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Title: "Sex Stereotyping" and Title VII Protections

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Gender identity has become an increasingly prevalent issue, in the news and across social media. In *Obergefell v. Hodges*, the 2015 U.S. Supreme Court landmark case recognizing the fundamental right to marry for same-sex couples, Justice Kennedy began the majority opinion by holding that "The Constitution promises liberty all within its reach, a liberty that includes certain specific rights that allow persons … to define and express their identity." 135 S.Ct. 2584, 2593 (2015). The ability to define one's own identity is broader than a simple demarcation between competing sexual orientations. Not surprisingly, employers have begun to find themselves tasked with accommodating the transitioning or transitioned employee in recognition of that individual's protected liberties, often in the face of antagonistic coworker responses, without creating an unreasonable interference with the employer's business.

As recently as 2004, the 6th Circuit Court of Appeals upheld a lower court's dismissal of a suit brought by a transsexual woman alleging discrimination in violation of Title VII and the Americans with Disabilities Act after she was fired for refusing to use a men's restroom. *Johnson v. Fresh Mark, Inc.*, 98 Fed. Appx. 461 (6th Cir. 2004). Just a few months later, however, the 6th Circuit seemingly reversed itself in a separate employment discrimination case, and determined that the protection against sex stereotyping via Title VII did not stop just because someone happened to be a transsexual. *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004). In other words, treating someone differently because that person's behavior does not conform to societal expectations for his or her biological gender is impermissible, not only in the workplace but in the educational setting for students as well under Title IX. *Dodds v. U.S. Dept. of Educ.*, No. 16-4117, 2016 WL 7241402 (6th Cir. Dec. 15, 2016) (quoting *Smith, supra*).

While these 6th Circuit decisions provide some public guidance, the fact remains that there are competing viewpoints across the board in the federal courts. Not surprisingly, state courts are reluctant to address how far Title VII protections extend. *See, e.g. Ransom v. B.F. South, Inc.*, No. 2013-CA-001340, 2015 WL 510807, n5 (Ky. App. Feb. 6, 2015) ("…we need not address whether transsexuals are a protected group. We note that the federal courts have

disagreed as to whether Title VII encompasses discrimination claims made by transsexuals."). By recognizing that conduct directed against someone because that person is transitioning can create a hostile work environment actionable under Title VII, the courts appear to be implicitly affirming that the person belongs to a protected group, which is required to maintain the claim. *See id.*

Where does all this leave the employer? Not up a creek without a paddle, though it may seem that way at first blush. With the continuing legal trend to expand civil liberties in the area of gender rights, putting policies into place that are designed to protect those rights by prohibiting discriminatory behavior towards employees singled out because of their gender affiliation, and enforcing those policies, is well-advised.