"Least Restrictive Means?" Court Grants Employer Religious Exemption from Title VII in Gender Stereotyping Case

BY ROBERT G. YOUNG • SEPTEMBER 8, 2016

While many recent decisions have taken up the issue of whether gender identity or expression falls within the scope of Title VII's proscription on sex discrimination, one court recently went one step further and found that an employer may be exempt from a Title VII enforcement action based on the Religious Freedom Restoration Act ("RFRA"). In *EEOC v. R.G. & G.R. Harris Funeral Homes*, the employer, a funeral home, maintained a dress code under which male employees were required to wear dark pant-suits and female employees were required to wear dark skirt-suits. The EEOC challenged the employer's decision to invoke the dress code policy as a basis to terminate a transgender employee (a biological male) after the employee announced an intention to begin dressing as a woman in preparation for sex reassignment surgery.

The United States District Court for the Eastern District of Michigan found that the employer's enforcement of its sex-specific dress code policy violated Title VII's prohibition on gender stereotyping. However, the Court also found that enforcing Title VII against the funeral home under the circumstances of the case implicated the employer's rights under RFRA. The Court decided that the proprietor of the funeral home held sincere religious beliefs that prevented him from allowing a biological male to dress as a woman. Under the United States Supreme Court's decision in *Hobby Lobby*, those religious beliefs could be transferred to the for-profit business that the proprietor ran for purposes of the RFRA, thus establishing a presumption of exemption from enforcement of Title VII under the RFRA.

To overcome the exemption under the RFRA, the EEOC was required to demonstrate that the law it sought to enforce served a compelling government interest and was the least restrictive means of accomplishing that interest. The Court had little trouble concluding that Title VII served a compelling government interest in eradicating discrimination in the workforce. However, under the facts and arguments presented in the particular case, the Court decided that Title VII was not the least restrictive means of accomplishing that compelling interest and therefore could not overcome the employer's rights under RFRA.

The Court focused on the fact that the EEOC did not challenge the sex-specific dress code policy as a whole, but rather argued only that the employee should have the right to conform to the woman-specific aspects of the dress code in order to express the person's true gender identity. In other words, the Court found that because the EEOC essentially was arguing that the employee should have the right to conform to whichever of the employer's gender stereotypes best suited the gender identity of the employee, the EEOC was not pursuing the least restrictive means of accomplishing Title VII's goals of eliminating sex stereotyping in the workplace. The Court suggested that the EEOC could have proposed a gender-neutral dress code as a less restrictive alternative. Because the EEOC did not do so, however, the Court decided that the employer's rights under the RFRA trumped the employee's rights under Title VII and dismissed the EEOC's case against the employer (the Court did note that the RFRA defense would be inapplicable

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in a lawsuit brought by a private party; RFRA applied in this case only because the EEOC—a government entity—brought the case).

This case serves as yet another example of the complex legal issues that arise in applying Title VII to gender identity cases. Likely, either Congress or the Supreme Court (or, perhaps, both) will need to step in to provide clarity on these issues.

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