



Protecting transgender employees from discrimination in the US

By **Ben Smith** - 30 November 2018

Discrimination against trans employees has taken centre stage in the US as the US Supreme Court weighs up whether it will consider if dismissing a trans employee because of their gender identity breached federal discrimination laws.

Protection against discrimination on the basis of gender identity is not found in federal law in the US. Title VII to the Civil Rights Act 1964 (often referred to simply as Title VII) prohibits discrimination in employment on the basis of race, colour, religion, sex and national origin. However certain US states, such as California and Delaware, expressly prohibit employment discrimination on the basis of gender identity and others have interpreted protections against sex discrimination to cover gender identity (and sexual orientation). Michigan, where the present case originated, falls in the latter category. Although many appeals courts have found that sex discrimination covers gender identity, to date there is no Supreme Court authority on the point. That may be about to change as a trans woman's case about her dismissal due to transitioning while employed may be making its way in front of the highest court in the USA.

The case involved Aimee Stephens, an employee at RG and RR Funeral Homes in Michigan (the Funeral Home). Ms Stephens worked for the Funeral Home from 2007 to 2013. Ms Stephens was assigned male at birth but began her transition in 2013, telling her employer immediately. She was dismissed shortly afterwards. In the course of proceedings, it became clear that her manager had dismissed her because she began her transition. The Equal Employment Opportunities Commission (the EEOC) brought a claim against the Funeral Home for unlawfully discriminating against Ms Stephens (in US law, it is typical for the EEOC to enforce discrimination laws rather than for the employee to bring a claim as would be usual in the UK).

The claim in part failed at first instance, with a district court finding that discrimination on the basis of sex did not extend to cover transgender or transitioning status. The Court of Appeals for the Sixth Circuit disagreed, however, and considered that it was impossible to dismiss an employee because they were trans without being in part motivated by the employee's sex. In their view discriminating against a trans person is inherently sex-based discrimination because it is discriminating against someone because of a

change in sex. The appeal therefore succeeded, and the claim was returned to the lower court to be reconsidered.

That was not the end of things, however. On 30 November, the Supreme Court will decide whether it will allow an appeal against the Sixth Circuit's decision to proceed to a full hearing. On the same date, the Supreme Court will also consider whether two other cases – which argue that the federal prohibition of sex-based discrimination also prohibits discrimination on the basis of sexual orientation – will be allowed to proceed to a full hearing. It is certainly an interesting time for the Supreme Court's case law on discrimination – these cases have the potential to radically expand the scope of discrimination law across the US or to stymie the hopes of those hoping for greater protection.

For employers in the UK, these US proceedings are something of a curiosity. The Equality Act 2010 prohibits discrimination because of a person's gender reassignment – while not strictly speaking as wide as 'gender identity', the category of gender reassignment will protect many who identify as trans. This is just a minimum level that employers should ensure compliance with – best practice would be to ensure that all trans employees are not discriminated against, even if they would not necessarily fall within the scope of the Equality Act's "gender reassignment" category. Employers should also be aware that it is a criminal offence (and there is no defence available) for someone in an official capacity to reveal a person's gender identity without consent. This would include inadvertently giving details of a trans person's former name, for instance.