consider a person's abrasive behavior toward other employees in deciding that person's employment future, but in short, men and women needed to be held to the same standard. "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." *Id.*

In its overview of Title VII, the Supreme Court was clear: "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions." *Id.* at 239. The question becomes what is a sex based consideration and what is a quality or characteristic that does not evidence sex discrimination. Certainly, employers are able to consider an employee's abrasiveness in the workplace so long as they consider the characteristic the same for men and women. But where does an inherently "gender non-conforming" trait fall in the *Price Waterhouse* analysis? Several courts that have considered the issue have found that expecting a man to appear, dress, and behave as a man is inherently a sex based stereotype. Such a conclusion only begs the question of whether an employer can even acknowledge the inherent, biological differences between men and women without violating Title VII.

One area where this becomes evident is in sex specific dress codes. The Sixth Circuit in *Harris Funeral Home* specifically avoided answering that question but did take the time to distinguish and disavow opinions from other courts that upheld sex specific dress codes. Initially, the Sixth Circuit described the issue before it as follows:

> We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex," i.e., that Stephens was a biological male and would be held to the male dress codes.

884 F.3d at 573. The Sixth Circuit then rejected an opinion from the United States Court of Appeals for the Ninth Circuit (covering California, Oregon, Washington, Hawaii, Alaska, Arizona, Nevada, Idaho, and Montana) where that court upheld an employer's requirement that women employees wear makeup but men employees were forbidden from doing so because, in that court's opinion, the policy did "not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job." *Id.* at 573. The Sixth Circuit rejected the "impede [an employee's] ability to perform her job" requirement and held that any stereotype, regardless of its impact on the workplace was impermissible. *Id.* at 574.

Likewise, the Sixth Circuit rejected the notation that "sex stereotyping violates Title VII *only* when 'the employer's sex stereotyping resulted in "disparate treatment of men and women."'" The court did so because "[t]his interpretation of Title VII cannot be squared with our holding in Smith." *Id.* The court then went on to hold that the funeral home could not rely on a sex specific dress code to defend its decision to terminate Stephens because, in the view of the court, the application of such a dress code results "in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex." *Id.* All this while holding that Stephens' actual sex was "irrelevant" and without discussing whether Stephens was male or female for purposes of Title VII.

What Will The Supreme Court Do?

In arguing in favor of Supreme Court review of the *Harris Funeral Home* decision, the States discuss the inherent difference between the meaning of the words "sex" and "gender identity." Brief p. 5-8. The States also point out that Congress has specifically provided for protections on the basis of "gender identity" in other statutes while not including "gender identity" as a protected category under Title VII, thus making it clear that Congress understands there is a fundamental difference between "sex" and "gender identity." Brief, p. 10 (noting, by way of example, the Violence Against Women Act and hate crimes legislation). According to the States, "Congress clearly knows there is a distinction between sex and gender identity. It has used both terms at the same time (indicating they are not interchangeable), and it has thus far declined to add gender identity to Title VII. That should be the end of the inquiry into whether Title VII protects gender identity." Brief, p. 10.

Whether a Supreme Court holding that Title VII does not provide protections on the basis of "transgender or transitioning status" or "gender identity" as a status is "the end of the inquiry" in the funeral home case or under Title VII in general is another matter. Accepting the States' argument as to statutory interpretation, the question remains whether

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Stephens, as a male who identifies as female, is able to establish a claim of sex discrimination when the funeral home terminated Stephens for expressing a desire to conform to the female dress code. In short, how far does the Supreme Court precedent cited above go in addressing discrimination "because of . . . sex."

In applying *Price Waterhouse*, some courts ask simply whether the adverse employment action would have been taken had the employee been of the opposite sex. So, in Harris Funeral Home, the question would be had Stephens been female, would the employer have terminated Stephens for asking to comply with the female dress code, restroom, and so forth. The answer is clearly "no," which raises the issue of whether it is always a violation of Title VII to expect men, for example, to dress as a man, use the men's restroom, and otherwise present as a man. The EEOC and Sixth Circuit hold that it is. Other courts, as noted above, inquire if the criteria applied creates a disadvantageous term or condition of employment for one of the sexes. Such an analysis necessarily involves Title VII's definition of "sex," the employee's sex for Title VII purposes, and whether the person was held to a standard not applied to the other sex.

Accordingly, there are lots of questions for the Supreme Court to answer with regard to the scope of Title VII's prohibition on discrimination "because of . . . sex" in a post-*Price Waterhouse* world where the concept of sex, gender, and sexuality no longer have a common or generally accepted meaning. For example, as a matter of law, is a person's sex a biological reality of either male or female or is one's sex a philosophical or psychological phenomenon subject to change based on an individual's own designation, whether as male, female, or some other or no designation? If the later, does the law mandate that everyone, including employers and co-workers, accept a person's own self designation of his or her sex regardless of whether that self-identification corresponds with biological reality? Is the EEOC correct that the objections, sensibilities, or "biases" of other employees who object to a biological male using a communal female restroom are to be ignored and considered of no consequence? Is any consideration of a person's sex unlawful and what actions would be deemed based on a person's sex in violation of Title VII?

Additional questions for the Court would be what is an impermissible "sex stereotype" and when is a "stereotype" prohibited by Title VII? Can an employer establish sex specific dress codes and enforce those based on biological sex or must an exception be made based on gender identity? What about the use of sex specific pronouns and titles? What about multi-use sex designated restroom access (NOTE: There are several cases addressing this issue in the school context under Title IX that is patterned after Title VII)? Does a person's actual biological sex actually matter in practice and the law or is it "irrelevant" as the Sixth Circuit held? Further, the religious liberty implications from (a) discussion of the topic in the workplace between co-workers (in light of recent proposed EEOC guidance on harassment in the workplace) to (b) an employer's religious convictions on human sexuality (an issue in *Harris Funeral Home* but beyond the scope of this article) are surely intertwined in this issue and have received very little clarification in the case law although discussed at length by the Sixth Circuit in *Harris Funeral Home*.

The holding in *Harris Funeral Home* is indeed a matter of national concern and at least sixteen States have joined together to ask the Supreme Court to hear the case. Whether the Supreme Court will take the case may depend on what happens with the vote on Judge Brett Kavanaugh's nomination to fil the seat of retired Justice Anthony Kennedy on the Supreme Court. Should the Supreme Court hear the case, the outcome is anyone's guess. There are many issues to be decided and the Supreme Court has shown a tendency to prefer to take issues narrowly, so a key question will be what issue or issues will the Court consider if it were to accept review of the case. Only time will tell. What is clear is that the scope of Title VII's prohibition on discrimination "because of . . . sex" is hotly contested and the legal standard for reviewing such claims varies widely across the country. A Supreme Court review of the Harris Funeral Home case could begin to provide some clarity to a very murky legal landscape in the battle to eliminate sex discrimination in the workplace.

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