Does discrimination based on gender identity fall within Title VII of the Civil Rights Act of 1964’s protection against discrimination “because of sex”? Adopting the U.S. Equal Employment Opportunity Commission’s (EEOC) interpretation of Title VII, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the federal Sixth Circuit Court of Appeals recently said “yes” and reversed a lower court that had ruled to the contrary. The status of being transgender (or transitioning) is now—on its own—a recognized protected status under Title VII in the Sixth Circuit. Although the decision was only a slight extension of existing precedent, which protected transgender and transitioning individuals to the extent their exhibited behavior did not conform to gender stereotypes, the reasoning employed by the court raises the question of whether the Sixth Circuit could—in the future—reverse its previous position and extend Title VII protections to sexual orientation.

**Background**

Aimee Stephens was employed by R.G & G.R. Harris Funeral Homes, Inc. for over five years before being discharged for giving her boss notice that she was going to live her life as “the person that [her] mind already is” and that she would be undergoing sex reassignment surgery to transition from male to female. Her boss squarely told her that “this is not going to work out” and terminated her employment because—according to his testimony—she was no longer going to represent herself as a man and wanted to dress as a woman.

The EEOC filed suit on Stephens’s behalf, alleging her termination violated Title VII because it was based on (i) her status as a transgender (or transitioning) individual and (ii) her failure to conform to the funeral home’s gender-based preferences and stereotypes. The EEOC also challenged the funeral home’s practice of purchasing clothing for its public-facing male employees but not its public-facing female employees.

First, the U.S. District Court for the Eastern District of Michigan dismissed Stephens’s Title VII claim alleging she was discharged because she was transgender (or transitioning), finding that being transgender is not a protected status under Title VII. Next, the district court determined that there was direct evidence that Stephens was discriminated against because she did not conform to the funeral home’s gender-based stereotypes. Nonetheless, the district court granted summary judgment in the funeral home’s favor on all counts. The district court found that the Religious Freedom Restoration Act (RFRA) precluded the EEOC from enforcing Title VII against the funeral home, as the imposition of Title VII would substantially burden the funeral home’s religious exercise and there was not a sufficient showing that such enforcement was the least restrictive way to achieve the EEOC’s goals. The EEOC appealed the district court’s ruling to the Sixth Circuit Court of Appeals.
The Sixth Circuit’s Decision

In a decision that signifies building momentum to simplify the Title VII landscape, the Sixth Circuit Court of Appeals determined that the district court erred in finding Stephens could not pursue her claim that she was discriminated against based on her transgender (or transitioning) status. The Sixth Circuit expressly held that “[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.” Stated even more plainly, the circuit court stated that “discrimination on the basis of transgender and transitioning status violates Title VII.” This holding represents a clear and concise statement of law in the Sixth Circuit, eliminating the prior requirement that transgender and transitioning individuals shroud their Title VII discrimination claims in claims that they failed to conform to gender stereotypes. This holding lessens the evidentiary burden on transgender and transitioning individuals wishing to pursue claims and, correspondingly, may increase the number of Title VII lawsuits based on gender identity—as there is now a lower bar to state a viable claim.

In making its holding, the Sixth Circuit adopted a line of reasoning recently set forth by the Seventh Circuit in its landmark 2017 decision holding that sexual orientation is protected under Title VII, *Hively v. Ivy Tech Community College of Indiana*. The court reasoned that when “isolat[ing] the significance of the plaintiff’s sex to the employer’s decision” it becomes quite obvious that the decision to discharge Stephens was made because of her sex. Had Stephens been a woman seeking to comply with the funeral home’s female stereotypes, the funeral home would not have made the decision to terminate her employment. Therefore, Stephens’s sex undoubtedly affected her discharge.

In a separate portion of its opinion, the Sixth Circuit agreed with the district court’s determination that there was direct evidence presented that the company discharged Stephens because she failed to conform to the funeral home’s gender stereotypes. The court granted summary judgment to Stephens on her gender stereotype discrimination claim. It also reversed the district court’s determination that the RFRA prevented the EEOC from enforcing the religiously neutral law of Title VII against the funeral home.

The importance of this decision is that it expressly expanded the Sixth Circuit’s interpretation of the protections offered by Title VII. The court extended existing precedent prohibiting discrimination on the basis of gender stereotypes into the straightforward holding that transgender or transitioning status is a protected status under Title VII. As stated eloquently by the court:

>[D]iscrimination against transgender persons necessarily implicates Title VII’s proscriptions against sex stereotyping... an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of gender status from discrimination on the basis of gender non-conformity, and we see no reason to try.

**Impact on Title VII Sexual Orientation Claims**

Within the Sixth Circuit, Title VII now undoubtedly and directly protects transgender (and transitioning) persons because of their transgender (or transitioning) status—without regard to whether the discrimination is because an
employee failed to conform to a gender stereotype. The lasting impact of this opinion—and its logical conclusion—may be the future expansion of Title VII’s protections within the Sixth Circuit to include sexual orientation as a protected class.

Protection from discrimination on the basis of sexual orientation is growing in both legal and political popularity. Currently, individuals who want to pursue a Title VII claim for sexual orientation discrimination in the Sixth Circuit are only able to do so to the extent they were discriminated against because they do not conform to gender stereotypes in some observable way (other than sexual orientation). Historically, this has only included males that behave in a very feminine way and females that behave in a very masculine way. The Sixth Circuit’s logic in R.G. & G.R. Harris Funeral Homes stated that an individual’s transgender (or transitioning) status is inseparable from their sex and incongruent to gender stereotypes, and it is easy to see how the Sixth Circuit could use the same reasoning to conclude that sexual orientation is a protected status. Indeed, the Sixth Circuit has previously noted how difficult it is to consider sexual orientation without regard to gender stereotypes but ultimately came to the conclusion that sexual orientation is not protected under Title VII. In that case, Tuminello v. Father Ryan High School, Inc., the Sixth Circuit stated that its decision was based solely on binding precedent and expressed that it would not be able to change its stance until the issue was reviewed en banc or by the Supreme Court of the United States. The recent ruling in R.G. & G.R. Harris Funeral Homes suggests that if given the opportunity, the Sixth Circuit would be likely to reverse its precedent.

The argument that has prevailed in other circuits is that sexual orientation discrimination is innately connected to gender stereotypes; the individual being discriminated against because of his or her sexual orientation is not different than other individuals not conforming to their gender’s stereotype. Therefore, other courts have found that sexual orientation is just as protected by Title VII as nonconformance to gender stereotypes. Stated an alternate way, if the victim were the opposite sex, there would be no alleged discrimination, and therefore the discrimination is “because of” sex. The Sixth Circuit’s reasoning in this case appears to be consistent with such reasoning—despite being at odds with earlier Sixth Circuit precedent—and seems to be closing the gap that may result in sexual orientation being recognized as a protected class in the Sixth Circuit. This, of course, would only deepen the existing circuit split on whether sexual orientation discrimination is prohibited by Title VII.

**Key Takeaways**

Being transgender (or transitioning) is now its own recognized protected status under Title VII in the Sixth Circuit. Thus, transgender and transitioning individuals in the Sixth Circuit no longer need to assert their Title VII discrimination claims on the basis that they were discriminated against because they did not conform to gender stereotypes in some observable way. This ruling could result in increased allegations of discrimination since it effectively lowers the evidentiary bar for plaintiffs.

The Sixth Circuit’s view that transgender (gender identity) discrimination is inseparable from discrimination on the basis of sex because it is rooted in the person’s gender could be applied to argue that sexual orientation discrimination should also be a recognized protected status under Title VII. It will be interesting to see whether this decision closes the gap in that respect and results in the Sixth Circuit departing from prior precedent and joining the Second and Seventh Circuits in concluding that sexual orientation discrimination is—on its own—prohibited by Title VII.