

## LITIGATION

### EMPLOYMENT >> ALERT

# SUPREME COURT RULES THAT FEDERAL LAW PROTECTS GAY AND TRANSGENDER/TRANSITIONING EMPLOYEES FROM WORKPLACE DISCRIMINATION

On June 15, 2020, the Supreme Court issued a landmark decision in a L.G.B.T. civil rights case that is important for employers to note, as it is likely to apply broadly to gender-based policies in the workplace.

In one of the three cases decided by the Supreme Court, it ruled in favor of Aimee Stephens, an employee who claimed that her former employer, R.G. & G.R. Harris Funeral Homes, Inc. (the Funeral Home), had fired her in violation of Title VII of the Civil Rights Act of 1964 (Title VII) when the Funeral Home prohibited her from representing herself, and dressing, as a woman while at work, as she transitioned from male to female. The other two cases involved claims by gay men that they were being discriminated against on the basis of their sexual orientation.

## BACKGROUND

Stephens, formerly Anthony Stephens, was born biologically male. During her employment with the Funeral Home, Stephens presented as a man and used her then legal name, William Anthony. Stephens eventually informed the Funeral Home's owner that she had struggled with a "gender identity

## THE BOTTOM LINE

Firing an employee for being gay, bisexual, transgender or transitioning is a violation of federal law. Employers should be mindful that such discrimination may seep into the workplace in much more subtle ways than an employee's termination. Employees should be encouraged to shed gender-based notions of what a male and female colleague "should" look like and employers should adopt gender neutral policies that do not require employees to choose a binary male or female gender identity at work.

disorder" and had "decided to become the person that [her] mind already is." Stephens also revealed her intent to have sex reassignment surgery; and the first step was to live and work full-time as a woman for one year, which included reporting to her job as funeral director as a woman.

Upon learning of Stephens' plans, the Funeral Home's owner terminated her employment, stating "this is not going to work out." There was no dispute as to why Stephens was fired; the owner readily admitted that she was terminated because "he [Stephens] was no longer going to represent himself as a man" and "wanted to dress as a woman." The Funeral Home had a dress code and the owner believed that he would be "violating God's commands" if he allowed an employee to deny their biological

sex, which he described as believing is "an immutable God-given gift," while at work. The Funeral Home also defended its sex-specific dress code because it imposed an equal burden on men and women.

Stephens filed a charge with the Equal Employment Opportunity Charge (EEOC) alleging sex discrimination. The EEOC determined that the Funeral Home had terminated Stephens in violation of Title VII due to her sex and gender identity (female) and because she was transgender. The EEOC ultimately filed a complaint on Stephens' behalf for unlawful termination in district court.

The district court accepted the Funeral Home's argument that allowing Stephens to report to work presented as a woman would

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substantially burden the owner's religious rights under the Religious Freedom Restoration Act (RFRA). The RFRA prohibits the government from enforcing a law against an individual if that law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. The district court reasoned that the EEOC could have proposed that the Funeral Home impose a gender-neutral dress code, rather than trying to force the Funeral Home's owner to operate his funeral home in a way that is consistent with his faith.

### THE SUPREME COURT'S ANALYSIS AND REVERSAL

On June 15 2020, the Supreme Court ruled on the Stephens' case, along with two other cases each filed by a gay man alleging that he had been fired for being gay. While approximately half of the states in the United States have enacted laws prohibiting workplace discrimination against gay, bisexual and/or transgender persons, the question before the Supreme Court was whether these individuals are protected under Title VII, a federal law.

In a 6-to-3 decision, the Supreme Court's majority stated unequivocally that "an employer who fires an individual merely for being gay or transgender defies the law. "Although the district court had rejected the theory that a transgender employee was protected under Title VII, the

Supreme Court's majority reasoned that it is analytically "impossible" to fire an employee for being gay or transgender without being motivated, at least in part, by the employee's sex, which is a clear violation of Title VII. The Supreme Court also noted that discrimination against gay and transgender persons implicates sex stereotyping, which also runs afoul of Title VII.

The Supreme Court also ruled that, in the Stephens' case, the Funeral Home's owner's exercise of religion would not be substantially burdened if he had to employ Stephens, but could not force her to wear men's clothes in accordance with the dress code that assigned male and female identity according to biological gender at birth. The Court rejected the argument that Stephens would present a distraction to grieving families, which the court called a "presumed bias," and such bias cannot be relied upon to demonstrate a burden on religious rights.

The Supreme Court has spoken loudly and clearly that the EEOC's interest in enforcing Title VII is compelling and Title VII's prohibition against sex discrimination includes discrimination against gay, transgender and transitioning employees. While many states, and some cities and localities, already have laws protecting L.B.G.T. employees in the workplace, the Supreme Court's ruling is an important

legal decision for employers. Even though the Supreme Court's majority noted that the issue of "bathrooms, locker rooms or anything else of the kind" are questions for future cases, employers often decide these questions based upon employees' biological gender identity, which means employers would be wise to consider them now.

### EMPLOYER TAKEAWAYS

Employers should be cautioned against imposing policies and rules that are plainly gender-based, particularly rules that focus on grooming, clothing and makeup. The question of whether any employee is permitted or prohibited from wearing makeup, a dress, high heels or baseball cap, etc. are often usually intertwined with an employee's presumed gender identity and thus may run afoul of both federal and state law.

Employers should train employees to recognize and reject binary biases concerning how a man or a woman *should* look and/or behave in the workplace, regardless of whether any employee may hold contrary religious beliefs. Employers who tolerate comments or conduct directed at employees who do not conform to a gender stereotype are ignoring the legal risk created by such workplace cultures, especially in light of the Supreme Court's landmark ruling.

Employers should continue to coach employees to refer to their colleagues by their preferred gender pronoun because imposing a gender identity on

others in the workplace should not be permitted.

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