

Case No. 16-2424
United States Court of Appeals for the Sixth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

and

AIMEE STEPHENS,
Intervenor,

v.

R.G. & G.R. HARRIS FUNERAL HOME, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

MOTION OF INTERVENOR AIMEE STEPHENS
FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

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Pursuant to Sixth Circuit Rule 34(e) and this Court's order granting her motion to intervene, Intervenor Aimee Stephens respectfully moves for leave to participate in oral argument.

This appeal concerns whether the Defendant-Appellee R.G. & G.R. Harris Funeral Home's (the "Funeral Home") termination of Ms. Stephens because she is transgender and intended to present and dress as a woman violated Title VII's prohibition on sex discrimination. Ms. Stephens requests additional time to present oral argument in order to assist this Court in giving full consideration to her substantial legal interests and the nationally important legal issues presented by this appeal.

As this Court recognized in granting her motion to intervene, Ms. Stephens has a considerable legal interest in this litigation. She was directly harmed by the Funeral Home's decision to end her nearly six-year career as a funeral home director and embalmer because she is transgender and intended to transition to presenting as female at work. Ms. Stephens should be granted the opportunity to represent in oral argument the important interest she and other transgender individuals have in keeping their jobs after transitioning and in overcoming the use of discriminatory dress code policies as a basis for terminating employees. In addition, this Court should allow Ms. Stephens time to argue because of the national importance of this case in deciding whether employers should be allowed

exemptions to enforcement of Title VII under the Religious Freedom Restoration Act based on their religious beliefs and practices. The interests of transgender individuals, as well as women, religious minorities, and persons of color, could be impaired by an adverse ruling against Ms. Stephens and the EEOC. Allocating additional time to oral argument and hearing from Ms. Stephens will aid this Court in considering the full depth of these issues.

Given the importance of these issues, even a remote chance that the EEOC will not fully and vigorously represent Ms. Stephens' interests at oral argument warrants Ms. Stephens' participation. Political developments continue to pose the risk that the EEOC may not adequately represent Ms. Stephens' interests in litigating this appeal. The new presidential administration has demonstrated its willingness to reverse course in investigations, litigation, and policy concerning the rights of LGBT persons. *See* Michael D. Shear & Charlie Savage, *In One Day, Trump Administration Lands 3 Punches Against Gay Rights*, New York Times (July 27, 2017)¹; Emma Brown, *Education Dept. closes transgender cases as it pushes to scale back civil rights investigations*, Washington Post (June 17, 2017)²;

¹ <https://www.nytimes.com/2017/07/27/us/politics/white-house-lgbt-rights-military-civil-rights-act.html>.

² https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html?utm_term=.62247ed18aa5.

Defs.-Appellants’ Notice of Withdrawal of Mot. for Partial Stay Pending Appeal & Joint Mot. to Cancel Argument, *Texas v. United States*, Case No. 16-11534 (5th Cir. Feb 10, 2017) (requesting cancellation of argument and withdrawing request to limit injunction restraining government action in accordance with guidance documents concerning transgender students’ rights); Mary Emily O’Hara, *Justice Department Withdraws Lawsuit Over HB2 “Bathroom Bill,”* NBC News (Apr. 14, 2017).³

There remains ongoing risk that the administration will take the same approach to this case. Although the EEOC eventually filed briefs in the instant appeal, it did so after requesting delay and after reports that it refused to confirm whether it planned to continue representing Ms. Stephens. *See* EEOC Mot. for Extension of Time, Doc. 18; Mark Joseph Stern, *Due to “Administration-Related Changes” the EEOC May Withdraw from a Trans Rights Case*, Slate (Jan. 27, 2017).⁴ The upcoming appointments of a new General Counsel and replacement Commissioner may result in more dramatic changes to the EEOC’s litigation strategy. *See* Kevin McGowan, *Two Former Federal Officials in Running to*

³ <http://www.nbcnews.com/feature/nbc-out/justice-department-withdraws-lawsuit-over-hb2-bathroom-bill-n746551>.

⁴ http://www.slate.com/blogs/outward/2017/01/27/eec_is_withdrawing_from_a_transgender_rights_case.html.

Become EEOC's Top Lawyer, Bloomberg (May 22, 2017) (noting that interviews for the General Counsel position are underway).⁵

These “administration-related changes” to the government’s priorities pose the risk that the EEOC will not vigorously represent Ms. Stephens’ interests in oral argument. Even if the EEOC does not withdraw from this case, it may fail to make all available arguments or may qualify them in some way. *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). As the victim of the Funeral Home’s alleged discrimination, Ms. Stephens’ participation in oral argument will ensure that her important interests are adequately represented and aid this Court in resolving this appeal.

For the foregoing reasons, Ms. Stephens requests that the Court expand the total time allotted for oral argument and allow Ms. Stephens time for oral argument in addition to the time already allotted to the EEOC. The EEOC consents to Ms. Stephens’ participation. The Funeral Home has declined consent.

Accordingly, Ms. Stephens respectfully requests that the Court grant this motion for leave to participate in oral argument.

⁵ <https://www.bna.com/two-former-federal-n73014451316/>.

Dated: August 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2017 I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

/s/ John A. Knight