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The EEOC's Shocking Reversal on LGBT Protections Under Title VII

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Does Title VII protect transgender people from employment discrimination? The Equal Employment Opportunity Commission (EEOC) says "no," but only after a stunning reversal of its own policy.

In 2014, during the Obama Administration, the EEOC sued a Michigan funeral home chain alleging, among other things, that the funeral home violated Title VII by discriminating against a transgender employee. The employee, Aimee Stephens, presented as a male when hired. The funeral home fired her after she disclosed that she would be transitioning to female.

Stephens filed an EEOC complaint and the Commission subsequently brought suit against the funeral home. The district court granted summary judgment in favor of the funeral home on both claims, and the EEOC appealed to the Sixth Circuit.

On October 4, 2017, while the EEOC's appeal was pending, Attorney General Sessions issued a memorandum to United States Attorneys and heads of Department of Justice components stating that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se." The memorandum further stated that "Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." It explained that "the Department of Justice will take that position in all pending and future matters."

On March 7, 2018, the Sixth Circuit reversed the holding of the District Court in Stephens' case. It found, in pertinent part, that the funeral home engaged in unlawful discrimination against Stephens on the basis of her sex. The United States Supreme Court agreed to hear the case to determine, once and for all, the issue of whether Title VII prohibits discrimination against transgender people based on their status as transgender.

The EEOC, however, underwent a massive transformation since the time it initiated the Stephens lawsuit against the funeral home. The EEOC now consists of a Trump-appointed Chair, a 2-1 Republican majority, as well as a Trump-appointed General Counsel. Accordingly, on August 16, 2019, this newly-appointed EEOC filed a brief with the Supreme Court in the Stephens case arguing the exact opposite of what it initially argued in the District Court case. For the first time, and in direct contradiction to the claims made in the original complaint, the EEOC now argues that the legislative intent of Title VII precludes an interpretation that includes gender identity discrimination because when Congress enacted Title VII in 1964, the ordinary public meaning of "sex" was biological sex, not transgender status. Additionally, the EEOC asserts that discrimination based on transgender status does not inherently entail discrimination because of sex.

The Supreme Court will hear oral arguments on October 8, 2019. Currently 26 states do not expressly prohibit sexual orientation or gender identity discrimination in employment. Should the Supreme Court determine Title VII does not encompass gender identity, the implications for transgender workers across the country would be enormous. With a seemingly more conservative Court, a 5-4 ruling holding that Title VII does not protect transgender workers is a real possibility.

While it is unclear if the new conservative-majority court will be amenable to protecting the rights of transgender workers, this case has the potential to be to gender identity what *Obergefell v. Hodges* was to same-sex marriage.