

EQUALITY PROGRESSION? UNCERTAINTY IN THE STATE OF TRANSGENDER

EMPLOYMENT PROTECTIONS UNDER TITLE VII

by

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I

INTRODUCTION

The Civil Rights Act of 1964 provides protections for individuals from discrimination based on a person's race, color, religion, sex, or national origin in any aspect of employment in Title VII of the Act.¹ The question of protections for individuals based on their sexual orientation or gender identity is not explicitly addressed under Title VII. The Federal Government and separate states' governments have begun to address the issue of whether to provide specific protections from employment discrimination based on an individual's gender identity. Different jurisdictions have taken a wide range of approaches as to whether a person's gender identity is a protected status and how much protection is afforded to those individuals. The approaches have ranged from specifically stating that gender identity is absolutely not a protected status to providing complete protection from employment discrimination based on a person's gender identity. This topic is currently under discussion in many jurisdictions and changes are being made on a regular basis throughout the country.

II

HISTORY

On July 2nd, 1964, President Lyndon B. Johnson signed the Civil Rights Act into law.² This was comprehensive legislation designed to end discrimination based on race, color, religion or national origin.³ Title VII of the Civil Rights Act of 1964 banned discrimination by trade

¹ 2 U.S.C.A. § 2000e-2

² *Civil Rights Act of 1964*, National Park Service (March 22, 2016), <https://www.nps.gov/articles/civil-rights-act.htm>

³ *Id.*

unions, schools and employers; included a prohibition against discrimination on the basis of sex; and established the Equal Employment Opportunity Commission (EEOC).⁴ Title VII states,

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise 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; (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁵

While the law itself has not changed, the interpretation of the law has broadened. In 1989, The United States Supreme Court held in *Price Waterhouse v. Hopkins*⁶ that discrimination based on gender stereotypes can be a cause of liability in an employment case.⁷ In *Price Waterhouse*, the plaintiff was denied a partnership at the Price Waterhouse accounting firm.⁸ Multiple comments on her denial paperwork referenced her gender and that some of her actions did not conform to gender stereotypes.⁹ One specific comment from a partner stated that in order to be considered, she needed to “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.”¹⁰

The EEOC further broadened the interpretation of discrimination on the basis of sex in *Mia Macy v. Eric Holder*.¹¹ Here, the plaintiff, Mia Macy, was denied a job after she informed the company that she was transitioning to female.¹² The Department of Justice declined to

⁴ 2 U.S.C.A. § 2000e-2

⁵ *Id.*

⁶ 490 U.S. 228 (1989)

⁷ *Id.* at 258

⁸ *Id.* at 233

⁹ *Id.* at 235

¹⁰ *Id.*

¹¹ EEOC DOC 0120120821, 2012 WL 1435995, (Apr. 20, 2012)

¹² *Id.* at *1

process the part of the complaint alleging discrimination based on gender identity, change of sex, and/or transgender status, stating that adjudication by the EEOC of discrimination allegations based on those classifications was not available.¹³ The EEOC referenced the *Price Waterhouse* opinion that held that discrimination based on sex includes discrimination based on failure to conform to gender expectations.¹⁴ The EEOC reversed the DOJ decision and remanded the complaint on the grounds that intentional discrimination against a transgender individual violated Title VII protections.¹⁵ This was the first case in which the EEOC held that transgender individuals are entitled to protection from discrimination under federal law.

III

EXECUTIVE BRANCH - TITLE VII UNDER THE OBAMA ADMINISTRATION

Under the Obama administration, transgender individuals were officially recognized as a class protected from discrimination in employment under the Federal Government. In July 2014, with Executive Order 13672, President Barack Obama announced that discrimination based on gender identity is prohibited for purposes of federal employment and government contracting.¹⁶ The President's Executive Order specifically amended terminology in previous Executive Orders 11478 and 11246 "in order to provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity"¹⁷ The order substituted the terminology "sexual orientation and gender identity" for what had previously read "sexual orientation" in Executive Order 11478 of August

¹³ *Id.* at *3

¹⁴ *Id.* at *7

¹⁵ *Id.* at *11

¹⁶ Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 23, 2014); see also U.S. Dep't of Labor Directive 2014-02 (August 19, 2014)

¹⁷ *Id.*

8, 1969; and substituted “sex, sexual orientation, gender identity, or national origin” for “sex, or national origin” in several sections of Executive Order 11246 of September 24, 1965.¹⁸

President Obama’s Executive Order directed the Secretary of Labor to prepare regulations to implement the Order within 90 days.¹⁹

In support of the Executive Order, President Obama’s Attorney General from 2009 to 2015, Eric Holder, authored a memorandum in December 2014.²⁰ Attorney General Holder’s memorandum held that the Department of Justice extended employment discrimination protections to include gender identity as a protected status.²¹ Attorney General Holder’s memorandum stated,

After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.²²

Recognizing that there were several Federal Court decisions supporting both sides of the argument of whether an individual’s gender identity is a protected class, Holder argued that the Federal government’s approach to the issue had evolved over time.²³ In supporting his argument, Attorney General Holder referenced the holdings in *Price Waterhouse* and *Macy*, 2011 guidance from the Office of Personnel Management, and President Obama’s July 2014 Executive Order.²⁴ He determined that the most straightforward reading of “discrimination because of sex” includes

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Memorandum from Eric Holder, Attorney Gen., U.S. Dep’t of Justice, on Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), <https://www.justice.gov/file/188671/download>

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

an employees' gender identity or transgender status.²⁵ Attorney General Holder concluded by stating, "the Department will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination)."²⁶

IV

EXECUTIVE BRANCH - TITLE VII UNDER THE TRUMP ADMINISTRATION

The Trump administration has taken a contrary approach to the Obama administration's, and rolled back the protections granted under President Barack Obama.

In October 2017, The Department of Justice, led by Attorney General Jeff Sessions from 2017 to 2018, reversed the employment protections for discrimination based on gender identity enacted by the Obama administration.²⁷ In a memorandum on October 4, 2017, Attorney General Sessions opined that while Title VII provided various protections to transgender individuals, Title VII did not prohibit the discrimination based on gender identity *per se*.²⁸ Attorney General Sessions concluded his memo, stating,

Accordingly, Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status. Therefore, as of the date of this memorandum, which hereby withdraws the December 15, 2014, memorandum, the Department of Justice will take that position in all pending and future matters (except where controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential further review).²⁹

²⁵ *Id.*

²⁶ *Id.*

²⁷ Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download>

²⁸ *Id.*

²⁹ *Id.*

The memo specifically referenced and withdrew former Attorney General Holder's memorandum of December 15, 2014.³⁰ Former Attorney General Sessions reasoned that Eric Holder's interpretation of the statute was incorrect and too expansive.³¹ Attorney General Sessions stated that Title VII prohibits discrimination on the basis of sex, among other protected traits, but does not specifically mention gender identity.³² Since gender identity is not specifically mentioned in Title VII, then it is not a protected class according to the plain meaning of the statute.³³ While removing employment discrimination protections for transgender individuals, Former Attorney General Sessions felt the need to conclude his memo by specifically stating that the Department of Justice "will continue to affirm the dignity of all people, including transgender individuals", and does not condone mistreatment of individuals based on their gender identity.³⁴

Despite the actions of former Attorney General Sessions on behalf of the President and the Trump administration, the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration and the Office of Federal Contract Compliance Programs did not reverse their policies and have continued recognize the protections from discriminations. The EEOC specifically states in their overview that they are "responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of that person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information."³⁵ The EEOC states their authority in

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *About the EEOC: Overview*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/index.cfm>

the matter is to investigate charges of discrimination and if they are not able to settle the charges, then to file a lawsuit to protect the rights of the individuals and the interests of the public.³⁶ The EEOC provides outreach, education and technical assistance programs to prevent discrimination.³⁷ The EEOC website states that the “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. These protections apply regardless of any contrary state or local laws.”³⁸

The Occupational Safety and Health Administration (OSHA) continues to recognize protections from discrimination on the basis of gender identity. An example of this is their publication, *Best Practices: A Guide to Restroom Access for Transgender Individuals*.³⁹ The memo states that “all employees, including transgender employees, should have access to restrooms that correspond to their gender identities.”⁴⁰ This memo was released to help employers interpret the Department of Labor regulations on toilet facilities for employees.⁴¹

The Office of Federal Contract Compliance Programs (OFCCP) continues to recognize the protections from discrimination on the basis of gender identity as well.⁴² On December 9, 2014, the OFCCP published an updated rule revising regulations implemented in Executive Order 11246, going into effect on April 8, 2015.⁴³ The updates prohibit federal contractors and

³⁶ *Id.*

³⁷ *Id.*

³⁸ *About the EEOC: What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

³⁹ OSHA.gov, (2015) <https://www.osha.gov/Publications/OSHA3795.pdf>

⁴⁰ *Id.*

⁴¹ *Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities*, United States Department of Labor, <https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0>

⁴² *Executive Order 11246: Regulations Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*, U.S. Department of Labor, <https://www.dol.gov/ofccp/LGBT.html>

⁴³ *Id.*

subcontractors from discriminating on the basis of sexual orientation or gender identity and apply to any contracts entered into or modified on or after that date.⁴⁴ These amendments are still current, as of October 21, 2019, despite the 2017 Department of Justice memo.⁴⁵

V

JUDICIAL BRANCH – 6TH CIRCUIT

In 2014, the EEOC brought a Title VII discrimination suit in the 6th Circuit on behalf of a transgender woman.⁴⁶ In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Aimee Stephens, who had worked for the R.G & G.R. Harris Funeral Home for six years, was fired two weeks after she informed the funeral home’s owner that she was transitioning to female and would represent herself and dress as a female at work.⁴⁷ The EEOC brought suit, charging the funeral home with violating Title VII by terminating Stephens’s employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and administering a discriminatory clothing allowance policy.⁴⁸ In 2015 the District Court granted summary judgment for the defendant funeral home.⁴⁹ In his ruling, U.S. District Court Judge Cox found that while the discrimination was impermissible under Title VII, the employer established a valid defense under the Religious Freedom Restoration Act.⁵⁰ The RFRA prohibited the EEOC from using Title VII to force the funeral home to violate its sincerely held religious beliefs, and

⁴⁴ *Id.*

⁴⁵ *Title 41 → Subtitle B → Chapter 60*, Electronic Code of Federal Regulations, <https://www.ecfr.gov/cgi-bin/text-idx?SID=bf8e18a5468dc0b1650a66621715a36a&mc=true&tpl=/ecfrbrowse/Title41/41chapter60.tpl>

⁴⁶ *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, (6th Cir. 2018)

⁴⁷ *Id.* at 566

⁴⁸ *Id.* at 566-7

⁴⁹ *Id.* at 567

⁵⁰ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 857 (E.D. Mich. 2016)

the EEOC failed to show the standard it wished to apply was the least restrictive means of furthering the compelling government interest of protecting employees from gender stereotyping.⁵¹

The 6th Circuit Court of Appeals reversed the District Court's grant of Summary Judgment in favor of the funeral home and granted summary judgment in favor of the EEOC.⁵² The Court held that the funeral home had engaged in unlawful discrimination against Stephens; the funeral home was not entitled to a defense under the Religious Freedom Restoration Act; that enforcing Title VII was the least restrictive means of furthering the compelling government interest in eradicating workplace discrimination against Stephens; and that the EEOC may bring a discriminatory clothing allowance claim against the funeral home.⁵³

On the unlawful discrimination claim, The Court based its holding on *Price Waterhouse*.⁵⁴ The Court stated that the funeral home's owner's decision to fire Stephens because she was no longer going to represent herself as a man was right in line with the sex-based discrimination forbidden by *Price Waterhouse*.⁵⁵ As to the unlawful discrimination claim directly based on Stephens's transgender status, The Court stated,

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... Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected Rost's decision to fire Stephens.⁵⁶

⁵¹ *Id.* at 863

⁵² *EEOC v. R.G.*, 884 F.3d, 600

⁵³ *Id.* at 567

⁵⁴ *Id.* at 572

⁵⁵ *Id.*

⁵⁶ *Id.* at 575

The 6th Circuit Court of Appeals concluded by flatly stating that discrimination due to an individual's failure to conform to sex stereotypes or their transitioning or transgender status is illegal under Title VII of the Civil Rights Act of 1964.⁵⁷

VI

JUDICIAL BRANCH – UNITED STATES SUPREME COURT

The United States Supreme Court just recently held that Title VII of the Civil Rights Act of 1964 affords employment protections for homosexual and transgender individuals.⁵⁸ Leading up to this recent decision, several state governors and state's attorneys generals filed an amicus brief with the Supreme Court asking The Court to consider the 6th Circuit Court of Appeals' decision in *EEOC v. R.G.*⁵⁹ They asked The Court to answer the question of whether the word "sex" in Title VII's prohibition on discrimination "because of sex," 42 U.S.C. § 2000e-2(a)(1) meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964.⁶⁰

On April 22, 2019, The Supreme Court granted certiorari to *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* and heard arguments from the attorneys on October 8, 2019.⁶¹ The Court granted certiorari on the limited question of whether Title VII prohibits discrimination against transgender individuals based on (1) their status as transgender or (2) sex stereotyping under

⁵⁷ *Id.* at 600

⁵⁸ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSblog (July 2, 2020), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>.

⁵⁹ Brief For The States Of Nebraska, et al., As Amici Curiae In Support Of Petitioner, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (No. 18-107).

⁶⁰ *Id.*

⁶¹ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSblog (May. 20, 2020), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>

Price Waterhouse.⁶² David Cole, arguing on behalf of Respondent, Aimee Stephens, stated that Ms. Stephens, a transgender individual, was discriminated against and fired for three reasons.⁶³ First, for failing to conform to her employer's stereotypes about how men and women should behave; second, for identifying as a woman, while being assigned male sex at birth; and third, for changing her sex.⁶⁴ Mr. Cole argued that all three reasons equated to Ms. Stephens being discriminated against on the basis of sex in violation of Title VII and the holding of *Price Waterhouse*.⁶⁵ Mr. Cole concluded by arguing that considering the Court found in *Price Waterhouse* that Ann Hopkins could not be fired for being insufficiently feminine, then Ms. Stephens could not be fired for being insufficiently masculine.⁶⁶

John Bursch, arguing on behalf of the employer funeral home, based his argument primarily on the idea that sex-specific policies based on biological sex are not the same as sex discrimination under Title VII.⁶⁷ Mr. Bursch stated that Ms. Stephens's termination based on her identifying as a female at work, despite being born as a male, was a violation of a legal sex-specific policy, and not discrimination in violation of Title VII.⁶⁸

Solicitor General Noel Francisco argued on behalf of the EEOC, but in support of reversing the Sixth Circuit decision.⁶⁹ Gen. Francisco argued that Congress did not include gender identity in their definition of sex; and that gender identity is recognized as a different

⁶² *Id.*

⁶³ Argument Transcript at 3, *R.G. & G.R. Funeral Homes, Inc. v. Equal Employment Opportunity Commission, Et. Al.*, (No. 18-107).

⁶⁴ *Id.* at 3-4

⁶⁵ *Id.* at 4

⁶⁶ *Id.* at 27-28

⁶⁷ *Id.* at 30

⁶⁸ *Id.*

⁶⁹ *Id.* at 2

trait.⁷⁰ As long as the employer is treating men and women with the same different trait the same regardless of their sex, then the employer is not discriminating because of their sex.⁷¹

On June 15, 2020, The United States Supreme Court upheld Title VII employment discrimination protections for gay and transgender individuals.⁷² In a 6 to 3 decision authored by Justice Neil Gorsuch, the Supreme Court held that “an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.”⁷³

In the majority opinion, Justice Gorsuch held that when an employer fires an individual merely for being gay or transgender, that employer is doing so based on the employee’s sex, therefore in violation of Title VII.⁷⁴ Justice Gorsuch summed up the decision plainly in the introduction to the opinion.⁷⁵ To answer the question as to whether an employer can fire someone simply for being transgender or homosexual, he stated,

The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.⁷⁶

Justice Gorsuch concluded his opinion by stating that Title VII, as written by Congress, adopted broad language prohibiting relying on an employee’s sex when making a decision to fire that

⁷⁰ *Id.* at 46

⁷¹ *Id.*

⁷² *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSblog (July 2, 2020), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>.

⁷³ *Id.*

⁷⁴ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, 590 U.S. _____, 33 (2020).

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

employee.⁷⁷ A necessary consequence of that legislative choice is the logical prohibition on firing an employee merely for being gay or transgender.⁷⁸

This is a particularly significant decision since this issue is the topic of much current debate and many jurisdictions are grappling with whether they want to afford protection from discrimination to individuals based on their transgender status. Sadly, Aimee Stephens, the transgender woman at the center of this controversy passed away on May 12, 2020 from kidney failure before The Supreme Court released its opinion upholding the Court of Appeals decision in her case.⁷⁹

VII

LEGISLATIVE BRANCH

There are currently no legislative branch protections in effect for transgender individuals, though there are legislative protections currently in Congress for consideration. The Equality Act was introduced in the House of Representatives on March 13, 2019 by a bi-partisan group of legislators.⁸⁰ The Equality Act in its current form would amend existing civil rights laws and several laws regarding employment with the federal government, as well as the Civil Rights Act of 1964, the Fair Housing Act, The Equal Credit Opportunity Act, and the Jury Selection and Services Act. Gender identity and sexual orientation would be explicitly included as protected characteristics.⁸¹ The Act would specifically amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex in public spaces and services and in federally funded

⁷⁷ *Id.* at 33.

⁷⁸ *Id.*

⁷⁹ Aimee Ortiz, *Aimee Stephens, Plaintiff in Transgender Case, Dies at 59*, The New York Times, (May 13, 2020), <https://www.nytimes.com/2020/05/12/us/aimee-stephens-supreme-court-dead.html>

⁸⁰ The Equality Act - H.R.5. *The Equality Act*, Human Rights Campaign (Mar. 20, 2019), <https://www.hrc.org/resources/the-equality-act>

⁸¹ *Id.*

programs.⁸² The Equality Act Passed in the House of Representatives on May 17, 2019 with a bipartisan vote of 236 - 173.⁸³ The Act was transmitted to the Senate and received on May 20, 2019 and referred to the Senate Committee on the Judiciary for initial consideration.⁸⁴

Considering the current political climate, there is no indication as to whether or not this will be passed in the Senate, even taking into consideration the broad bi-partisan support the Equality Act received in the House of Representatives.

VIII

STATE OF TENNESSEE

The State of Tennessee is currently at the end of the spectrum that provides little or no protections in terms of employment for transgender individuals. The State government does not offer any protections for transgender individuals in employment, but a few of the metropolitan area governments offer some protections. There are currently bills in the Tennessee House and Senate that further limit employment protections from discrimination based on transgender status and gender identity.

The Nashville Metropolitan government has granted some protections from discrimination in employment based on gender identity.⁸⁵ The Metro Council passed an ordinance that protects employees from discrimination based on sexual orientation and gender identity, but only in the public employment sector.⁸⁶ The ordinance does not extend those protections to private employers.⁸⁷

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *H.R. 5 – Equality Act*, Congress.Gov, <https://www.congress.gov/bill/116th-congress/house-bill/5/all-actions?overview=closed#tabs>

⁸⁵ Nashville, Tennessee, Code of Ordinances Title 11, Division 1, Chapter 11, § 11.20.130

⁸⁶ *Id.*

⁸⁷ *Id.*

The Metro Nashville government has also issued a statement on non-discrimination, which states,

The Metropolitan Government of Nashville and Davidson County (Metro Government) is committed to promoting the quality of opportunity for all citizens. ... Metro Government does not discriminate on the basis of race, color, national origin, gender, gender identity, sexual orientation, age, religion, creed or disability in admission to, access to, or operations of its programs, services, or activities. Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other employment practices because of non-merit factors shall be prohibited⁸⁸

The state government in Tennessee differs from the Metro Nashville government. House Bill 0563 and Senate Bill 0364, as they have been introduced, will prohibit the state and local governments from taking any sort of discriminatory actions against a business based on the business's internal policies.⁸⁹ As long as the company's policies comply with state and federal statutes, rules and regulations, the State of Tennessee will not discriminate against any business based on its internal policies regarding antidiscrimination, minimum wage, family leave or health insurance.⁹⁰ The bill also states that local governments in Tennessee will be prohibited from taking any sort of discriminatory action against a business for the same reasons.⁹¹ If passed, this bill intends to override the protections that some of the cities have enacted.⁹² The bill passed in the House on March 21, 2019 and was transmitted to the Senate.⁹³ The Senate has currently deferred this bill until 2020.⁹⁴

⁸⁸ *Statement of Non-discrimination*, Nashville.Gov, <https://www.nashville.gov/Government/NonDiscrimination.aspx>

⁸⁹ *HB 0563*, Tennessee General Assembly, <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0563&GA=111>

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

The Tennessee Attorney General, Herbert Slatery, III, is one of the State’s Attorneys General who signed the amicus brief that was filed with the United States Supreme Court opposing the 6th Circuit Court of Appeals decision in *EEOC v. R.G.* and asking The Court to consider the Court of Appeals decision.⁹⁵

IX

STATE OF NEW YORK

The State of New York is on the opposite end of the spectrum from Tennessee regarding employment discrimination protections for transgender individuals. New York City and the State of New York provide extensive protections in employment and other aspects of life for transgender individuals.

New York City enacted the New York City Human Rights Law (NYCHRL), in its original form in 1944, in response to the citywide concerns about race relations, by executive order of Mayor Fiorello H. LaGuardia.⁹⁶ In its current form, the NYCHRL prohibits discrimination in employment, public accommodations, and housing based on race, color, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, marital status, and partnership status.⁹⁷ Gender is defined in the statute to include actual or perceived sex, gender identity or gender expression, including a person’s actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristics, regardless of the sex assigned to that person at birth.⁹⁸

⁹⁵ Brief For The States Of Nebraska, et al., As Amici Curiae In Support Of Petitioner, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (No. 18-107)

⁹⁶ *Commission’s History*, New York City Human Rights, <https://www1.nyc.gov/site/cchr/about/commissions-history.page>

⁹⁷ New York City, N.Y., Code § 8-101

⁹⁸ New York City, N.Y., Code § 8-102

The New York City Council specifically expanded the scope of the NYCHRL and included gender identity as a protected class with the Transgender Rights Bill in 2002.⁹⁹ The City Council’s stated intent in the Transgender Rights Bill was to ensure protection for people whose “gender and self-image do not fully accord with the legal sex assigned to them at birth.”¹⁰⁰ In 2018, the City Council amended the definition of gender in the NYCHRL to ensure a broader and more inclusive understanding of their intent and definition of gender.¹⁰¹

The New York City Commission on Human Rights gives more specific guidance on what constitutes violations of gender discrimination in its legal enforcement guide.¹⁰² The essential violations regarding employment are covered, along with violations in public accommodations and housing providers.¹⁰³ It is a violation to refuse to hire, promote, or fire a person based on these characteristics, as well as set different compensation or different terms of employment.¹⁰⁴ In addition, the Commission states that there are several other practices that constitute discriminatory practices in employment.¹⁰⁵ These include failing to use the name or pronouns with which a person identifies, refusing to allow a person to use single-gender facilities and programs most closely aligned with their gender, gender stereotyping, imposing different grooming standards or uniforms based on gender, providing different benefits that discriminate based on gender, considering gender in requests for accommodations, engaging in discriminatory harassment, and retaliation.¹⁰⁶ Civil penalties of up to \$125,000 may be imposed for violations of

⁹⁹ *Gender Identity/Gender Expressions: Legal Enforcement Guidance*, New York City Human Rights, <https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page#1>

¹⁰⁰ *Id.*, quoting Local Law 3 (2002)

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

this act, and up to \$250,000 if the violation is a result of willful, wanton, or malicious conduct.¹⁰⁷

The civil penalties may be in addition to any other penalties, including compensatory or punitive damages awarded to persons who successfully resolve or prevail in claims brought under the NYCHRL.¹⁰⁸

The State of New York was the first state to enact legislation that prohibited discrimination in employment based on race, creed, color, or national origin.¹⁰⁹ Governor Thomas Dewey signed the Ives-Quinn Anti-Discrimination Bill and created the State Commission Against Discrimination in 1945.¹¹⁰ The law was renamed the Human Rights Law and the Commission was renamed the New York State Division of Human Rights in 1968.¹¹¹

The New York (State) Human Rights Law (NYHRL) states that employers are prohibited from discriminating against individuals based on the individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence.¹¹²

The New York Legislature amended the NYHRL in 2016 to add gender identity as a class protected from discrimination.¹¹³ The amendment defined the terms gender identity, transgender person, and gender dysphoria.¹¹⁴ The amendment stated that that the term "sex," when used in the NYHRL included gender identity and the status of being transgender.¹¹⁵ Where

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Agency History*, New York State Division of Human Rights, <https://dhr.ny.gov/agency-history>

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² N.Y. Exec. Law § 296 (McKinney)

¹¹³ N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13

¹¹⁴ *Id.*

¹¹⁵ *Id.*

sex is a protected category, discrimination and harassment would also be prohibited on the basis of gender identity or the status of being transgender.¹¹⁶

While the 2016 amendment added gender identity as a protected class in a general sense, transgender individuals were given much broader protections under New York State law in 2019.¹¹⁷ In 2019, New York State Senate passed the Gender Expression Non-Discrimination Act (GENDA).¹¹⁸ The Act gave included specific protections from discrimination by employers, educational institutions, landlords, creditors and other on the basis of gender identity and gender expression.¹¹⁹ The bill had been passed every year by the New York State Assembly since 2008, but did not pass in the Senate until 2019, the first time it was introduced in a Democrat majority Senate.¹²⁰ New York Governor, Andrew Cuomo signed the GENDA bill into law on January 25, 2019.¹²¹

The bill states that the legislature found that the prejudice encountered by individuals based on their gender identity or expression had prevented access to employment, housing, and other basic necessities, and lead to deprivation and suffering; and these individuals had been subjected to hostility and distrust, and at times, physical violence.¹²² The Courts had properly held that New York's sex discrimination laws prohibit discrimination based on gender stereotypes, or that an individual had transitioned or planned to transition from one gender to the

¹¹⁶ *Id.*

¹¹⁷ *Senate Passes GENDA & Bans Conversion Therapy*, The New York State Senate (Jan. 15, 2019), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-genda-bans-conversion-therapy>

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Grace Segers, *New York legislature passes historic bill against transgender discrimination*, CBS News (Jan. 15, 2019, 3:08PM) <https://www.cbsnews.com/news/new-york-legislature-passes-historic-anti-transgender-discrimination-bill/>

¹²¹ *Governor Cuomo Signs Landmark Legislation Protecting LGBTQ Rights*, New York State (Jan. 25, 2019) <https://www.governor.ny.gov/news/governor-cuomo-signs-landmark-legislation-protecting-lgbtq-rights>.

¹²² *Discrimination—Gender Identity*, 2019 Sess. Law News of N.Y. Ch. 8 (S. 1047) (McKinney's)

other.¹²³ This law intended to codify this principle and ensure the public understood that discrimination based on gender identity and expression was prohibited.¹²⁴ The bill specifically amended the NYHRL to include gender identity and gender expression as additional classes protected from discrimination.¹²⁵ GENDA defined gender identity and expression as “a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.”¹²⁶

X

COMPARISON OF TITLE VII PROTECTIONS

The expansion of Title VII employment discrimination protections to include gender identity varies widely across jurisdictions in the United States. This area of the law is relatively unsettled primarily because different states and jurisdictions are currently developing, increasing, or limiting their protections at different paces, or as their protections or lack of protections are challenged.

At this point, The Civil Rights Act of 1964 provides employment discrimination protection for transgender individuals according to the 6th Circuit Federal Appellate Courts under the theory that the definition of sex for the purposes of the Act includes gender identity and transgender status.¹²⁷ The United States Supreme Court just recently upheld that interpretation of Title VII of the Civil Rights Act from the 6th Circuit Court of Appeals.¹²⁸

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *EEOC v. R.G.*, 884 F.3d 560

¹²⁸ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSblog (July 2, 2020), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>.

The individual states provide widely different levels of protections for transgender individuals. Some jurisdictions approach the level of protections as discrimination based on sex and gender norms, as in *Price Waterhouse v. Hopkins*.¹²⁹ Other jurisdictions have afforded specific protections based on gender identity by statute.¹³⁰ And on the opposite end of the spectrum, some jurisdictions have declined to recognize a person's gender identity or transgender status as a protected class.¹³¹

Even within states, there may be differing levels of protection between the state level government and municipal level governments. The State of Tennessee is a prime example of this. The larger city governments provide at least some level of employment protections for transgender individuals,¹³² while the State declines to offer any protections.¹³³ In the case of Tennessee, there are efforts by the State government to supersede the authority of the municipal governments in this area.¹³⁴

New York, by comparison, has approached this issue quite differently. The State government of New York and the New York City government have both made successful efforts to ensure extensive protections from employment discrimination on the basis of gender identity and gender expression by enacting specific legislation in order to codify and support protections afforded by caselaw.¹³⁵

As this is a developing area of the law, there may be opposing efforts within a particular jurisdiction to both increase and decrease discrimination protections for transgender individuals.

¹²⁹ 490 U.S. 228 (1989)

¹³⁰ N.Y. Exec. Law § 296 (McKinney)

¹³¹ *National Equality Map*, Transgender Law Center, <https://transgenderlawcenter.org/equalitymap>

¹³² Nashville, Tennessee, Code of Ordinances Title 11, Division 1, Chapter 11, § 11.20.130

¹³³ *HB 0563*, Tennessee General Assembly,

<https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0563&GA=111>

¹³⁴ *Id.*

¹³⁵ *LGBT Rights*, New York State Office of the Attorney General, <https://ag.ny.gov/civil-rights/lgbt-rights>

XI

FUTURE OF TITLE VII PROTECTIONS FOR TRANSGENDER INDIVIDUALS

The future of Title VII employment discrimination protections for transgender individuals is unpredictable at this point. Different jurisdictions currently have efforts to increase, decrease, or completely eliminate employment discrimination protections on the basis of gender identity and transgender status. These efforts will continue to evolve and change as the political climate in the United States and the separate states continues to evolve and change.

The United States Supreme Court granted certiorari to *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* on April 22, 2019 and heard oral arguments on October 8, 2019.¹³⁶ In a landmark ruling in June of 2020, The Supreme Court upheld Title VII employment discrimination protections for gay and transgender individuals.¹³⁷ With the Supreme Court affirming the 6th Circuit's ruling, discrimination protections in employment for transgender individuals will remain in place as far as the Federal judicial branch is concerned.

The Equality Act is currently being considered by the legislative branch.¹³⁸ The Equality Act would amend numerous existing civil rights laws to include sexual orientation and gender identity as characteristics protected from discriminations.¹³⁹ The Act passed in the house in May 2019 and was transmitted to the Senate.¹⁴⁰ The Equality Act is currently being reviewed by the

¹³⁶ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSblog (May 20, 2020), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>

¹³⁷ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSblog (July 2, 2020), <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>.

¹³⁸ *H.R. 5 – Equality Act*, Congress.Gov, <https://www.congress.gov/bill/116th-congress/house-bill/5/all-actions?overview=closed#tabs>

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Senate Committee on the Judiciary.¹⁴¹ The bill was introduced in both the House of Representatives and the Senate by bipartisan sponsors.¹⁴² The bill passed in the House with bipartisan support with a vote of 236-173.¹⁴³ It is difficult to predict if the Equality Act will receive the same level of bipartisan support if it is brought to the floor of the Senate for a vote.

The State of Tennessee General Assembly is currently considering legislation that would take the State in the opposite direction, slashing current protections, if passed. Senate Bill 0364 aims to strip the state and local governments of the authority to discriminate against a business based on that businesses internal policies, as long as the internal policies comply with State and Federal statutes, rules, and regulations.¹⁴⁴ While this does not directly mention transgender or gender identity discrimination protections, this would effectively allow businesses in Tennessee to maintain discriminatory policies against transgender individuals without the risk of losing state or local government contracts, funding, or be penalized for those policies.¹⁴⁵ Senate Bill 0364 passed in the House.¹⁴⁶ The Senate State and Local Government Committee has deferred the Bill until 2020.¹⁴⁷ Considering that the Bill passed in the House and passed first and second consideration in the Senate before being deferred until 2020, it seems likely that this bill will pass in Tennessee if it is brought to the floor for a vote. If this bill does pass, the State of Tennessee will demonstrate that it is not interested in limiting discriminatory practices, while many other states are generally moving towards allowing for more protections for more people from discriminatory practices.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *HB 0563*, Tennessee General Assembly, <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0563&GA=111>

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

On the opposite end of the spectrum on the state level, New York has already specifically granted wide ranging protections from discrimination on the basis of gender identity or gender expression.¹⁴⁸ The State of New York has clearly established that it wants to be inclusive of all people and has offered discrimination protections before many other states and the Federal Government. The State of New York supported case law in the state and codified protections from discrimination on the basis of gender identity and gender expression. There will likely be more states moving toward moving closer to the New York model in the relative near future.

It is not likely that the 50 state governments will come to a unanimous decision concerning the employment discrimination protections for transgender individuals in the near future. The general trend in recent history is to offer greater protections, in more areas, for more classes of individuals, but it will likely be many years before there are nationwide state-level protections in this area. Now that the United States Supreme Court has upheld the protections granted by the Court of Appeals in *EEOC v. R.G.*, proponents of increased protections for transgender individuals have a much stronger weapon in their arsenal.

XII

CONCLUSION

The topic of Title VII employment discrimination protections for transgender individuals is currently very much in a state of flux. This topic, like many others in the current political climate, is quite divisive and peoples' viewpoints vary widely, and opinions can be very strong. The protections from discrimination afforded to transgender individuals on the basis of their gender identity, regarding employment as well as many other areas, is going to be a hotly debated topic for many years to come. Even with the United States Supreme Court ruling in

¹⁴⁸ *National Equality Map*, Transgender Law Center, <https://transgenderlawcenter.org/equalitymap>

favor of Aimee Stephens and the EEOC, and affirming the employment protections under Title VII, the issue will still not be settled. The separate state governments will very likely continue to offer a very broad range of or lack of protections for individuals. Now that the Supreme Court decided to uphold the inclusion of gender identity as a protected class, there will likely continue to be challenges from some of the separate states and possibly individual employers.

The state and federal governments of the United States have slowly marched towards prohibiting discrimination against more classes of individuals and encouraged more inclusiveness in all aspects of life. There have been times that progress has seemed to slow, and times that progress has advanced rapidly. Unless there is an almost inconceivably major shift in the feelings of American citizens or a radical change in the structure of the government, progress towards inclusiveness and prohibition of discrimination will continue.