

The SESCO Report

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Your “Human” Resource Since 1945

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Sex Discrimination Law Just Became Extremely Complicated

Employers Need to be Aware of New Legal Landmines

On March 7th, the U.S. Court of Appeals for the Sixth Circuit ruled that a business fired a **transgender employee** who planned to start going to work dressed as a woman broke the law. The case pitted the former employee, Aimee Stephens, and the Equal Employment Opportunity Commission against R.G. & G.R. Harris Funeral Homes with locations in Detroit, Livonia and Garden City, Michigan. The 3-0 decision **reverses** an earlier ruling by U.S. District Judge, Shan Cox, in August of 2016 who showed that Stephens’ employment “would impose a substantial burden on its ability to conduct business in accordance with its sincerely held religious beliefs.”

This all began in 2013 when the primary owner, Thomas Rost, fired Stephens shortly after she wrote him a letter saying **she would no longer be coming to work dressed as a man.**

The opinion written by Judge Moore notes, “Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status is illegal under Title VII of the Civil Rights Act of 1964. Unrefuted facts show that the funeral

home fired Stephens because she refused to abide by her employer’s stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful termination claim.”

The funeral home’s arguments that Rost was allowed to fire Stephens under the Religious Freedom Restoration Act of 1993 were without merit, the Appeals Court ruled, even if it did apply, it says, “The EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination.”

John Knight, Senior Staff Attorney, with the LGBT and HIV Project for the American Civil Liberties Union stated, “Today’s decision is an exciting and important victory for transgender people and allied communities across the country.”

The ACLU and ACLU of Michigan represented Stephens and intervened on her behalf last year in the EEOC’s lawsuit against the funeral home.

This decision is significant because it held that the government’s interest in prohibiting employment discrimination based on gender identity trumps the employer’s religious views regarding transgender employees. Additionally, the Sixth Circuit ruled in 2004 that discrimination based on gender identity is illegal under federal law. What makes this new case notable is that it rejected the funeral home owner’s argument that his decision to terminate the employee

should have been protected because it was motivated by his religious beliefs.

Where this issue becomes very difficult for employers is that gender identity and sexual orientation are distinct concepts. Courts sometimes find that gender identity is a protected category under federal law, but sexual orientation is not. **So far, the Sixth Circuit has maintained that sexual orientation discrimination is not prohibited under federal law.**

The Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee) is normally a very non-political and somewhat conservative Circuit. As such, this and previous cases will undergird the prohibition of discrimination based on gender identity. As such, SESCO clients across the country must be sensitive to this type of discrimination. **And as of note, the employee did, in fact, place the employer on notice that she, in fact, was identifying as a female versus male which immediately protects her under the gender identity concept.**

While most organizations will likely never face this type of issue as only .02% of the population identify as transgender, employers must be very sensitive and aware and ensure that their employment practices from screening and hiring, dress codes and non-discrimination are intact and compliant.

This case should serve to all employers as a warning. In light of the “Me Too” and other movements today, this is going

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Common Human Resource Manager Mistakes

In SESCO's Basic and Advanced Human Resource Management Seminars, we discuss the primary role that a Human Resource Manager should play in an organization. Often though in conducting client assessments and working with human resource professionals, we find the following concerns:

1. **Forgetting who the HR Manager represents.** Too many HR Managers feel as if they are the employee's advocate and constantly debate and push back on managers and owners. Certainly, HR Managers should be a place where employees feel as if they can take their complaints or ask questions, but a professional HR Manager will understand how to balance their roles and responsibilities with the realities of running and operating a successful business.
2. **We see HR Managers having the need to be "friends" with employees.** HR Managers many times have the need to be "liked." This can create a significant strain on the organization's overall employee relations climate and culture and can drive a wedge between organizational goals and the employee asset.
3. **Many HR Managers are frightened of federal and state compliance requirements and attorneys.** HR Managers will many times push back against management and tell them that "we can't do that," "we will get in trouble," etc. Certainly, an HR Manager needs to know and understand the laws and regulations at least enough to contact a professional consultant like SESCO but ultimately, organizations do have the right and should make decisions that best support the organization's overall mission and vision.

Human Resource Managers who become the organization's "compliance police" ultimately do not sit at the table with the executive team because these HR Managers are the naysayers and are not open in working with



management in developing solutions. This is not to say that owners and managers are looking to break the law or create liability for the organization, but certainly risk can be managed and solutions are available in most all situations.

4. **Many Human Resource Managers do not understand the overall importance and value of the position.** In essence, the Human Resource Manager should sit at the table with executives. In Japanese companies, the Human Resource Manager is the "number two" person in the pecking order. This is because Japanese run organizations understand the value of their human resources as their most valued asset as well as the organization's largest, single controllable cost.

In today's environment, the HR Manager must understand that compensation and subsequent labor costs are critical costs that must be managed. This means understanding and proactively managing scheduling, staffing and performance efficiency so that the organization can do more with less (labor cost). Many HR Managers simply do not understand this and recommend to owners and managers that they need to hire more people to get the job done or simply pay more or increase benefits to promote productivity.

5. **Human Resource Managers must understand that they are "managers" first and that they need to understand the organization's goals and needs.** They must become a member of the management team and balance their roles in ensuring compliance as well as employee satisfaction and certainly, this is a very difficult

SEX DISCRIMINATION

to make the EEOC a force to be reckoned with. In addition to the IRS and Department of Labor, Wage-Hour Division, the EEOC is going to rise to the same level of compliance - enforcing agency and employers need to be preventative.

SESCO's prevention recommendations include an on or offsite assessment of human resource practices to include:

- Screening and hiring
 - Questions
 - Assessment tools
 - Forms
- Employee handbook
 - Clothing Allowance Policies
 - Dress Code
 - EEOC/Accommodation

line to balance. However, your good, professional HR professionals do, in fact, understand that human resources is just not compliance or advocating for employees, but that they help the management team in ultimately achieving the organization's goals through people.

Special Thanks to New SESCO Clients!

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Hilton Head, SC
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Freehold Tire Pros
Freehold, NJ
Stevenson & Sons Funeral Homes
Miles City, MT

What Managers Need to Know About Sexual Harassment

Managers are an employer's "eyes and ears," so they have a key legal responsibility to be on the lookout for behaviors that could spark a sexual harassment complaint. Here's a primer on what sexual harassment is and how to react when you see it.

What is Sexual Harassment?

Sexual harassment occurs when one person attempts to exert power over another in the workplace through sexual intimidation.

Legally speaking, it's a form of sexual discrimination, which violates Title VII of the federal Civil Rights Act. (States often have their own laws against sexual harassment.)

The EEOC, which enforces the Civil Rights Act, gives this definition of sexual harassment: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment."

Two Kinds of Harassment

Managers need to be aware of two (2) kinds of sexual harassment:

1. Quid pro quo harassment literally means "this for that" harassment, and it's usually the most blatant kind. It occurs when a boss uses job rewards (such as raises or promotions) or punishment (such as demotions or firing) to force employees into a sexual relationship or sexual act.

Once single incident of quid pro quo harassment is enough to justify a lawsuit. And victims don't even need to suffer any actual physical contact; they need to show only that a coercive offer was made.

2. Hostile environment harassment is more subtle. Employees who make such claims argue that the workplace

is so sexually charged that it affects their job performance. Recognized causes include pornographic pictures displayed, verbal abuse, inappropriate touching, sexual jokes or demeaning gender-based remarks.

To justify hostile environment claims, employees must typically prove they were subjected to repeated offenses; one incident usually won't suffice.

In both types of harassment, employees must prove that the conduct was offensive to someone (not necessarily the intended victim of the harassment).

Example: Say a male employee tells a dirty joke to a female co-worker. She thinks it's funny, but a second woman passing by finds it offensive. That offhand joke could contribute to a hostile environment claim simply because someone finds it offensive. That's good reason for supervisors to discourage any amount of sexually charged jokes or behavior, even if the majority of employees don't have a problem with it.

Who Can File Lawsuits?

You may be surprised to discover that sexual harassment isn't just a male-against-female offense. While most cases involve men harassing women, some male employees have successfully filed sex harassment lawsuits against their harassing female bosses.

Also, people of the same gender can sexually harass each other, as long as the harassment is of a heterosexual nature. *Example:* A male employer's co-workers bombard him with sexually explicit photos and emails that make him uncomfortable because he is married.

Can Harassers Be Personally Sued?

When employees sue for sexual harassment, they usually name the employer and the individual harasser in the lawsuit. Lawyers typically spend more effort going after employers, but all managers should be aware that they could be paying for harassment out of their own



wallets.

That fact gives you more reason to personally avoid any harassing behavior. It's also a good point to make to employees who have demonstrated borderline harassing behavior in the past. They'll back off quickly if they know that their personal fortunes are at stake, not just their employers'.

How Should Supervisors Respond?

Supervisors should be well-versed in the organization's policy, knowing what does and does not constitute sexual harassment in the workplace.

If you see harassing situations, don't be afraid to call employees on the behavior and state why it's wrong, assigning discipline if necessary. Contact HR to discuss appropriate next steps or discipline. When directing employees on sexual harassment issues, advise them to:

- Avoid unwelcome physical contact.
- Never demean others. Such behavior could contribute to a hostile environment, especially if it's aimed at an employee's gender.
- Don't make suggestive comments. The workplace isn't the place for sexual banter. When giving a compliment, don't add innuendo.
- Keep the door open. If possible, employees who need to speak to employees of the opposite sex should not close the door and invite accusations. If you expect trouble, bring a witness.

Final tip: Never retaliate in any way against employees who have complained about sexual harassment, filed a lawsuit or participated in an investigation. Federal law makes it illegal to retaliate against them.



P.O. Box 1848
Bristol, TN 37621
(423) 764-4127 • FAX (423) 764-5869
www.sescomgt.com
email: sesco@sescomgt.com

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SESCO Client Corner



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Sanderson Farms, Inc. maximizes stockholder value by being a successful producer and marketer of high quality food products and providing superior service to the food industry.

Sanderson Farms' Board of Directors is committed to leading the company with honesty, integrity and innovation.

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May 2-3, 2018
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Virginia Community Healthcare Association

April 25-26, 2018
Human Resources -
Understanding the Basics

May 9-10, 2018
Human Resources for the Advanced
Professional

(SESCO has partnered with one of our valued clients, Virginia Community Healthcare Association, to host our Richmond Seminar Series.)

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