



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

October 13, 2017

Deborah S. Hunt, Clerk of Court
United States Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

Re: *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424

Dear Ms. Hunt,

This letter responds to the Rule 28(j) letter filed on October 6, 2017, by Appellee R.G. & G.R. Funeral Homes, Inc. That letter referred to, and attached, the October 4, 2017, memorandum issued by the Attorney General entitled “Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964.”

In response, EEOC makes two points. First, the EEOC’s position in this case continues to be the position articulated in its opening and reply briefs, and at oral argument: that Title VII’s prohibition on sex discrimination necessarily encompasses discrimination based on transgender status and transitioning. The memorandum, which is directed to “United States Attorneys, Heads of Department Components,” Memo. at 1, withdraws former Attorney General Holder’s December 2014 memorandum and sets out the litigation position that Department of Justice attorneys must advance in all pending and future matters. Memo. at 2. The memorandum does not implicate or alter the position that EEOC has consistently argued in this case: that discrimination on the basis of transgender status is *per se* sex discrimination.

Second, in this case, the EEOC is also advancing an argument based on this Court’s binding precedent in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). *Smith* holds that under *Price Waterhouse*, a transgender employee states a claim of sex discrimination where the alleged discrimination is based on gender non-conforming conduct, as it was here. *Id.* at 571, 573. Therefore, regardless of whether this Court addresses the *per se* coverage argument, *Smith* supports the EEOC’s claim, as the district court held. Nothing in the Attorney General’s memorandum undermines *Smith*. See Memo. at 2 (acknowledging the binding nature of “controlling lower-court precedent”).

Sincerely,

s/Anne Noel Occhialino
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