

LEGISLATIVE UPDATE

May 2018

Discrimination Based on Transgender Status Violates Title VII

The U.S. Court of Appeals for the Sixth Circuit recently ruled that discrimination based on an employee's transgender status is discrimination based on "sex" in violation of Title VII of the Civil Rights Act of 1964. The Sixth Circuit, which covers Michigan, Ohio, Kentucky, and Tennessee, is the first such federal appellate court to so rule.

The employer, R.G. & G.R. Harris Funeral Home, employed Stephens beginning October 1, 2007. At the time she was hired, Stephens presented as a male. In July of 2013, Stephens informed the owner that she intended to begin living and working as a woman when she returned from her vacation in August of 2013. The employer terminated Stephens just before she left for her vacation. Stephens filed a complaint with the EEOC alleging she was discriminated against based on her sex. The EEOC found there was reasonable cause to believe the funeral home terminated Stephens due to her sex and gender identify in violation of Title VII. The EEOC also found the funeral home discriminated against its female employees because it provided male employees with a clothing benefit that it did not provide to its female employees.

The EEOC filed a complaint against the funeral home in the United States District Court for the Eastern District of Michigan. The District Court narrowed the wrongful termination claim by finding Stephens' transgender status was not protected under Title VII. However, the court ruled that the EEOC could proceed under the theory that Stephens was terminated based on her failure to conform to the funeral home's expectations of sex or gender based stereotypes. Both the employer and the EEOC filed

motions for summary judgment. The court found that the employer terminated Stephens based on her "failure to conform to sex stereotypes" in violation of Title VII. However, the court then agreed with the employer's defense that the application of Title VII would force it to violate its sincerely-held religious beliefs. Therefore, the district court found the employer was exempt from Title VII pursuant to the Religious Freedom Restoration Act of 1993.

On appeal, the Sixth Circuit Court of Appeals reversed the district court's decision, and found that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." The court then analyzed the employer's argument that it was exempt from Title VII under the Religious Freedom Restoration Act (RFRA). The court found that the EEOC had a compelling interest in combating discrimination in the workforce, and that permitting Stephens to remain employed while she underwent a gender transition was not unduly burdensome on the employer's religious convictions. The court stated that "enforcing Title VII is itself the least restrictive way to further the EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace."

The Harris decision makes it clear that employers may not discriminate, harass, or retaliate against transgender employees under the guise of religious freedom. As a result, employers should review their policies and practices, and take all necessary steps including training of managers and supervisors, to prevent harassment, discrimination, or retaliation against transgender employees.

The full text of the trial court's opinion may be found here: <http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0045p-06.pdf>



U.S. Supreme Court Holds Services Advisors are Exempt from the FLSA Overtime-Pay Requirement

Under the Fair Labor Standards Act (FLSA) employers must pay overtime to covered employees who work more than 40 hours in a week. The law, however, exempts many categories of employees, among which are employees at car dealerships. Congress narrowed the exemption to cover salesman, partsmen, and mechanics primarily engaged in selling or servicing automobiles and other vehicles. For years, the law was understood to exempt service advisors. However, in 2011, the Department of Labor determined that service advisors were not salesman and not exempt under the law.

The DOL's position gave rise to a lawsuit in which services advisors sought backpay, arguing their employer (a car dealership), violated the FLSA by failing to pay them overtime. Eventually, the case was heard by the 9th Circuit Court of Appeals, which ruled in favor of the service advisors, deferring to the DOL's rule.

On April 2, 2018, the U.S. Supreme Court reversed the 9th Circuit in *Encino Motorcars, LLC v. Navarro*. In a 5-4 decision, with Justice Clarence Thomas writing for the majority, the Court concluded that services advisors are exempt from the overtime-pay requirement of the FLSA because they are salesmen primarily engaged in servicing automobiles. In rendering its decision, the Court broke with its longstanding principles of reading exemptions narrowly against employers. The Court created a new standard, under which courts should give exemptions a "fair reading." Legal commentators believe the application of this new standard will ease the burden for employers who claim a FLSA exemption. Additionally, some commentators believe the Court's ruling should impact exemptions for executive, administrative, and professional employees, which are not defined under the FLSA.

Of course, it is too early to tell what the impact of the Court's decision will be. Nevertheless, the case has the potential to be a very significant decision for employers defending wage and hour cases.

The full text of the trial court's opinion may be found here: https://www.supremecourt.gov/opinions/17pdf/16-1362_gfbh.pdf

Ninth Circuit Holds Prior History Does Not Justify Wage Discrimination

For over 35 years, the 9th Circuit held that past salary is a "factor other than sex" that employers could use to justify pay gaps between men and women under the Equal Pay Act. However, on April 9, 2018, the full court reversed its prior precedent and employers can no longer justify such pay disparities based on past salaries. In *Rizo v. Yovino*, the 9th Circuit found that prior salary alone or in combination with other factors cannot justify a wage differential. The court wrote: "to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." The court noted that although the gender wage gap has improved, the wage gap persists, sending a message to women that they are not work as much as men. The court held that allowing prior salary to justify a wage differential perpetuates that message and is discrimination, plain and simple.

The full text of the trial court's opinion may be found here: <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/04/09/16-15372.pdf>

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