CIVIL RIGHTS – DISCRIMINATION BY REASON OF SEXUAL ORIENTATION OR IDENTITY: THE SIXTH CIRCUIT DETERMINES THAT TRANSGENDER AND TRANSITIONING STATUS ARE PROTECTED CLASSES UNDER TITLE VII

Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *petition for cert. filed*, No. 18-107 (U.S. July 24, 2018)

ABSTRACT

In *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, the United States Court of Appeals for the Sixth Circuit *held* that R.G. & G.R. Harris Funeral Homes, Inc. violated Title VII of the Civil Rights Act of 1964 when its owner terminated the employment of Aimee Stephens because of her status as a transgender person. Most significantly, the court also *held* that transgender and transitioning status are protected classes under Title VII. In July 2013, Anthony Stephens informed Thomas Rost, owner the funeral home where Stephens worked, that she was going to begin her transition from male to female. She had planned to undergo sexual reassignment surgery and informed her boss that before she could have surgery she was required to live for one year as a female. Consequently, Rost terminated Stephens' employment. The EEOC on behalf of Stephens filed suit in the United States District Court for the Eastern District of Michigan claiming Rost violated Title VII when he discriminated against Stephens on the basis of sex. The district court ruled in favor of Rost. The EEOC appealed, and the Sixth Circuit Court of Appeals reversed. The court reasoned that any question of sex, whether it is the sex that a person identifies with, whether he or she is transitioning between sexes, or whether or not sex can even be changed was wholly irrelevant because Title VII requires only that sex not be considered by employers in making work-related personnel decisions. Additionally, the court ruled that despite Rost's sincerely held religious objections, the Religious Freedom Restoration Act, which Rost relied on to defend his decision to fire Stephens, did not apply. With this decision, transgender persons who may have not have had a case for discrimination previously may now have such a case. Employers and lawyers in North Dakota and the Eighth Circuit should be aware of the Sixth Circuit's holding and reasoning for future discrimination cases based on transgender or transitioning status.

I. FACTS

R.G. & G.R. Harris Funeral Homes, Inc. ("Harris Funeral Homes") owns and operates three funeral homes in Michigan.[1] Thomas Rost ("Rost") is the majority owner of the three funeral homes and the former boss of Aimee Stephens, formerly known as Anthony Stephens ("Stephens").[2] Stephens began an apprenticeship under Rost in October 2007 and then worked as a funeral director and embalmer from April 2008 until August 2013.[3]

On July 31, 2013, Stephens informed Rost that she was going to begin the process of gender reassignment.[4] She planned to transition from male to female and eventually undergo sexual reassignment surgery.[5] But before undergoing surgery, Stephens informed Rost that she was required to live and work for one year as a female.[6] Stephens explained to Rost that she planned to go on a vacation, but that when she returned she would then prefer to be addressed as "Aimee" and would begin wearing business appropriate, female clothing.[7] During this time Stephens would have still physically been a male. Rost, hesitant to allow Stephens to wear female clothing as she was a public-facing employee, informed Stephens that her employment would be terminated.[8] Rost offered Stephens a severance agreement if she "agreed not to say or do anything,"[9] but Stephens declined.[10]

Rost fired Stephens for two reasons: first, that Stephens would be unable to adhere to the company's dress code policy,[11] and second, Rost's own religious convictions prevented him from employing a transgender person.[12] Although the funeral home was not affiliated with any one church, Rost himself believed 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] directors to deny their sex while acting as a representative of [the] organization."[13]

---

1. Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).
2. *Id.* at 567–68.
3. *Id.* at 567.
4. *Id.* at 568.
5. *Id.*
6. *Id.* at 568.
7. *Harris Funeral Homes*, 884 F.3d at 569.
8. *Id.*
9. *Id.*
10. *Id.*
11. *See id.*
12. *See id.*
13. *Harris Funeral Homes*, 884 F.3d at 569.

After she was terminated, Stephens filed a sex discrimination claim with the Equal Opportunity Employment Commission ("EEOC").[14] The EEOC determined there was cause to believe Harris Funeral Homes fired Stephens because of her sex.[15] The EEOC filed a complaint in federal district court in September 2014.[16]

The district court found that Rost violated Title VII and that he discriminated against Stephens on the basis of sex.[17] The court held that Rost discriminated against Stephens for "failure to conform to the Funeral Home's sex- or gender-based preferences, expectations, or stereotypes."[18] But the court held that the EEOC could not sue for discrimination based only on the fact that Stephens was transgender or in transitioning status because neither was a protected class under Title VII.[19] Despite finding discrimination based on sex stereotypes, the district court also found that Rost was protected under the Religious Freedom Restoration Act ("RFRA").[20] With this ruling, the EEOC was unable to enforce Title VII against Harris Funeral Homes.[21] The EEOC appealed.[22]

After reviewing the case de novo, the Sixth Circuit Court of Appeals reversed the decision of the lower court and held in favor of the EEOC and Stephens.[23] The court's unanimous decision held for the first time that both transgender status and transitioning status are, on their own, protected classes of persons under Title VII.[24] Furthermore, the Religious Freedom Restoration Act did not protect Harris Funeral Homes because Rost failed to show how Stephens' status substantially burdened the sincere exercise of his religious beliefs.[25]

II. LEGAL BACKGROUND

Title VII is a subpart of the Civil Rights Act of 1964,[26] which makes it unlawful for employers to discriminate on the basis of race, color, religion,

14. *Id.*
15. *Id.*
16. *Id.*
17. *See id.* at 570.
18. *Id.*
19. *Harris Funeral Homes*, 884 F.3d at 569–70.
20. *Id.* at 570.
21. *Id.*
22. *Id.*
23. *Id.* at 570–71, 600.
24. *Id.* at 574–75.
25. *Harris Funeral Homes*, 884 F.3d at 596–97.
26. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

sex, or national origin.[27] Firing an employee based on an association with any of these protected classes is similarly prohibited.[28] The EEOC has the authority to investigate cases of employment discrimination and may file lawsuits on behalf of the complaining employees.[29]

A. PROTECTED CLASSES UNDER TITLE VII

As part of the Civil Rights Act of 1964, the motivation in implementing Title VII was (and still is) to prohibit unequal opportunity for employment in the United States. Title VII states, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religions, sex or nation origin . . . ."[30] Thus, the point of Title VII is to prevent employers from making hiring, firing, or other work-related decisions based on an employee's sex, skin color, religion, or national origin.[31]

The legal issues in this case focus on two aspects of Title VII: sex and religion. The most pertinent legal issue in this case relates to how Title VII protects men and women from sex discrimination. Additionally, this case interprets the limits of religious protection under Title VII. Religious beliefs also constitute a protected class, so long as the employee's exercise of religious beliefs does not cause an "undue hardship" on the employer's business.[32]

B. DISCRIMINATION ON THE BASIS OF SEX, TRADITIONALLY

The traditional – and at the time, perhaps the only intended – reason for including sex as a protected class of persons was to prevent employers from making employment-related decisions based on the sex of that employee. In *City of Los Angeles Department of Water & Power v. Manhart*,[33] female employees of the Los Angeles Department of Water and Power ("the Department") brought a class action suit[34] because the Department's policy at that time forced female employees to contribute more to their pension funds than

27. 42 U.S.C.§ 2000e-2 (2012).
28. *Id.*
29. *Id.*
30. *Id.* § 2000e-2(a)(1).
31. *Id.* § 2000e(b). This law applies to employers with fifteen or more employees. *Id.*
32. *Id.* § 2000e(j).
33. 435 U.S. 702 (1978).
34. *Manhart*, 435 U.S. at 702.

male employees.[35] The Department argued that since women have a longer life expectancy than men, they ought to contribute more to their pension funds.[36]

The Supreme Court of the United States granted *certiorari* and ultimately found that the Department made a decision (or had a policy) that was predicated on sex.[37] As a result, the policy created an environment that was unequal and unfair. Writing for the majority, Justice Stevens opined that even though data showed that women did tend to live longer than men, the pension contribution discrepancy still violated Title VII.[38] He wrote, "The statute makes it unlawful to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin."[39]

Justice Stevens continued, stating that "[t]he statute focuses on fairness to individuals rather than fairness to classes."[40] In *Manhart*, even though numerical data indicated women lived longer than men, that fact simply did not matter. Regardless of any evidence, the court found that if the policy in place treats "a person in a manner which but for that person's sex would be different" the statute is necessarily discriminatory.[41] While in a case like *Manhart* it was objectively easy to see the unequal status of men and women, not every issue regarding sex has been so easy to discern. What happens if an employee is denied an opportunity at work not because she is a woman, but because she does not act in a way that women "normally" act?

C. DISCRIMINATION ON THE BASIS OF NONCONFORMITY TO SEX STEREOTYPES

Generally, though not always, courts have held in favor of transgender and homosexual persons in cases where such persons have alleged employer discrimination.[42] These results were predicated on discrimination on the basis of sex stereotypes.[43] One important case cited in *Harris Funeral Homes* is

35. *Id.* at 704.
36. *Id.* at 705.
37. *Id.* at 716.
38. *Id.* at 709.
39. *Id.* (internal quotation marks omitted).
40. *Manhart*, 435 U.S. at 709.
41. *Id.* at 711.
42. *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017) (finding that homosexuality was not a protected class under Title VII).
43. Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562 (2007).

Price Waterhouse v. Hopkins.[44] In 1989, Ann Hopkins claimed she was denied partnership at her firm for failing to adhere to gender stereotypes.[45] Hopkins was described as "overly aggressive, unduly harsh, difficult to work with and impatient with staff."[46] When passed over for promotion, the supervisor of her department told her that among other things, she needed to "walk more femininely" and "talk more femininely."[47] Despite the fact that Hopkins secured a $25 million dollar contract with the Department of State, and that the other partners at Hopkins' firm called the accomplishment an "outstanding performance," the following year she was again passed over for promotion.[48]

The Supreme Court of the United States held that "because *of* . . . sex . . . mean[s] that gender must be irrelevant to employment decisions."[49] The Court reasoned that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[50] The importance here is the fact that Hopkins was not discriminated against for being a woman per se but instead for not acting the way her employers thought a woman should act.[51]

With the Supreme Court's decision in *Price Waterhouse*, a person's nonadherence to traditional notions of gender behavior cannot be grounds for termination. But Ann Hopkins was already part of a protected class. What if someone who was not a member of a protected class brought similar claims? Of particular importance for addressing this question is *Smith v. City of Salem*.[52]

In *Smith*, a biological male was a lieutenant in the Salem Fire Department.[53] Smith had been diagnosed with Gender Identity Disorder, and seven years into his employment he began to outwardly express female characteristics and informed his boss he eventually was going to begin the transition to female.[54] After Smith's superiors began to take notice of his behavior, they attempted to get Smith to either resign or to fire him.[55] The fire department

---

44. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Burrage v. United States, 571 U.S. 204 (2014).
45. *Id.* at 231–32.
46. *Id.* at 235.
47. *Id.*
48. *Id.* at 233.
49. *Id.* at 240 (internal quotation marks omitted).
50. *Price Waterhouse*, 490 U.S. at 251.
51. *See id.*
52. 378 F.3d 566 (6th Cir. 2005).
53. *Smith*, 378 F.3d at 568.
54. *Id.*
55. *Id.* at 569.

later suspended him, and Smith filed a claim with the EEOC.[56] The court held that Smith was discriminated against for his transitioning status, and his employer plainly violated the provision in Title VII in suspending him, with the intention of eventually firing him, on the basis of sex.[57] The court's holding cited gender stereotyping as the basis for the ruling in favor of Smith.[58] While ultimately successful, the EEOC was not able to argue that Smith was protected as a transgender person because transgender status was not recognized as a protected class at the time.

D. A HISTORICAL UNWILLINGNESS TO STATE THAT TRANSGENDER OR TRANSITIONING STATUS IS PROTECTED UNDER TITLE VII

The court in *Smith* held that the City of Salem discriminated against Smith on the basis of nonconformity to sex stereotypes.[59] The *Smith* court's holding is not surprising in that it achieves what Title VII aims to accomplish; gender or gender expression cannot be taken into account when hiring, firing, or setting conditions of employment. So *Smith* demonstrates that transgender discrimination inherently implicates gender stereotypes, meaning Title VII can apply even without transgender status being designated a protected class.

Even so, this reasoning forces a transgender person to make their allegations line up with a narrative that an employer discriminated against that person for not adhering to the stereotypes of their biological gender. And more importantly, as in *Smith*, the complainant may run into a legal "wall." A court might determine that since transgender status has not been recognized as a protected class, arguments showing nonconformity to sex stereotypes where the "real" claim is discrimination against a transgender person would have to fail. This was the case at the district court level in *Smith*.[60]

E. APPLICABILITY OF THE RELIGIOUS FREEDOM RESTORATION ACT

In *Harris Funeral Homes*, Rost and the funeral home prevailed in district court even after the court admitted that Rost had discriminated against Stephens. The district court ruled that Harris Funeral Homes engaged in

56. *Id.*
57. *Id.* at 575.
58. *Id.*
59. *Smith*, 378 F.3d at 574–75.
60. *See id.* at 571 (the district court opined that Smith "merely 'invokes . . . "sex-stereotyping"' as an end run around his 'real' claim, which . . . was 'based upon his transsexuality'").

discrimination, but precluded the EEOC from enforcing Title VII because of the Religious Freedom Restoration Act.[61]

RFRA was passed in 1993 and prohibits the government from substantially burdening the exercise of religion unless there is a compelling governmental interest and the government uses the least restrictive means possible to obtain that interest.[62] The United States Supreme Court held that RFRA was unconstitutional in 1997 as applied to the states, but the statute still applies to the federal government.[63] This law took center stage in the highly publicized case *Burwell v. Hobby Lobby Stores, Inc*.[64]

In *Hobby Lobby*, the United States Supreme Court held that a closely held for-profit corporation—the same kind of corporation as Harris Funeral Homes—was exempt from regulations that its owners object to on religious grounds, so long as there was a less restrictive means of furthering the government's interest in the regulation.[65] The central issue in *Hobby Lobby* was a Department of Health and Human Services regulation requiring employers to cover the cost of contraception for employees under the Affordable Care Act.[66] The Court held that the mandate was *not* the least restrictive way to ensure access to contraceptive care, citing to the fact that one less restrictive alternative was employee access to contraceptives through religious nonprofit organizations.[67]

III. ANALYSIS

Reviewing this case de novo, the Sixth Circuit Court of Appeals ultimately agreed with the district court, finding that Harris Funeral Homes was in clear violation of Title VII because Rost fired Stephens for not conforming to traditional notions of gender stereotypes.[68] Judge Moore, writing for a unanimous court, reasoned that transgender status was inextricably related to sex, and that not only was Rost's discrimination based on a nonadherence to sex stereotypes, but that transgender status, on its own, constituted a

---

61. Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 570 (6th Cir. 2018).

62. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 148842 [hereinafter RFRA].

63. City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

64. 134 S. Ct. 2751 (2014).

65. *Hobby Lobby*, 134 S. Ct. at 2759.

66. *Id.* at 2754.

67. *Id.* at 2782.

68. Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018).

protected class.[69] Judge Moore determined that the plain language of Title VII, as well as precedent concerning sex stereotypes, indicated that any consideration of sex was prohibited in employment decisions.[70] The court found that society's expanding views on sex and gender did not call for a more nuanced reading of the language of Title VII.[71] If sex is considered in any capacity in the decision-making of the employer, the court explained, then that employer is at risk for violating Title VII.[72] Finally, the court reasoned that RFRA did not apply in this case because Harris Funeral Homes failed to demonstrate that the enforcement action substantially burdened a sincere exercise of Rost's religious beliefs.[73]

A. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT HARRIS FUNERAL HOMES DISCRIMINATED BASED ON NONADHERENCE TO SEX STEREOTYPES

At the district court level, the court found that Rost had discriminated against Stephens based on sex stereotypes, relying heavily on *Price Waterhouse*.[74] Harris Funeral Homes resolutely argued that it had "not violated Title VII because sex stereotyping is barred only when the employer's reliance on stereotypes . . . result[s] in disparate treatment of employees because they are either male or female."[75] Harris Funeral Homes pointed out that it was merely asking all of its employees, male and female, to abide by the company's dress code: suits for men and dresses for women.[76] In its argument, Harris Funeral Homes relied on a Ninth Circuit case, which found that a "sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII."[77] But the Sixth Circuit rejected these arguments and ruled in favor of Stephens for three reasons.

To begin with, the court reasoned that Harris Funeral Homes' neutral dress code argument was misplaced. The case did not turn on the dress code at the funeral home.[78] Instead, the question presented was whether Harris Funeral Homes could fire Stephens despite the fact that she was completely

69. *Id.* at 574–75.
70. *Id.* at 576.
71. *Id.* at 578 (quoting Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)).
72. *Id.* at 576.
73. *Id.* (internal quotation marks omitted).
74. *Harris Funeral* Homes, 884 F.3d at 571.
75. *Id.* at 572 (internal quotation marks omitted).
76. *Id.*
77. *Id.* at 572; *see also* Jesperson v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006).
78. *Harris Funeral Homes*, 884 F.3d at 573.

willing to comply with the company's sex-specific dress code. The determinative issue was that she did not conform to the Funeral Home's *notion of sex.*[79]

In illustrating its second point, the court adopted the reasoning in *Smith*, asking whether sex stereotyping was a "but for" cause of Stephens' termination.[80] The *Smith* court, for example, found that requiring women to wear makeup was improper sex stereotyping, and it therefore followed that a male being required *not to wear makeup* would also be improper sex stereotyping.[81] The Sixth Circuit applied this same reasoning and determined that sex stereotyping caused Rost to fire Stephens.[82]

Finally, Harris Funeral Homes argued that "sex stereotyping violates Title VII only when the employer's sex stereotyping resulted in disparate treatment of men and women."[83] The court again looked to *Smith*, concluding "that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave."[84] The opinion continued, "The employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-nonconforming man as well as a gender-nonconforming woman."[85] As a result, the Sixth Circuit ultimately agreed with the district court that Harris Funeral Homes' defense – that its dress code did not violate Title VII – did not apply.[86] The real issue was whether it was improper to fire Stephens based on how she appeared or behaved relative to her sex.[87]

B. TRANSGENDER OR TRANSITIONING STATUS IS INEXTRICABLY RELATED TO SEX

As the court noted, and as the EEOC argued, "transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex based norms or expectations; therefore, 'discrimination because of an individual's transgender status is *always* based on gender stereotypes . . . .'"[88] In what became the most important portion of this decision,

79. *Id.*
80. *Id.* at 572; *see* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2005).
81. *Smith*, 378 F.3d at 574.
82. *Harris Funeral Homes*, 884 F.3d at 574.
83. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)) (internal quotation marks omitted).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Harris Funeral Homes,* 884 F.3d at 575 (citing other sources).

Stephens and the EEOC argued that transgender and transitioning status should be protected classes.

Harris Funeral Homes argued against this point energetically. Harris Funeral Homes' claim rested on the notion that sex is a binary characteristic concerning only male and female, and that this is based on the genetic make-up of the person's "chromosomally driven physiology and reproduction function."[89] Harris Funeral Homes continued, arguing that "transgender status refers to 'a person's self-assigned gender identity' rather than a person's sex, and therefore such a status is not protected under Title VII."[90]

At this juncture, the court made a decision that on its face seems broad, activist, and possibly swayed by public pressure and outcry. From a purely legal, technical, and plain language reading of Title VII, the court held that transgender and transitioning status are protected classes under Title VII.[91] The court stated that "it 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."[92] The court cited *Hively v. Ivy Tech Community College of Indiana*.[93] In *Hively*, the court posed the question of whether the plaintiff, a self-described lesbian, would have been fired if she had been a man married to a woman (or living with or dating a woman) and everything else had stayed the same.[94] If the answer to that question was no, then the plaintiff had stated a paradigmatic sex discrimination.[95] The court posed a variation of this question to Harris Funeral Homes, and since the answer was "no," it was clear that Stephens' sex affected her boss's decision to fire her.[96]

Harris Funeral Homes pushed back on this point and argued that transgender status is something that someone *chooses*. The funeral home asserted that Title VII was only intended to protect the traditional, binary concept of sex.[97] This argument is logical and had persuaded other circuit courts of appeals for decades, but the Sixth Circuit rejected it nonetheless. The court found that whether or not being transgender is a choice, the legitimacy of that choice was irrelevant in interpreting Title VII.[98] The Sixth Circuit cited to the

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. 853 F.3d 339 (7th Cir. 2017).
94. *Hively*, 853 F.3d at 345.
95. *Id.*
96. *Harris Funeral Homes*, 884 F.3d at 577.
97. *Id.* at 578.
98. *See id.* at 576.

Second Circuit in *Zarda v. Altitude Express, Inc.*:[99] "Title VII . . . asks whether a particular '*individual*' is discriminated against 'because of such *individual's . . . sex*.'"[100] On this reasoning, it is simply impossible to discriminate against someone who is transgender without taking into consideration either the person's biological sex, the person's new sex, or both. Accordingly, the court held that Title VII prohibits discrimination based on transgender status.[101]

C. THE RELIGIOUS FREEDOM RESTORATION ACT DID NOT PRECLUDE ENFORCEMENT UNDER TITLE VII

At the district court level, Harris Funeral Homes was found to have violated Title VII based on firing Stephens for not conforming to sex stereotypes.[102] But the district court also found that RFRA precluded enforcement on the matter due to Rost's sincerely held religious beliefs.[103] The Sixth Circuit disagreed.[104] The court had to contemplate the two-step test that RFRA demands. First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his or her religious exercise.[105] If that showing is made, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.[106] The Sixth Circuit opined that (1) keeping Stephens as an employee would not have substantially burdened Rost's religious exercise, and (2) that the EEOC demonstrated a compelling government interest and enforcement of Title VII was the least restrictive way to further that compelling interest.[107]

One exception to the enforcement of Title VII is the First Amendment's Ministerial Exception.[108] Although Harris Funeral Homes did not make this argument,[109] the Court noted that "private parties may not waive the First Amendment's Ministerial Exception."[110] For this exception to apply, the

---

99. 883 F.3d 100 (2d Cir. 2018) (en banc) (plurality opinion).

100. *Zarda*, 883 F.3d at 123 n.23 (citing 42 U.S.C. § 2000e-2(a)(1) (2012)).

101. *Harris Funeral Homes*, 884 F.3d at 575.

102. *Id.* at 570.

103. *Id.*

104. *Id.* at 581.

105. *Id.* at 581.

106. 42 U.S.C. § 2000bb-1(b)(2) (2012).

107. *Harris Funeral Homes*, 884 F.3d at 600.

108. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 194 (2012).

109. *Harris Funeral Homes*, 884 F.3d at 581.

110. *Id.* at 582 (quoting Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829, 836 (6th Cir. 2015)).

employer must demonstrate that it owns a religious institution and that the employee who had been discriminated against was a ministerial employee.[111] Although an institution does not have to be an actual church or worship building, and it need not be operated by a religious organization, it must be "marked by clear and obvious religious characteristics" to be a religious institution.[112] Although the Harris Funeral Homes did not claim the Ministerial Exception, the Court was still required to analyze the applicability of the exception.[113]

Because Harris Funeral Homes was not associated with any church, did not seek to forward Christian values, and employed people of several religions, the court determined that the funeral home was not a religious institution.[114] Additionally, Stephens, in her capacity as a funeral director, was not a ministerial employee. The court found her role to be completely secular in that she did not perform religious rituals, she was not an "ambassador" to a specific faith, and she had no religious training.[115]

Outside of the ministerial exception, Harris Funeral Homes sought protection under RFRA. In order to be granted such protection, a party must show that government action, in this case enforcement of Title VII, would "(1) substantially burden (2) a sincere (3) religious exercise."[116] Here, both parties treated Rost's religious convictions as sincere.[117]

Thus, the question was whether keeping Stephens as an employee would substantially burden Rost's exercise of his religion. The court ruled it was not a substantial burden.[118] Rost's purported duty was to serve the mourning family members of the deceased, and he first argued that Stephens, still biologically male, dressing as a female would distract the mourners.[119] The court explained this was not a valid argument because it was based completely on a presumption, and the court could not assume a fact.[120]

Next, the court looked to determine if keeping Stephens as an employee would have violated Rost's personal belief that sex is a gift from God, and to

111. *Id.* at 581.
112. *Id.* at 582 (quoting Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829, 834 (6th Cir. 2015)).
113. *Id.* at 581–82.
114. *Id.*
115. *Harris Funeral Homes*, 884 F.3d at 583.
116. *Id.* at 585.
117. *Id.*
118. *Id.* at 586.
119. *Id.*
120. *Id.*

change one's sex is to reject that gift.[121] Rost felt that by allowing Stephens to remain an employee, and that by purchasing female clothes for a male, he would be dishonoring God.[122] The court pointed out that if Rost had been forced to somehow assist or facilitate Stephens' sex change, that likely would not have been permissible under RFRA, but that simply adhering to Title VII did not constitute an endorsement of Stephens' conduct.[123] Therefore, Rost having only to "tolerate" Stephens' decision to change sex in her personal life did not rise to the level of endorsement necessary to win preclusion under RFRA.[124]

Finally, the court found the goals of Title VII were important.[125] The court deemed eliminating workplace discrimination a compelling government interest and found that less restrictive means, such as providing Stephens with a government job or sending her to work for a company with no objection to her status, were not plausible.[126] Consequently, the court held that enforcement of Title VII was the least restrictive means of achieving the government's compelling interest in preventing workplace discrimination.[127]

IV. IMPACT

Harris Funeral Homes will have a profound effect on the Eighth Circuit as well as potentially significant consequences for employers in North Dakota. The Eighth Circuit has previously ruled, like the rest of the United States prior to *Harris Funeral Homes*, that transgender status alone is not a protected class under Title VII.[128] But with this ruling from the Sixth Circuit, transgender victims of discrimination may be more confident bringing a Title VII claim now. The Sixth Circuit's decision, coupled with a recent decision from the Second Circuit, mark a trend in widening protection for persons who do not conform to traditional gender norms.[129] Moreover, the arguments made for the inclusion of transgender persons as a protected class under Title

121. *Harris Funeral Homes*, 884 F.3d at 569.
122. *Id.* at 588.
123. *Id.* at 589.
124. *Id.*
125. *Id.* at 589–90.
126. *Id.* at 594 n.13.
127. *Harris Funeral Homes*, 884 F.3d at 595–97.
128. *See* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989); Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982).
129. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (plurality opinion) (holding that Title VII prohibits discrimination on the basis of sexual orientation as discrimination "because of . . . sex").

VII are instructive, persuasive, and rely on a simple and literal understanding of the language of language of Title VII.[130]

The gravity of this decision will not be felt immediately in North Dakota or the Eighth Circuit, but it will be of immense importance when at some point in the future the EEOC brings a Title VII suit against a local employer that has been accused of discriminating against an employee based on the employee's transgender or transitioning status. The North Dakota federal court system has not yet adjudicated a case involving such a claim. Before the Sixth Circuit's decision, any claim would have been forced to pursue a theory of nonconformity to gender stereotypes (which does not always succeed). An advocate now arguing on behalf of a complainant, however, will have a persuasive argument and reasoning from the Sixth Circuit for including transgender or transitioning status as a protected class.[131] In addition, the Sixth Circuit's treatment of RFRA is instructive and shows that merely having a sincere religious conviction might not be enough to escape enforcement of Title VII. The court's finding that accepting another person's transgender status for Title VII purposes does not constitute an endorsement of that person's conduct could have far-reaching implications for future RFRA decisions.

As other states and the federal courts slowly change course on what has traditionally been protected under Title VII, so too could North Dakota and the Eighth Circuit. Furthermore, the widening of such a split increases the likelihood that the issue reaches the Supreme Court of the United States. A petition for certiorari was filed in July 2018[132] and if heard, that decision would, of course, directly affect North Dakota courts and employers.

A. THE COURT EXPLICITLY HELD THAT TRANSGENDER AND TRANSITIONING STATUS ARE PROTECTED CLASSES UNDER TITLE VII

The greatest distinction in this case is the explicit addition of transgender individuals as a protected class in the Sixth Circuit. Again, from a strictly results-oriented perspective, there seems to be little difference between this decision and past decisions.[133] A number of cases have been decided in favor of an employee who has been fired or not hired because they did not adhere to traditional gender stereotypes, and in many instances those employees

130. *Harris Funeral Homes*, 884 F.3d at 578.

131. *See* Smith v. City of Salem, 378 F.3d 566, 571 (6th Cir. 2005).

132. Petition for Writ of Certiorari, *Harris Funeral Homes*, 2018 WL 3572625 (U.S. July 24, 2018) (No. 18-107).

133. Turner, *supra* note 43, at 562.

were transgender.[134] But the court here found that the very nature of transgender or transitioning status means that someone is not adhering to traditional sex stereotypes by some degree because they are acting or dressing in a way that differs from the sex they were assigned at birth, which provides inherent protection from discrimination under Title VII.[135]

This decision reinforces the notion that discrimination based on sex can and should be applied broadly. The plain language of Title VII makes clear that sex cannot come into the decision-making process of employers, even if that discrimination is predicated on someone who has undergone or is currently undergoing gender transition. Where before discrimination claims predicated on stereotyping based on transgender or transitioning status might have failed, now such claims are backed by more persuasive case law and access to arguments that reinforce that claim.

B. TRANSGENDER STATUS ALONE DOES NOT SUBSTANTIALLY BURDEN ANOTHER INDIVIDUAL'S ABILITY TO EXERCISE HIS OR HER RELIGIOUS BELIEFS

At the heart of the RFRA question was whether Rost was endorsing Stephens' views by allowing her to continue to work at the funeral home.[136] The burden for showing an endorsement proved too much for Rost to overcome. As an employer, the Sixth Circuit held that merely employing someone who is transgender, and even paying for their clothing, did not amount to endorsement.[137]

The court reasoned that had Rost been forced to facilitate or assist in Stephens' transition, that might have risen to the level of endorsement and would have potentially allowed for precluding enforcement of Title VII.[138] Rost relied heavily on *Hobby Lobby* where for similar religious reasons Hobby Lobby refused to provide birth control to female employees.[139] But the argument in *Hobby Lobby* was different for two reasons.

First, the Sixth Circuit found that keeping Stephens employed at her current position was mere toleration. And that tolerating someone's transitioning

---

134. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (finding Title VII violation when plaintiff, who was transitioning from male to female, was demoted for failure to conform to sex stereotypes); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (finding Title VII violation when hospital did not hire orthopedic surgeon after disclosing her identity as transgender woman).

135. *Harris Funeral Homes*, 884 F.3d at 575.

136. *Id.* at 589.

137. *Id.* at 588.

138. *Id.* at 589–90.

139. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2764–65 (2014).

status did not significantly affect one's religious beliefs.[140] Second, Hobby Lobby primarily prevailed because the court determined that there was a less restrictive way for female employees to have the same access to birth control.[141] In this case, by contrast, simply enforcing Title VII proved to be the least restrictive means of protecting the compelling government interest of preventing workplace discrimination.[142]

The impact for North Dakota employers, especially religious ones, has the potential to be significant for two reasons. First, in keeping with *Hobby Lobby*, the government can only enforce a compelling interest so long as there are not less restrictive means of doing so.[143] While religious employers may look to *Hobby Lobby* as a blanket protection for religious beliefs, they would likely be incorrect as it relates to Title VII. The Sixth Circuit noted that *Hobby Lobby* was correct in its assessment, but also explained that in *Harris Funeral Homes*, less restrictive means, outside of merely enforcing Title VII, did not exist.[144] If a court in North Dakota or the Eighth Circuit was presented with a similar case, Title VII would likely be the least restrictive means of enforcing federal anti-discrimination law.

The second impact on religious North Dakota employers would be the seemingly large gap between religious individuals and courts on what constitutes an endorsement versus mere toleration. In *Harris Funeral Homes*, the court noted that being required to tolerate an employee's decision to identify as transgender or transitioning did not rise to the level of endorsement necessary to significantly affect an employer's religious beliefs.[145] Again, the national trend seems to be toward reading religious protections more narrowly, even in cases that affirm the religious convictions of employers.

V. CONCLUSION

The decision in *Harris Funeral Homes* has the potential to significantly impact employment law in North Dakota and the Eighth Circuit. This decision is not only a departure from past decisions, but also widens a growing split among other circuits. It also demonstrates the profound shift in national trends related to protection of individuals who do not conform to traditional notions of sex.

The impact of *Harris Funeral Homes* will likely be felt in the coming years in North Dakota, too. The significance of the decision is largely related

140. *Harris Funeral Homes*, 884 F.3d at 589.
141. *Hobby Lobby*, 134 S. Ct. at 2782.
142. *Harris Funeral Homes*, 884 F.3d at 593.
143. *Hobby Lobby*, 134 S. Ct. at 2754.
144. *Harris Funeral Homes*, 884 F.3d at 594.
145. *Id.* at 589.

to the dearth of precedent that federal courts in North Dakota and the Eighth Circuit have on this issue. As a Sixth Circuit decision, this broad holding deeming transgender and transitioning status as protected classes is not binding on North Dakota courts. But it does represent a growing shift in the understanding of Title VII. As North Dakota lawyers study this case, the arguments for the inclusion of transgender status as a protected class under Title VII become persuasive – or at the very least useful – in formulating an argument for or against such a claim that will at some point come before a North Dakota court.

*Anthony Saccocio**

*2020 J.D. Candidate at the University of North Dakota School of Law. I would like to thank all my family for their unwavering love and support, you all mean so much to me. I would also like to extend a special thank you to Patrick Saccocio, John Saccocio, Christina Parker, and Matt Parker. Thank you for your guidance and for being a source of inspiration.