NEWTON'S LAWS OF MOTION AND THE LGBT COMMUNITY... WHAT'S NEXT

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I. INTRODUCTION

It has been over 50 years since Title VII introduced employment anti-discrimination law to the United States, and yet, the concept of equal protection under the law still excludes the L.B.G.T. community at the federal level. Under Title VII, a person's race, color, religion, national origin and *sex* are all bases upon which workplace discrimination is federally prohibited. 42 U.S.C.A. § 2000e-2. Notably left unaccounted for by Congress are the classes "sexual orientation" and "gender identity." This lack of explicit nationwide protection has left countless lesbian, gay, bisexual and transgender employees exposed to adverse employment actions. Without clear and adequate legal recourse, L.B.G.T. individuals turn to their respective state's laws, only to find that more than half of U.S. states do not extend such protections, either.[1] According to the Human Rights Campaign, 28 out of 50 U.S. states do not include in their human rights laws "sexual orientation" or "gender identity" as protected categories for employees working in the private sector. *See* http://www.hrc.org/state_maps. In the absence of state and federal law, counties and county equivalents have the ability to enact local ordinances to protect the L.B.G.T. community, but there remains a dearth of protection at that level, as well.

Necessity, they say, is the mother of invention. Despite Title VII's narrow categorical protections, substantial ground has been made in extending protection on the basis of sexual orientation and transgender status, but the finish line has not yet been crossed. Leading the charge in many cases has been the Equal Employment Opportunity Commission, both internally, and in federal court. The result has been a profusion of case law interpreting the

[1] *See* Appendix 1.

meaning of "sex" as either inclusive or exclusive of sexual orientation and gender identity, categories pivotal in protecting the L.B.G.T. community. This submission is written to capture the evolution of the meaning of "sex" under Title VII, and will also explore state and local legislation regarding gender identity, and both the legal and cultural climate, and implications of such legislation.

II. THE ORIGINAL MEANING OF "SEX": A MAN OR A WOMAN, ONLY

There is an ongoing historical debate about whether the term "sex" was included in Title VII as a way to defeat it at its bill stage, or if its inclusion in the original 1964 statute was meant, in earnest, to inure to the benefit of women. *See Law and Inequality: A Journal of Theory and Practice*, Vol. 9, No. 2, March 1991, pp. 163-184 ("the popular interpretation of the addition of 'sex' to Title VII is that it was the result of a deliberate ploy of foes of the bill to scuttle it...[b]itter opponents of the job discrimination title...decided to load up the bill with objectionable features [such as gender equality] that might split the coalition supporting it."). One thing that is clear, however, is that Congress has been of no assistance in defining the term. Regardless of Congress' original intent, the fact the term "sex" has not been addressed by Congress since Title VII's enactment has left the interpretation of "sex" solely to the courts.

As with many of the first cases pertaining to civil rights issues, the first few decades of Title VII jurisprudence is beset with conservative rulings. Much of this is not only due in large part to Congress' silence on the interpretation of Title VII and the breadth of the term "sex," but also its inaction with respect to amending the statute. Indeed, many of the judges issuing these rulings felt constrained by the text of Title VII in the absence of Congressional guidance or action, using that fact as the basis for their decision. Many of the first cases also

used this position when analyzing "transsexualism" in the context of Title VII, and ultimately precluding it from Title VII's protections. *See, e.g., Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) ("[i]n absence of any indication of congressional intent to expand the term 'sex' beyond its traditional meaning, for purposes of Title VII, the Court of Appeals would not enlarge Title VII's application to encompass employment discrimination against individuals who undergo sex changes"); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977) ("[c]omplaint wherein male who was engaged in trial venture of living as a woman as prerequisite to having a sex change operation claimed that he had been unlawfully discriminated against on the basis of sex in that he was fired on the first day of his job when the supervisor discovered that he was male failed to state a cause of action under the Civil Rights Act of 1964…the Act did not reach discrimination against a transsexual").

Perhaps the court in *Voyles* best summarized the judicial climate at the outset of this endeavor:

> Section 2000e-2(a)(1) speaks of discrimination on the basis of one's "sex." No mention is made of change of sex or of sexual preference. The legislative history of as well as the case law interpreting Title VII nowhere indicate that "sex" discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof. Indeed, neither party has cited, nor does research disclose, a single case which holds squarely that Title VII provides redress for claims of the sort raised here.
>
> Furthermore, even the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress' paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions.
>
> Recognizing this apparent oversight, various members of the House of Representatives have, on three separate occasions during this year alone, introduced

> as of yet unenacted legislation which would amend § 2000e-2(a) to include 'affectional or sexual preference' as additional basis upon which employers are precluded from discharging their employees. HR 166, 94th Cong., 1st Sess. (1975); HR 2667, 94th Cong., 1st Sess. (1975); HR 5452, 94th Cong., 1st Sess. (1975) (HR 5452 was referred to the House Committee on the Judiciary on March 25, 1975, and subsequently referred to the Subcommittee on Civil and Constitutional Rights on March 31, 1975, where its disposition is still pending). Thus, it becomes clear that in enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism, and only recently has it attempted to include conduct within the reach of Title VII which is even remotely applicable to the complained-of activity here.

Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *see also, e.g., Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1100–01 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978) ("[w]hether or not the Congress should, by law, forbid discrimination based upon 'affectional or sexual preference' of an applicant, it is clear that the Congress has not done so"); *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 65 Cal. App. 3d 608, 135 Cal. Rptr. 465, 470 (Ct. App. 1977), *vacated sub nom. Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592 (1979) (noting in its decision to exclude sexual orientation from Title VII's California counterpart that Title VII "has been interpreted by the United States Supreme Court and other federal courts to prohibit only those bases of employment discrimination enumerated in the Act.") *citing Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 95, 94 S.Ct. 334, 38 L.Ed.2d 287; *Bradington v. International Business Machines Corp.* (D.Md.1973) 360 F.Supp. 845, 852, *aff'd.* (4th Cir. 1974) 492 F.2d 1240).

Later court decisions followed along the same path, adhering to a strict reading of the term "sex." *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). In denying protections against discrimination on the basis of one's sexual identity (and comparing it to the analysis used in denying sexual orientation the same protections as "sex"), the *Ulane* court

reasoned that "the phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane*, at 1085. Though the *Ulane* court still used the lack of legislative history as a basis for its opinion, it also demonstrated a willingness to apply the strictest of readings to a single term, an analysis that has been perpetuated each decade since, and still has major implications today. *See e.g., Griffith v. Keystone Steel & Wire, Div. of Keystone Consol. Indus., Inc.*, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *Creed v. Family Express Corp.*, No. 306-CV-465RM, 2007 WL 2265630, at *2 (N.D. Ind. Aug. 3, 2007); *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703, at *1 (7th Cir. July 28, 2016).

It should be noted that many of the earlier internal EEOC decisions also found against allowing sexual orientation to stand on its own as a basis upon which a person cannot be discriminated under both Title VII and its own EEOC regulations. *See Robert Campbell*, EEOC DOC 01831816, 1983 WL 411831, at *1 (Dec. 13, 1983) ("[n]either the EEOC Regulations nor Title VII include sexual orientation as a proscribed basis of discrimination"); *Mark E. Smith, Appellant*, EEOC DOC 01851294, EEOC DOC 01851295 (June 11, 1986) ("Congress intended Title VII's ban on sexual discrimination in employment to prevent discrimination because of gender, not because of sexual orientation or preference.").

To overcome the prevailing view at the time, courts needed to look beyond the statutory language and the perceived intent of such language, and espouse an entirely different substantive position. In a landmark decision rendered in 1989, a far more progressive and expansive analysis was introduced on the country's biggest legal stage.

III. DOES "SEX" INCLUDE SEXUAL ORIENTATION *VIS-À-VIS* SEXUAL STEREOTYPES?

a. The *Price Waterhouse* Decision

Price Waterhouse is a Supreme Court decision that expanded the protective coverage provided to citizens under the term "sex" to include sex stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (*superseded by statute on other grounds*). Though the case has nothing, specifically, to do with sexual orientation or gender identity, the analysis and reasoning proffered in the plurality opinion has since provided a path for asserting sex-based discrimination based upon sexual orientation and gender identity.

The Plaintiff in the original lower court filing, Hopkins, was a female senior manager in one of the offices of Defendant Price Waterhouse, a professional accounting partnership. *Id*. at 228, 1778. In 1982, Hopkins was nominated by a partner of Price Waterhouse to be considered for partnership. Integral to the partnership selection process was the comments of existing partners who review the application of each candidate. *Id*. at 251, 1971. Of the 662 partners at Price Waterhouse at the time of Hopkins' consideration, "7 were women." *Id*. at 233, 1781. "Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman...Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20…were 'held' for reconsideration the following year." *Id*. Of the 26 partners with an informed opinion of Hopkins who had submitted comments on Hopkins, only half supported her bid for partnership, with the others either recommending her candidacy be denied, or held in abeyance for a later cycle of partnership selection. *Id*. at 233, 1781. In comparison to the 88 other candidates for partnership, none had Hopkins' record for successfully securing contracts, a record which included securing a

$25,000,000 government contract bid during the same year as her partnership candidacy. *Id*. at 233-234, 1782.

Hopkins' candidacy was ultimately placed on hold, with the aim of reconsideration the following year. *Id*. at 228, 1778. When the Price Waterhouse partners refused to re-propose Hopkins as a partnership candidate in 1983, Hopkins filed suit, alleging sex discrimination in violation of Title VII. In overall support of their decision to not grant the partnership title to Hopkins, partners at Price Waterhouse, "[b]oth supporters and opponents of her candidacy," cited to their perception that Hopkins "was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id*., at 235, 1782. Of more significant legal impact, the partners offered the following additional comments, which became the subject of scrutiny in this case: "[Hopkins is] macho"; "[she] overcompensated for being a woman"; "[she should] take a course in charm school"; "[she might have been seen by opposing partners as objectionable] because it's a lady using foul language"; "[she] matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate"; and finally, "[she should] walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*.

The obvious hurdles Hopkins faced in her pursuit of recourse under Title VII were twofold. First, Hopkins had to overcome the overwhelming case law which narrowly interpreted "sex" as only being on the basis of either being a man or a woman. Second, Hopkins had to overcome the fact that most courts, to date, gave heavy credence to the position that Congress' abstinence from offering statutory interpretative guidance perpetuated the argument that sex is to be as narrowly construed as possible. Contributing to the difficulty of her chances at success

was the simple fact that not once did any of the partners ever explicitly say that their decision was made because Hopkins was a woman.

Delivering a forceful blow to employers off the bat, Justice Brennan, who penned the plurality opinion in *Price Waterhouse*, immediately dispelled the theory that Congress' inaction with respect to "sex" is an indicator of their position. In fact, Brennan wielded that detail as a weapon with which to carve out an opening for future litigants. In referring to Congress' limited inclusions of only "sex, race, religion, and national origin" in Title VII, Justice Brennan noted that "the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making their employment decisions." Essentially, Justice Brennan's take is that Congress' silence with respect to Title VII was an open invitation for courts to liberally interpret its meaning, which serves as the very foundation upon which the sex-based stereotypes argument is built.

Justice Brennan more explicitly develops his opinion by disavowing sex-based stereotype discrimination as legally permissible. The opinion does so by recognizing that decisions made because of stereotypes associated with one sex over the other are just as much based on sex as decisions made specifically because that person is a man or a woman. Brennan supports this notion with more than a few poignant statements, not the least of which is, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250, 1790-1791. Brennan continues with this line of reasoning by stating "if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Id*. at 256, 1793.

b. Cases Interpreting *Price Waterhouse*

Price Waterhouse has had a profound effect on Title VII litigation since the opinion was rendered. To be sure, a number of courts since the 1989 decision have held that where the employer acts upon "stereotypes of sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself to liability under Title VII's prohibition of discrimination on the basis of sex." *Tinory v. Autozoners*, No. CV 13-11477-DPW, 2016 WL 320108, at *5 (D. Mass. Jan. 26, 2016) *quoting Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002). Specifically with respect to Plaintiffs seeking to protect against sexual orientation or gender identity-based discrimination under the federal law, *Price Waterhouse*'s introduction of this broader standard has been a boon. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004) ("…the approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*) *citing Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("[t]he initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.").

In *Glenn v. Brumby*, the court, relying on *Price Waterhouse* and the sex-based stereotype discrimination argument, held that the Defendant discriminated against the Plaintiff because she was transitioning from a male to a female. *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011). Where this platform would have more likely than not failed pre-*Price Waterhouse*, the court in *Brumby* reasoned that "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Id*. at 1316. Though this was an Equal Protection Clause case, the court relied on

Title VII cases in determining that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination…" *Id*. at 1317.

In *Terveer*, the employer-Defendant began treating the Plaintiff differently and adversely after learning of his homosexuality, which ultimately culminated in denying Plaintiff a promotion. *Terveer v. Billington*, 34 F. Supp. 3d 100, 105–08 (D.D.C. 2014). Traditional notions of Title VII would have precluded the Plaintiff from recovering under the statute. However, *Terver* was able to successfully advance the argument that Title VII extended coverage for protection against discrimination based on sex stereotypes. The court, sympathizing with this sentiment and citing *Price Waterhouse* and its progeny, accordingly found satisfactory the assertions that Plaintiff is:

> a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, Am. Compl. ¶ 55, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, *id.* ¶ 59, and that his orientation as homosexual had removed him from Mech's preconceived definition of male,…. *id.* ¶ 13.

Id. at 116. *citing Price Waterhouse*, 490 U.S. at 251, 1775 ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

Likewise, in *Heller*, the court also attempted to remove any distinction that may practically exist between sexual orientation and sex with respect to workplace discrimination under Title VII. The Plaintiff in this case was an openly gay woman. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1216–20 (D. Or. 2002). Her employer would constantly berate Plaintiff with derogatory remarks in connection with her known relationship with another woman. *Id*. Almost immediately after informing her employer that she planned to

report these comments to her employer's board of directors, *Heller* was fired from her position. *Id*.

Like in *Terveer* and *Brumby*, the court determined that the Defendants' pre-conceived notions of gender, more specifically, that a man should date a woman and that a woman should date a man, are stereotypes, which, if they form the basis of an adverse employment action, constitute Title VII sex discrimination. *Id*. at 1224 ("[v]iewing the evidence in the light most favorable to plaintiff, a jury could find that [Defendant] repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to [Defendant's]stereotype of how a woman ought to behave…Heller is attracted to and dates other women, whereas [Defendant] believes that a woman should be attracted to and date only men."). In support of this position, the court attempted to place practical realities on the situation by way of a comparison to heterosexual plaintiffs in such discrimination cases:

> If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller—including numerous unwanted offensive comments regarding her sex life—the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual.

Id. at 1222–23. *Doe v. City of Belleville*, 119 F.3d 563, 575 (7th Cir. 1997) ("observing that if the plaintiff in that case had been a woman instead of a man, 'there would be no agonizing over whether the harassment ... described could be understood as sex discrimination'"), *vacated and remanded for reconsideration in light of Oncale*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998) (case settled on remand).

Finally, the court in *Videkis*, a very recent decision, has taken this notion even further, noting that, essentially, there is no line between discrimination on the basis of sexual

orientation and discrimination based on sex, stereotypes aside. There, the court wrote the following:

> the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best. (Dkt. No. 25.) After further briefing and argument, the Court concludes that the distinction is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination. Thus, claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims. Other courts have acknowledged the difficulty of distinguishing sexual orientation discrimination from discrimination based on sex or gender stereotypes. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir.2009) (stating that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw"); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir.2005) (acknowledging that it would be difficult to determine if an actionable Title VII claim was stated when a plaintiff stated she was discriminated against based on her sex, her failure to conform to gender norms, and her sexual orientation, because "the borders [between these classes] are so imprecise" (alteration in original)); *Centola v. Potter*, 183 F.Supp.2d 403, 408 (D.Mass.2002)(acknowledging that "the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear"). Simply put, the line between sex discrimination and sexual orientation discrimination is "difficult to draw" because that line does not exist, save as a lingering and faulty judicial construct.

Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015). This position, in advancing even beyond the ambit of *Price Waterhouse*, is indicative of some of the recent internal EEOC decisions rendered in this area, and the other cases that cite to the authority espoused therein.

IV. DOES "SEX" INCLUDE SEXUAL ORIENTATION BY ITS VERY NATURE?

a. The EEOC's *Baldwin* Decision and Its Impact

In holding that Title VII facially prohibits discrimination on the basis of sexual orientation, the *Videckis* court was persuaded by the EEOC's decision in *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015). *Baldwin* involved an air traffic controller who alleged in a complaint to the EEOC that he was discriminated against on the basis of his sexual orientation when he was not selected for a permanent management position at a Miami facility. *Id*. at 3. Under EEOC precedent, in determining whether a Title VII claim for sex discrimination has been stated, the EEOC examines whether the challenged employment action was made in reliance on "sex-based considerations" or whether gender "was taken into account." *Baldwin* at 5. While *Baldwin* explicitly adopted the sex-stereotyping rationale for allowing sexual orientation discrimination claims to proceed under Title VII in EEOC proceedings, it additionally took the leap that could become the subject of Title VII litigation for the foreseeable future. *Id*. at 9.

In *Baldwin*, the EEOC held that, where an employer discriminates against an employee on the basis of his or her sexual orientation, sex-based considerations are necessarily at play, given that sexual orientation is a characteristic definitionally tied to one's sex. *Id*. at 6. The *Baldwin* decision signified the advent of the EEOC's current interpretation of Title VII, which diverges from previous Title VII jurisprudence by regarding sexual orientation discrimination as necessarily sex-based discrimination. In applying the EEOC's position that allegations of sexual orientation discrimination necessarily involves sex-based considerations, the *Videkis* court reasoned that plaintiffs who allege sexual orientation discrimination allege that the employer took the employee's sex into account by treating him or her differently for associating with a person of the same sex.

Videckis' approval of *Baldwin* is not inconsequential, by any means. It's extension of the *Baldwin* position represents a break from long-standing Title VII precedent roundly rejecting a cause of action for sexual orientation discrimination under Title VII. With that said, some district courts are currently at odds over whether to adopt the EEOC's *Baldwin* decision and recognize sexual orientation discrimination under Title VII. For instance, while *Isaacs v. Felder Services*, LLC, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015) relied on *Baldwin* in adopting the view that sexual orientation discrimination is cognizable under Title VI, *Hinton v. Va. Union Univ.*, 2016 WL 2621967 (E.D. Va. 2016) disagreed with *Isaacs* when it affirmed its belief that the EEOC's view is merely persuasive, thus failing to extend Title VII protection to claims of sexual orientation discrimination.

Still other courts have taken another approach in light of the Baldwin decision. Some have deferred their rulings on private lawsuits in anticipation of guidance on the question of whether sexual orientation discrimination is indeed "sex discrimination" by its very nature given the *Baldwin* interpretation. *See*, *e. g.*, *Matavka v. Board of Educ. Of J. Sterling Morton High School Dist.*, 201, 2016 WL 3063950 (N. D. Ill. 2016) (noting that "[s]hould [the circuit court] follow [*Isaacs* and *Videckis*] in finding *Baldwin* persuasive, [such a] finding plainly would affect the disposition of [the motion before it].").

b. EEOC's Involvement in Title VII Litigation in District Court

On March 1, 2016, the EEOC filed two landmark federal cases, arguing for the first time in the federal courts that Title VII protections extend to sexual orientation by virtue of one's sex. (*See* Appendices 2 and 3 for copies of the both complaints). *EEOC v. Scott Medical Health Center*, Case No. 2:16-CV-00225; *EEOC v. Pallet Companies d/b/a IFCO Systems NA,*

Inc., Case No. 1:16-CV-00595. With respect to both cases, the argument advanced by the EEOC, in essence, has two integral factors. First, borrowing from the *Baldwin* opinion issued in July of 2015, the EEOC more specifically contends that

> "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf ("Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted" (second emphasis added).

Baldwin v. Dep't of Transp., Appeal No. 0120133080 (July 15, 2015). At its core, the argument advanced by the EEOC in *Baldwin*, and now in the private sector in *Scott* and *Pallet Co.'s*, is that the two characteristics are inextricably linked, such that to discriminate on the basis of sexual orientation is to discriminate on the basis of sex, no matter how you slice it. This argument, as new as it is, has seen little critical legal analysis in the federal courts, and, accordingly, may not be the EEOC's strongest position.

But perhaps the second, more compelling argument advanced by the EEOC in these two cases is the *Price Waterhouse* argument grounded in sex-based stereotypes. In *Pallet Co.'s*, for example, it was alleged that an openly gay woman was terminated after complaining of anti-gay epithets meant to reinforce historical gender "norms," such as "I want to make you like men" and "you would look good in a dress." The EEOC has argued in its complaint that this "conduct…was motivated by sex (female)…in that [the Plaintiff], by virtue of her sexual orientation, did not conform to sex stereotypes and norms about females to which [the Defendants] subscribed." *Pallet Companies d/b/a IFCO Systems NA, Inc.*, Case No. 1:16-CV-

00595. This notion fundamentally proposes that, in such situations, but for an adversely affected employee's sex, he or she would not have been discriminated against for being insufficiently masculine or feminine." *Baldwin, v. Dep't of Transp.*, Appeal No. 0120133080 (July 15, 2015).

The parties recently settled this complaint. (*See* Appendix 4 for the Consent Decree associated with this case). Under the terms of the settlement, Pallet Co.'s, admitting no fault, as is customary in any settlement, will pay the plaintiff $182,200, and will pay an additional $20,000 over two years to the Human Rights Campaign Foundation.

Scott Medical involves a homosexual male working for a telemarketing company. The Plaintiff in this case was allegedly subjected to vile remarks from his direct supervisor, such as "fag," "faggot," "fucking faggot," "queer" and "fucking queer can't do your job." According to the complaint, the remarks were made on a regular basis, at least three to four times each week. The Defendant also invaded Plaintiff's personal life with other such derogatory remarks. Shortly after learning that the Plaintiff was in a relationship with another man, the Defendant said, "I always wondered how you fags have sex," "I don't understand how you fucking fags have sex," and "Who's the butch and who is the bitch?" In conjunction with these offensive statements, the Defendant allegedly mistreated Plaintiff by frequently screaming and yelling at him. Ultimately, when no action was taken to stop the harassment and discrimination, the Plaintiff resigned from his position.

The EEOC advanced the same argument in *Scott Medical* as it did in *Pallet Co.'s*. The Defendant in this action is challenging the EEOC's legal theories. Scott Medical Center moved the United States District Court and presiding judge Cathy Bissoon to dismiss the case, on the familiar premise that only Congress can extend employment protections to homosexual

people by amending Title VII. The EEOC responded by noting that a number of courts have adopted a broader view of Title VII's ban on sex discrimination, such as the *Price Waterhouse* sex stereotype argument.

The EEOC's general counsel, David Lopez, was clear with his agenda in saying, "[w]ith the filing of these two suits, the EEOC is continuing to solidify its commitment to ensuring that individuals are not discriminated against in workplaces because of their sexual orientation." Certainly, now that the EEOC is firmly entrenched in the fight for broader Title VII protections, employers, particularly those in jurisdictions without anti-discrimination laws, must exercise heightened discretion in their employment decisions in the event that these arguments are deemed successful by federal courts on a more national stage. The question remains, will *Baldwin*, advanced by *Scott Medical*, continue to gain acceptance in federal courts, specifically, in the circuit courts? Less than one month ago as this is being written, the question was answered in the negative.

c. The *Hively* Decision: Its Impact on EEOC Litigation and Other Federal Title VII Claims

Prior to July, 2016, no circuit had yet to formally adopt *Baldwin*. In what is already being discussed as a profound decision, the Seventh Circuit addressed *Baldwin* in *Hively*, when it squarely rejected its legal theory on sexual orientation discrimination. *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016). In doing so, *Hively* effectively dealt a blow to the EEOC's preferred interpretation of Title VII. This long-awaited decision rejects *Baldwin*'s specific argument, and affirms the Seventh Circuit's overall position that Title VII does not provide a cause of action for sexual orientation discrimination.

The court offered a lengthy explanation for its decision, in part relying on prior Title VII jurisprudence and Congress's reticence to expand protections for gay and lesbian employees in the workplace. *Hively* also spends time discrediting the practical use of *Price Waterhouse*'s sex-stereotyping discrimination argument, and finally, contemplates the expansive interpretation of "sex discrimination" propagated by *Baldwin* and the few district courts that have had the chance to weigh in on and use *Baldwin* in support of their liberal decisions.

Hively involves a part-time adjunct professor who began teaching at Ivy Tech Community College in 2000. *Hively*, at 2. In December of 2013, Hively filed a *pro se* charge with the EEOC, alleging that she had been discriminated against based on her sexual orientation and blocked from full time employment without just cause, in violation of Title VII. *Id*. After "exhausting the procedural requirements" in the EEOC, Hively again filed a *pro se* complaint, this time in the district court, again claiming that Ivy Tech Community College refused to interview her for full time positions for which she was qualified, based on her sexual orientation in violation of Title VII. *Id.*

Ivy Tech offered the same defense in the district court that it did on appeal to the Seventh Circuit, pointing to pre-*Baldwin* precedent, both within and outside the Seventh Circuit. *Id.* at 3. These prior rulings, importantly, either reject, or do not address *Baldwin*'s central proposition that sexual orientation discrimination is both facially discriminatory under Title VII, as well under the *Price Waterhouse* sex-stereotyping theory. In relying on these prior rulings, the district court, accordingly, ruled in favor of Ivy Tech. *Hively* at 3.

The Seventh Circuit panel in *Hively* begins its legal analysis by devoting significant time to the legislative litany in which most courts that deny such Title VII claims are

well versed. *Hively* offers a detailed discussion of Congress' silence and repeated rejections of legislation aiming to extend Title VII to cover sexual orientation discrimination. Beyond simply iterating this well-established fact, *Hively* suggests that Congress' inaction in the face of a recognized "emerging [judicial and social] consensus that sexual orientation [discrimination] can no longer be tolerated," is not a result of negligence or a "want of knowledge" or opportunity. *Id.* at 6-7. Rather, the *Hively* court seems to take Congress' failure to amend Title VII as an expression of the affirmative intent not to include sexual orientation discrimination under the types of discrimination actionable under Title VII. *Id.* at 8-9.

The *Hively* court notes that its analysis could stop at the legislative-based argument. However, whether as lip service, because of "changing workplace norms," or an attempt to erase the notion that the Seventh Circuit simply cites to precedent with little legal analysis, as *Baldwin* suggests, the Seventh Circuit panel pressed forward. *Hively* continues with a lengthy exercise in sex discrimination history and the competing arguments advanced over the past few decades.

The *Hively* court next addresses the sex stereotyping argument. It recognizes that the chief issue in deciding such claims is that "it is exceptionally difficult to distinguish between [a gender non-conformity claim and a sexual orientation claim]," citing to multiple pro and anti-*Price Waterhouse* courts that echo the same sentiment. *Id at 5-6.* *Hively* claims there are two ways to deal with this: (1) "throw out the baby with the bathwater," which is to say, dismiss any claim in which the line is blurred; or (2) attempt to discern a difference between the two types of claims. *Id*. at 5-7. Of course, there is a third way to deal with the perceived lack of distinction that *Hively* does not address in this portion of the opinion, which is to treat gender non-

conformity discrimination and sexual orientation discrimination as one in the same, as more liberal courts have done. Though *Hively* seems to agree that dressing sexual orientation claims in the guise of sex stereotyping claims is a way to shoehorn what might be viewed as otherwise meritless Title VII actions into federal courts, it does not appear inclined to use that as an excuse for immediately rejecting claims that are difficult to differentiate. As the court puts it, "we cannot conclude that it is impossible [to recognize differences between the two claims]." *Id.* at 7.

Accordingly, the court then turns away from whether to dismiss bootstrapped claims, and turns to the manner in which sex stereotyping claims can be analyzed and distinguished from sexual orientation claims. *Hively* points out that harassment of gay and lesbian employees may stem from stereotypes about the gay "lifestyle" that are not connected to the sex of the employee (i.e. stereotypes regarding gay "promiscuity, religious beliefs, spending habits, child-rearing, sexual practices, or politics"). *Id.* Thus, the Seventh Circuit adopts the practice of attempting to "extricate the gender non-conformity claims from the sexual orientation claims," and ultimately, dismiss the claims that are unmistakably grounded in discrimination on the basis of sexual orientation. *Id*. In doing so, the court is essentially intimating that, unlike as asserted in *Baldwin*, sexual orientation discrimination is not always sex discrimination.

The *Hively* court makes some parting statements that leave the reader wondering what the future might bring for Title VII sex discrimination claims. *Hively* recognizes the paradox the decision creates, noting that most Americans would be surprised to learn that, at least under current federal law, anyone is guaranteed the right to marry someone of the same sex, yet a private employer would face no federal penalty for firing an employee who married their same-sex partner. *Id.* at 11. The Seventh Circuit effectively concedes that, though it does not

support sexual orientation discrimination, its hands are tied when faced with precedent and a lack of Congressional action to amend Title VII:

> Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, (*see Baldwin,* 2015 WL 4397641 at **5, 10); many of the federal courts to consider the matter have stated that they do not condone it (*see*, *e.g., Vickers*, 453 F.3d at 764–65; *Bibby*, 260 F.3d at 265; *Simonton,* 232 F.3d at 35; *Higgins*, 194 F.3d at 259; *Rene*, 243 F.3d at 1209, (Hug, J., *dissenting*); *Kay*, 142 Fed.Appx. at 51; *Silva*, 2000 WL 525573, at *1); and this court undoubtedly does not condone it (*see Ulane*, 742 F.2d at 1084). But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED.

Id. at 15.

Proponents of the EEOC's *Baldwin* decision will undoubtedly be disappointed by the Seventh Circuit's ruling in *Hively* in that it squarely places the onus on Congress or the Supreme Court to afford Title VII's protection to employees discriminated against due to their sexual orientation. Certainly, the EEOC's position in *Scott Medical* has been placed in severe jeopardy, until such time as another circuit court rules in contrast to the ruling handed down by the Seventh Circuit court in *Hively*. In the meantime, those suffering sexual orientation discrimination must either plead sex-stereotyping discrimination and hope for the best (a pro-*Price Waterhouse* ruling), or be lucky enough to seek relief under an applicable state or local anti-discrimination statute, provided that there is such a statute in their state or locality.

d. Religious Freedom Laws and the Potential Impact on Gay Rights in the Workplace

When the Supreme Court handed down the *Hobby Lobby* decision in the summer of 2014, it immediately called into question the future of sexual orientation and gender identity

discrimination law in the United States. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

Hobby Lobby is a closely held, for-profit company that sells home goods, decorative items, and arts and crafts. As part of the Patient Protection and Affordable Care Act, the Department of Health and Human Services ("HHS") mandated that employers, such as Hobby Lobby, provide contraceptives to its employees. 42 U.S.C.A. § 300gg–13(a)(4). The owners of Hobby Lobby, and the owners of the two other closely held companies joining Hobby Lobby in the suit, "had sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point." *Id.* at 2755. The storeowners challenged the HHS mandate as being violative of the Religious Freedom Restoration Act of 1993, and the Free Exercise Clause of the United States Constitution. 42 U.S.C.A. § 2000bb–1(b); U.S.C.A. Const.Amend. 1. The Supreme Court, in a five to four decision penned by Justice Alito, ruled in favor of Hobby Lobby, stating that:

> HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion. The Government could, *e.g.,* assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers' religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs' religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion and it still serves HHS's stated interests. Pp. 2780 – 2783.

Id. at 2757–58.

In holding that religious beliefs trump a compelling government interest (where a viable alternative exists for the government), the court seemingly gave employers *carte blanche*

to make other employment related decisions based on their religious beliefs. Justice Alito did importantly note "that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction…" but that this decision "…provides no such shield." *Id*. at 2783. Presumably, that language would protect people from being discriminated against on the basis of sex where religious freedoms are espoused as the reason for otherwise discriminatory employment actions. But, how does it impact the L.B.G.T. community? If case law is still largely unsettled as to whether sexual orientation and gender identity are protected under the umbrella of "sex," can religious freedoms be asserted as an additional reason to deny employment to a homosexual person, or to terminate a person because he or she is transgender? These questions were answered in favor of employers and religious freedoms in a recently decided federal district court case. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-cv-13710-SFC-DRG (E.D. MI filed 08/18/16) (holding that an employer can terminate a transgender employee using religious freedoms as a valid legal justification).[2] Some state legislatures are also attempting to use *Hobby Lobby* as a jumping-off point to enact religious freedom laws that might very well implicate the L.G.B.T. community in that way. *See* https://www.aclu.org/anti-L.G.B.T.-religious-exemption-legislation-across-country#rfra16. Certainly, this case, and these state laws cloud the future of L.G.B.T. rights even more.

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[2] *See* Appendices 5-9 for: (5) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 8-18-16 Opinion & Order of Judge Sean F. Cox (6) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, EEOC's Summary Judgement Motion Brief; (7) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, ACLU's Unopposed Motion and Brief for Leave to File Amicus Curiae Brief in Support of EEOC's Summary Judgement Motion; and (8) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, R.G. & G.R.'s Summary Judgment Motion Brief.

V. TRANSGENDER PROTECTIONS

a. State and Local Laws Regarding Workplace Discrimination on the Basis of Gender Identity

Transgender people often face a long and strenuous internal battle to act upon their gender identity and transition to the gender that allows them to live as their most authentic self. Whether it means facing the rejection of family and friends, becoming subject to physical violence or experiencing various forms of discrimination, transgender individuals continue to fight for global acceptance and equality.

Recently, the fight for equality received a major endorsement from New York State Governor Andrew Cuomo, who announced new regulations in October of 2015, which have since updated the state's human rights laws. After repeated but failed efforts to enact legislation, Governor Cuomo recently took executive action by introducing what the Governor's Office called the most sweeping regulations in the nation. The regulations, which cover employees throughout New York State, prohibit both private and public employers from discriminating against a person on the basis of transgender status. The regulations, according to Cuomo, "cover[] it all." *See* Mckinley, Jesse. *"Cuomo Planning Discrimination Protections for Transgender New Yorkers."* The New York Times. The New York Times, 22 Oct. 2015. Web. 17 Nov. 2015. More specifically, the regulations read:

> "(a) Statutory Authority. Pursuant to N.Y. Executive Law section 295.5, it is a power and a duty of the Division to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of the N.Y. Executive Law, article 15 (Human Rights Law).
> (b) Definitions.
> (1) Gender identity means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender

identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.
(2) A transgender person is an individual who has a gender identity different from the sex assigned to that individual at birth.
(3) Gender dysphoria is a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.
(c) Discrimination on the basis of gender identity is sex discrimination.
(1) The term ”;sex”; when used in the Human Rights Law includes gender identity and the status of being transgender.
(2) The prohibitions contained in the Human Rights Law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected category, also prohibit discrimination on the basis of gender identity or the status of being transgender.
(3) Harassment on the basis of a person's gender identity or the status of being transgender is sexual harassment.
(d) Discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out below is disability discrimination.
(1) The term ”;disability”; as defined in Human Rights Law section 292.21, means:(i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; or(ii) a record of such an impairment; or(iii) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.
(2) The term ”;disability”; when used in the Human Rights Law includes gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.
(3) The prohibitions contained in the Human Rights Law against discrimination on the basis of disability, in all areas of jurisdiction where disability is a protected category, also prohibit discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.
(4) Refusal to provide reasonable accommodation for persons with gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above, where requested and necessary, and in accordance with the Divisions regulations on reasonable accommodation found at section 466.11 of this Part, is disability discrimination.
(5) Harassment on the basis of a person's gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above is harassment on the basis of disability.

N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13.

Prior to enactment, the New York State Human Rights Law protected individuals from discrimination on the basis of only: race; creed; color; national origin; sexual orientation; military status; age; sex; marital status; disability; or familial status. When publically announcing the regulations, Cuomo stated, "[i]n 2015, it is clear that the fair legal interpretation and definition of a person's sex includes gender identity and gender expression." *See* Mckinley, Jesse. "Cuomo Planning Discrimination Protections for Transgender New Yorkers." The New York Times. The New York Times, 22 Oct. 2015. Web. 17 Nov. 2015. "The [New York Human Rights Law] left out the T, so to speak…[t]hat was not right, it was not fair, and it was not legal" Cuomo said, later adding, "[t]ransgender individuals deserve the same civil right that protects them from discrimination." *Id*.

According to the New York State Division of Human Rights, "[i]f the Division determines there is probable cause to believe harassment or discrimination has occurred, the Commissioner of Human Rights…may award job, housing or other benefits, back and front pay, [uncapped] compensatory damages for mental anguish, [and] civil fines and penalties,…up to $50,000 or up to $100,000 if the discrimination is found be 'willful, wanton or malicious…'". *Id*. This level of recovery is just as it would be under any other New York State Human Rights Law violation grounded in discrimination on the basis of one of the aforementioned protected categories.

New York's statute stands as the beacon for civil rights, as it was the "first state regulatory action in the nation to affirm that harassment and other forms of discrimination, by both public and private entities, on the basis of a person's gender identity, transgender status, or

gender dysphoria is considered unlawful discrimination." https://www.governor.ny.gov/news/governor-cuomo-introduces-regulations-protect-transgender-new-yorkers-unlawful-discrimination. On the state level as a whole, only 20 states offer some form of protections for transgender employees. *See* Appendix 1. Additionally, the governors of Indiana, Kentucky, Michigan, and Pennsylvania have also issued executive orders banning discrimination against transgender *public* employees. Per the American Civil Liberties Union, 200 cities and counties have banned gender identity discrimination, including localities such as Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio. *See* https://www.aclu.org/know-your-rights/transgender-people-and-law. As with discrimination on the basis of sexual orientation, if citizens are not lucky enough to live within a jurisdiction offering the kinds of protections New York has extended, they must rely on judicial interpretations of Title VII, a perilous and unclear path.

b. Title VII Litigation Regarding Gender Identity in the Absence of State or Local Protections

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) is a landmark Supreme Court case in the realm of L.G.B.T. rights. Surprisingly, *Oncale* had little to do with homosexuality or gender identity. In fact, the case involved male-on-male horseplay on an oilrig, which was ultimately deemed harassment. The case contemplated whether discrimination on the basis of sex can occur between a harasser and a victim of the same sex. The late Justice Scalia was forced to confront the well-known intention of Congress when it drafted Title VII; that sex discrimination protections were designed to

protect women from men, and to a smaller extent, men from women. In looking to side-step the policy behind Title VII legislation, Justice Scalia penned the following line which has become a rallying cry for many courts that take a liberal view of Title VII: "But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. at 79. It is unlikely Scalia, one of the most notoriously conservative justices in the past two decades, had gender identity in mind when he proffered that proposition. Nonetheless, many courts and EEOC decisions have begun to apply that same philosophy in order to denigrate the argument that Congress' silence equals a strict and narrow intent to which the judiciary must adhere.

Like with sexual orientation discrimination, the EEOC maintains a strong position on the issue of gender identity discrimination in the workplace, maintaining that such discrimination is prohibited discrimination "because of sex" in the eyes of Title VII. In recent years, the EEOC has brought and resolved a number of actions against employers alleged to have discriminated against their transgender employees.

The EEOC opinion *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (2012), borrowing Justice Scalia's line from *Oncale*, exemplifies the EEOC's interpretation of Title VII with respect to gender identity discrimination. *Macy* involved a transgender police detective who alleged that she was denied a position for which she was otherwise qualified with the Bureau of Alcohol, Tobacco, Firearms and Explosives when she disclosed her transgender status. The EEOC took the opportunity to clarify its position that discrimination on the basis of gender identity is cognizable as sex discrimination under Title VII. Gender identity

discrimination is necessarily sex discrimination, according to *Macy*, because it involves non-conformance with gender norms and stereotypes and arises out of a plain reading of Title VII's "because of . . . sex" language. *Macy* and its offspring in turn look back to *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989), which, again, held that sex-stereotyping discrimination is inherently discrimination on the basis of sex. The EEOC continues to file actions against employers that discriminate against transgender employees under the sex-stereotyping theory. A current pending case, *EEOC v. Bojangles Restaurants, Inc.*, No. 5:16-cv-00654-BO (filed 2016), involves a North Carolina restaurant chain that has been accused of discriminating against a transgender employee. Specifically, the transgender employee allegedly was subjected to offensive comments made by managers demanding that the employee engage in behavior and grooming practices that are stereotypically male.

A number of federal courts have explicitly adopted EEOC's interpretation of Title VII, extending its protections to transgender plaintiffs. For example, in *Fabian v. Hospital of Central Connecticut*, WL 1089178 (D. Conn. 2016), an orthopedic surgeon brought a Title VII action alleging that she was not hired because she disclosed her identity as a transgender woman who would begin work after she transitioned to presenting as a woman. The court held that transgender individuals discriminated against on the basis of their gender identity had cognizable sex discrimination claims under Title VII, citing *Macy* for support.

Private litigants have also found success in courts in arguing that gender identity discrimination constitutes prohibited sex-based discrimination. Most notably, the 4th, 6th, and 9th Circuits have expressly adopted the sex-stereotyping theory in holding that gender identity discrimination is prohibited by Title VII. *See Schwenck v. Hartford*, 204 F. 3d 1187, 1201-02

(9th Cir. 2000); *see also Barnes v. City of Cincinnati*, 401 F. 3d 729 (6th Cir. 2005); *see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 2016 WL 1567467 (4th Cir. Apr. 19, 2016).

c. The Social State of Transgenderism in the United States and the Current Laws Either Perpetuating Discrimination or Protecting Against It

Transgender individuals continue to face struggles entirely separate and apart from the workplace discrimination to which they have been subject because of Title VII and various courts' interpretations of its drafters. To be sure, transgender individuals have endured disparate treatment in and been entangled in a constant fight for acceptance in their everyday social interactions.

Officer Budd is a man who transitioned from a woman in the same year he was finishing a course of study at the police academy to become a New York City police officer. *See* Rojas, Rick, *Transgender on the* Force. August 5, 2016. His whole life, he was burdened with the confusion of why he was born into a sex opposite from his gender identity. *Id*. An added layer of burden many in his position face is the prospect of disapproval from peers and society when the decision is ultimately made to be one's true self, publicly. Officer Budd recalls this feeling of insecurity with how he might be embraced, stating, "I didn't want to be judged before they got to know me as a person…I didn't want to be a science project." As New York Times writer Rick Rojas put it, "[t]hose who delay making the transition while on the force face the corrosive toll of living what feels like a fraudulent life; those who do make it risk being rejected from the tight-knit fellowship of law enforcement that was also central to their identity." Officer Budd was lucky enough to experience a "rebirth," after his transition, one that was received well

by an accepting group of officers in one of the nation's most accepting cities. Others are not quite as lucky.

Brad Roberts is an officer who worked for the Clark County School District in Nevada for more than two decades. Officer Roberts transitioned from a female to a male who, in accordance with his gender identity, has been using the men's bathroom since that time, just as any other man. In 2011, the Clark County School District banned Officer Roberts specifically from the men's bathroom, requiring that he submit evidence of genital surgery prior to being allowed re-entry. The ban was ultimately lifted because its of facially discriminatory aim, but not without Officer Roberts living through the public shame of being denied rights, and the humiliation of not having community acceptance for the person he knew himself to be for many years.

The State of North Carolina has enacted a similar statewide bathroom law, known as "HB2," that restricts transgender individuals from using public bathrooms that comport with their gender identity (e.g., a person originally born with the biological features of the male sex, but who identifies as a woman may not use a public restroom designed for women, regardless of whether that individual has undergone a sex change operation to either surgically remove such male biological features and/or add biological features of the female sex) N.C. Gen. Stat. Ann. § 143-760. The law specifically reads, in relevant part

> …(1) Biological sex.--The physical condition of being male or female, which is stated on a person's birth certificate…
> (3) Multiple occupancy bathroom or changing facility.--A facility designed or designated to be used by more than one person at a time where persons may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a restroom, locker room, changing room, or shower room….
> (4) Public agency.--Includes any of the following:

> a. Executive branch agencies.
> b. All agencies, boards, offices, and departments under the direction and control of a member of the Council of State.
> c. "Unit" as defined in G.S. 159-7(b)(15).
> d. "Public authority" as defined in G.S. 159-7(b)(10).
> e. A local board of education.
> f. The judicial branch.
> g. The legislative branch.
> h. Any other political subdivision of the State….
> (b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities.--Public agencies *shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.*

Id. (emphasis added).

As a result of this law that has garnered severe public scrutiny, the State University of New York ("SUNY") system, which includes SUNY Albany, refused to compete in a collegiate basketball game at Duke University, a school residing in the now notorious State of North Carolina. Additionally, the company PayPal has abandoned its plan to move part of its operations to North Carolina in reaction to the new state law. *See* https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/paypal-abandons-plans-to-open-facility-in-charlotte-due-to-lgbt-law/?utm_term=.067b8caf21b4. Joining in the boycott to operate in the state, the immortal Bruce Springsteen and famous pop-rock band Maroon 5 have canceled their shows in Greensboro and Raleigh, respectively, while more recently, the National Basketball Association moved its upcoming annual All-Star game from Charlotte to New Orleans. *See* http://brucespringsteen.net/news/2016/a-statement-from-bruce-springsteen-on-north-carolina; http://money.cnn.com/2016/05/20/media/maroon-5-cancel-north-carolina-concert-lgbt/; http://abcnews.go.com/US/nba-star-game-moved-orleans-controversial-nc-anti/story?id=41511843. These moves underscore the sentiment of many in the United States. But perhaps more impactful than eliciting major entities to publically reveal their clear social

stance is the negative impact HB2 has on transgender individuals. Laws such as HB2 demonstrate that transgender individuals are not just facing discrimination in the workplace, or simply enduring a struggle for community-wide acceptance, but they are subject to laws that restrict their public lifestyle specifically on the basis of their gender identity.

d. Bathroom Laws in the Workplace

On the issue of bathroom access in the workplace, the EEOC posits three primary points for employers to take heed of in order to avoid Title VII liability: 1) that denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination; 2) that an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and 3) that an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom. "Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964," https://www. eeoc. gov/eeoc/publications/fs-bathroom-access-transgender. cfm.

The EEOC summarized these positions powerfully in *Lusardi*, a case involving a transgender female employee of the United States Army who was constantly referred to by her former male name when attempting to use the women's bathroom at her employer's facilities. *Lusardi*, EEOC DOC 0120133395, 2015 WL 1607756, at *8 (Apr. 1, 2015). In their decision, which ultimately found the employer's conduct to be a violation of Title VII's prohibition against sex discrimination, the EEOC stated:

> This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else).

> An agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.
> On this record, there is no cause to question that Complainant -- who was assigned the sex of male at birth but identifies as female -- *is* female. And certainly where, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women's restrooms.

Id.

Though not all states have passed employment discrimination laws that specifically pertain to transgender employees, many have passed laws that enable a person to choose the workplace bathroom that best suits their gender identity. *See* Appendix 5. While this represents a step in the right direction, it remains insufficient in light of Title VII's narrow categorical inclusions, of which sexual orientation and gender identity are not a part, despite today's clear social climate.

VI. CONCLUSION

When Maria Robinson, an author who writes about raising children, famously stated "Nobody can go back and start a new beginning, but anyone can start today and make a new ending," she might as well have been talking about the current debate as to whether the meaning of sex in Title VII is inclusive of the LGBT community. From a strict construction early on, to a broader definition granting more rights to females, to the movement now which supports interpreting the term to include sexual orientation and transgender status, one thing is certain; we cannot go back and change previous decisions, but future decisions can bring a new ending. Indeed, some already have. Whether that new ending is perpetuated, either through judicial interpretation or legislation, remains to be seen

APPENDIX 1

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

State-by-State Survey
of
Sexual Orientation & Gender Identity Discrimination Laws

State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws[1]				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Alabama				
Alaska	X			
Arizona	X			
Arkansas				
California	X	X	X	X
Colorado	X	X	X	X
Connecticut	X	X	X	X
Delaware	X	X	X	X
Florida				

[1] Statistics taken from the Human Rights Campaign: http://www.hrc.org/state_maps.

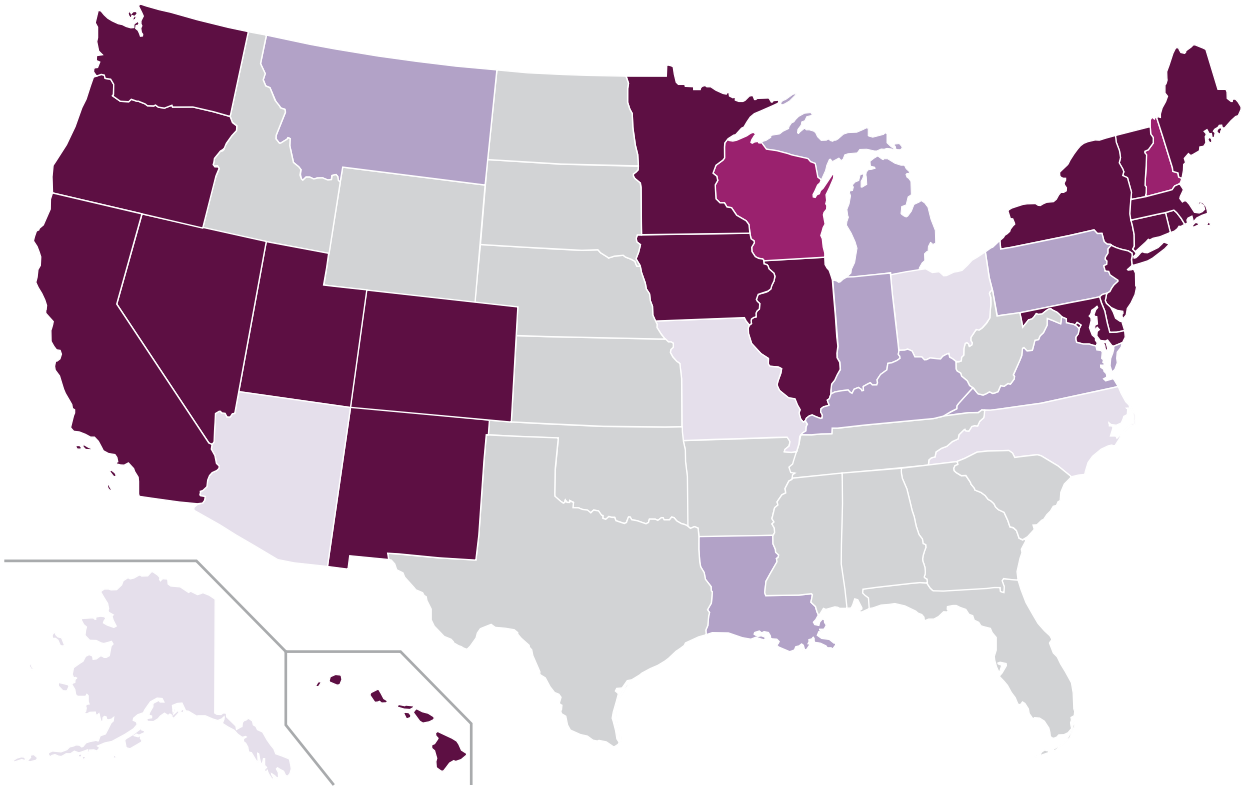
State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Georgia				
Hawaii	X	X	X	X
Idaho				
Illinois	X	X	X	X
Indiana	X		X	
Iowa	X	X	X	X
Kansas				
Kentucky	X		X	
Louisiana	X		X	
Maine	X	X	X	X
Maryland	X	X	X	X
Massachusetts	X	X	X	X
Michigan	X		X	
Minnesota	X	X	X	X

State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Mississippi				
Missouri	X			
Montana	X		X	
Nebraska				
Nevada	X	X	X	X
New Hampshire	X	X		
New Jersey	X	X	X	X
New Mexico	X	X	X	X
New York	X	X	X	X
North Carolina	X		X*	
North Dakota				
Ohio	X			
Oklahoma				
Oregon	X	X	X	X

State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Pennsylvania	X		X	
Rhode Island	X	X	X	X
South Carolina				
South Dakota				
Tennessee				
Texas				
Utah	X	X	X	X
Vermont	X	X	X	X
Virginia	X		X	
Washington	X	X	X	X
West Virginia				
Wisconsin	X	X		
Wyoming				

STATEWIDE EMPLOYMENT LAWS & POLICIES

HUMAN RIGHTS CAMPAIGN



Updated April 20, 2016

The Federal Equal Employment Opportunity Commission is now accepting complaints of gender identity discrimination in employment based on Title VII's prohibition against sex discrimination.

States that prohibit discrimination based on sexual orientation and gender identity (20 states & D.C.): California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington

States that prohibit discrimination based on sexual orientation only (2 states): New Hampshire, Wisconsin

States that prohibit discrimination against public employees based on sexual orientation and gender identity (7 states): Indiana, Kentucky, Louisiana, Michigan, Montana, Pennsylvania, Virginia

States that prohibit discrimination against public employees based on sexual orientation only (5 states): Alaska, Arizona, Missouri, North Carolina, Ohio

*State courts, commissions, agencies, or attorney general have interpreted the existing law to include some protection against discrimination against transgender individuals in Florida and New York.

*North Carolina's executive order enumerates sexual orientation and gender identity. However, this order has a bathroom carve out for transgender employees making the executive order not fully-inclusive.

APPENDIX 2

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***Scott Medical* Complaint**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	**CIVIL ACTION NO.**
v.	)	
SCOTT MEDICAL HEALTH CENTER, P.C.,	)	
Defendant.	)	

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and Title I of the Civil Rights Act of 1991, to correct unlawful employment practices on the basis of sex (male) to provide appropriate relief to Dale Baxley. As alleged with greater particularity in paragraphs 11(a) through (h) below, the Commission alleges that Defendant subjected Baxley to a sexually hostile work environment perpetuated by Defendant's telemarketing manager, Robert McClendon. Defendant constructively discharged Baxley as a result of the intolerable working conditions and Defendant's failure to take prompt and effective action to prevent or alleviate it.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Western District of Pennsylvania.

PARTIES

3. Plaintiff, the U.S. Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Section 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times Defendant Scott Medical Health Center, P.C. ("Defendant"), a Pennsylvania professional corporation, has continuously been doing business in the Commonwealth of Pennsylvania and the City of Pittsburgh, and has continuously had at least 15 employees.

5. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to the institution of this lawsuit, Charging Parties Libby Eber, Brittany Fullard, Allyssa Griffie, Donna Mackie and Kaitlyn Wieczorek filed charges of discrimination with the Commission alleging violations of Title VII by Defendant. During the course of its investigation of the aforementioned charges of discrimination, the Commission uncovered the violations of Dale Baxley's rights under Title VII that are reflected in paragraphs 11(a) through (h) of this Complaint.

7. On July 22, 2015, the Commission issued to Defendant a Letter of Determination finding reasonable cause to believe that Title VII was violated, including the violations of Dale Baxley's rights under Title VII that are reflected in paragraphs 11(a) through (h) of this Complaint, and inviting Defendant to join with the Commission in informal methods of conciliation to endeavor to eliminate the discriminatory practices and provide appropriate relief.

8. The Commission engaged in communications with Defendant to provide Defendant the opportunity to remedy the discriminatory practices described in the Letter of Determination.

9. The Commission was unable to secure from Defendant a conciliation agreement acceptable to the Commission.

10. On September 15, 2015, the Commission issued to Defendant a Notice of Failure of Conciliation.

11. Since at least May 2013, Defendant has engaged in unlawful employment practices at its Pittsburgh, Pennsylvania facility, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). These unlawful practices include, but are not limited to, the following:

(a) Dale Baxley is a gay male. He was previously employed by Defendant in a telemarketing position.

(b) At all relevant times, Robert McClendon was the Telemarketing Manager for Defendant, a supervisor with authority to hire and fire employees who reported to him. Defendant is vicariously liable for his harassing conduct.

(c) Defendant has engaged in sex discrimination against Baxley by subjecting him to a continuing course of unwelcome and offensive harassment because of his sex (male). Such harassment was of sufficient severity and/or pervasiveness to create a hostile work environment because of his sex (male).

(d) From at least mid-July 2013 until on or about August 19, 2013, Robert McClendon routinely made unwelcome and offensive comments about Baxley, including but not limited to regularly calling him "fag," "faggot," "fucking faggot," and "queer," and making statements such as "fucking queer can't do your job." McClendon directed these harassing comments at Baxley at least three to

four times each week.

(e) From at least mid-July 2013 until on or about August 19, 2013, McClendon routinely made other unwelcome and offensive sexual comments to Baxley. For instance, upon learning that Baxley is gay and had a male partner (and to whom he is now married), McClendon made highly offensive statements to Baxley about Baxley's relationship with the partner such as saying, "I always wondered how you fags have sex," "I don't understand how you fucking fags have sex," and "Who's the butch and who is the bitch?"

(f) From at least mid-July 2013 until on or about August 19, 2013, McClendon frequently screamed and yelled at Baxley.

(g) On or about August 19, 2013, Defendant constructively discharged Baxley because of his sex (male). Baxley reported McClendon's sex discriminatory behavior to Defendant's president, Dr. Gary Hieronimus, but Hieronimus expressly refused to take any action to stop the harassment. Baxley resigned in response to Defendant's creation of, and refusal to discontinue, a sexually hostile work environment. Defendant knowingly created and permitted working conditions that Baxley reasonably viewed as intolerable and that caused him to resign.

(h) McClendon's aforementioned conduct directed at Baxley was motivated by Baxley's sex (male), in that sexual orientation discrimination necessarily entails treating an employee less favorably because of his sex; in that Baxley, by virtue of his sexual orientation, did not conform to sex stereotypes and norms about males to which McClendon subscribed; and in that McClendon objected generally to males having romantic and sexual association with other males, and objected

specifically to Baxley's close, loving association with his male partner.

12. The effect of the practices complained of in paragraphs 11(a) through (h) above has been to deprive Baxley of equal employment opportunities and otherwise adversely affect his status as an employee because of his sex.

13. The unlawful employment practices complained of in paragraphs 11(a) through (h) above were intentional.

14. The unlawful employment practices complained of in paragraphs 11(a) through (h) above were done with malice or with reckless indifference to Baxley's federally protected rights.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in sex-based harassing conduct and other employment practices which discriminate on the basis of sex.

B. Order Defendant to institute and carry out training, policies, practices, and programs which provide equal employment opportunities based on sex, and which ensure that its operations are free from the existence of a sexually hostile work environment.

C. Order Defendant to make Baxley whole, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to front pay.

D. Order Defendant to make Baxley whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in

paragraphs 11(a) through (h) above, such as debt-related expenses, job search expenses, medical expenses and other expenses incurred by Baxley, which were reasonably incurred as a result of Defendant's conduct, in amounts to be determined at trial.

E. Order Defendant to make Baxley whole by providing compensation for past and future non-pecuniary losses resulting from the unlawful practices complained of in paragraphs 11(a) through (h) above, including emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.

F. Order Defendant to pay Baxley punitive damages for its malicious and reckless conduct described in paragraphs 11(a) through (h) above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

Respectfully submitted,

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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JAMES L. LEE
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GWENDOLYN YOUNG REAMS
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APPENDIX 3

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. Pallet Co's.* Complaint**

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Equal Employment Opportunity Commission, Baltimore Field Office
10 S. Howard Street, 3rd Fl.
Baltimore, MD 21201

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Amber Trzinski Fox, Trial Attorney
Baltimore Field Office, 10 S. Howard St., 3d Fl., Baltimore, MD 21201
(410) 209-2763

DEFENDANTS
Pallet Companies d/b/a IFCO Systems NA, Inc.
3030 Waterview Avenue, Suite 200
Baltimore, MD 21230

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
Marc Antonetti
Baker Hostetler
1050 Connecticut Ave., N.W., Suite 1100, Washington, DC 20036

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☒ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☒ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
Title VII of the Civil Rights Act of 1964, as amended, and Title I of the Civil Rights Act of 1991.
Brief description of cause:
Defendant discriminated against female employee because of her sex and subjected her to retaliatory discharge.

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE 03/01/2016
SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

U.S. Equal Employment Opportunity Commission, 10 S. Howard Street, 3rd Floor Baltimore, MD 21201, **Plaintiff,** **v.** **Pallet Companies d/b/a IFCO Systems NA, Inc.** 3030 Waterview Avenue, Suite 200 Baltimore, MD 21230, **Defendant.**	**Civil Action No.** **COMPLAINT** **JURY TRIAL DEMAND**

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the bases of sex and retaliation, and to provide appropriate relief to Yolanda Boone, who was adversely affected by such practices. As alleged with greater particularity below, the United States Equal Employment Opportunity Commission (the "EEOC" or the "Commission") alleges that Defendant Pallet Companies d/b/a IFCO Systems NA, Inc. ("Defendant" or "IFCO") unlawfully discriminated against Boone on the basis of her sex (female) by subjecting her to harassment, which culminated in her discharge. The Commission further alleges that Defendant discharged Boone in retaliation for complaining about the harassment.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII"). This action is also authorized and instituted pursuant to Section 102 of Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the District of Maryland.

PARTIES

3. Plaintiff, the United States Equal Employment Opportunity Commission, is an agency of the United States of America charged with the administration, interpretation, and enforcement of Title VII and is expressly authorized to bring this action by Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and (3).

4. At all relevant times, Defendant has continuously been a corporation doing business and operating within the State of Maryland with at least fifteen (15) employees.

5. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. § 2000e(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to the institution of this lawsuit, Boone filed a charge with the Commission alleging violations of Title VII by IFCO.

7. On or around August 31, 2015, the Commission issued to Defendant a Letter of Determination finding reasonable cause to believe that Title VII was violated and inviting Defendant to join with the Commission in informal methods of conciliation to endeavor to eliminate the discriminatory practices and provide appropriate relief.

8. The Commission engaged in communications with Defendant to provide

Defendant the opportunity to remedy the discriminatory practices described in the Letter of Determination.

9. The Commission was unable to secure from Defendant a conciliation agreement acceptable to the Commission.

10. On or around October 23, 2015, the Commission issued to Defendant a Notice of Failure of Conciliation.

11. All conditions precedent to the institution of this lawsuit have been fulfilled.

12. Defendant hired Boone on September 14, 2013, as a forklift operator working the first shift. Boone was an excellent forklift operator.

13. Boone is a lesbian. Her sexual orientation was known to most, if not all, of her co-workers, including the night shift manager, Charles Lowry.

14. Approximately three months after Boone began working for IFCO, Lowry requested that Boone begin working some hours during the night shift, which she agreed to do to earn extra income.

15. Almost as soon as Boone began working the night shift, Lowry began harassing Boone on a weekly basis, making comments such as "I want to turn you back into a woman;" "I want you to like men again;" "You would look good in a dress;" "Are you a girl or a man?" and "You don't have any breasts." He also quoted biblical passages stating that a man should be with a woman and not a woman with a woman. On several occasions, he would grab his crotch while staring at Boone.

16. After weeks of enduring Lowry's comments and behavior, Boone complained to her supervisor Anthony Powell in February and March 2014, but no action was taken.

17. On April 18, 2014, Lowry blew a kiss and stuck out his tongue and circled it in a suggestive manner toward Boone.

18. Boone immediately complained to Powell, and then to Anthony "Tony" Flores, the General Manager.

19. Boone told Flores what happened that day and also complained about the perpetual harassment and comments to which Lowry subjected her. Flores said he would speak with Lowry.

20. After her meeting with Flores, Boone returned to the warehouse and contacted Human Resources through the employee hotline to file a complaint about Lowry's harassment.

21. Lowry later returned to the warehouse and continued to intimidate and harass her. Unable to endure the continuing harassment, she informed Flores that she would leave early that day, which she did.

22. Boone returned to work on her next scheduled work day, April 22, 2014. As soon as she arrived, Flores called Boone into a meeting with himself, Brian Schaffer, the Regional Director, and Randall Lucas, a Human Resources representative, and asked her to resign. Boone refused to resign.

23. Flores, Schaffer, and Lucas called Boone back into Flores's office later that day and handed her a typed letter stating she had resigned from her position. They again demanded her resignation and when she again refused to resign, Defendant discharged her and called the police to escort her off the property.

24. Since at least September 2013, Defendant engaged in unlawful employment practices in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) by subjecting Boone to harassment which culminated in her discharge. Lowry's aforementioned conduct directed at

Boone was motivated by Boone's sex (female), in that sexual orientation discrimination necessarily entails treating an employee less favorably because of her sex; in that Boone, by virtue of her sexual orientation, did not conform to sex stereotypes and norms about females to which Lowry subscribed; and in that Lowry objected generally to females having romantic and sexual association with other females, and objected specifically to Boone's close, loving association with her female partner.

25. Since at least April 22, 2014, Defendant engaged in unlawful employment practices in violation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) when it discharged Boone for complaining about the harassment.

26. The effect of the practices complained of in the above paragraphs has been to deprive Boone of equal employment opportunities and otherwise adversely affect her rights under Title VII, resulting in expenses incurred due to lost wages, emotional pain, suffering, inconvenience, mental anguish, embarrassment, frustration, humiliation, and loss of enjoyment of life.

27. The unlawful employment practices complained of above were intentional.

28. The unlawful employment practices complained of above were done with malice or with reckless indifference to Boone's federally protected rights.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns and all persons in active concert or participation with them, from engaging in any employment practice that discriminates on the basis of sex and from retaliating against persons who engage in protected activity;

B. Order Defendant to institute and carry out policies, practices, and programs that provide equal employment opportunities for women and that eradicate the effects of its past and present unlawful employment practices, and prevent sex discrimination and retaliation from occurring in the future;

C. Order Defendant to make Boone whole by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement or front pay in lieu of reinstatement;

D. Order Defendant to make Boone whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in the paragraphs above.

E. Order Defendant to make Boone whole by providing compensation for past and future non-pecuniary losses including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, frustration, and humiliation, in an amount to be proven at trial;

F. Order Defendant to pay Boone punitive damages for its callous indifference to her federally protected right to be free from discrimination based on disability;

G. Order Defendant to sign and conspicuously post, for a designated period of time, a notice to all employees that sets forth the remedial action required by the Court and inform all employees that it will not discriminate against any employee because of sex, will not retaliate against any person for engaging in protected activity, and will comply with all aspects of Title VII;

H. Grant such further relief as the Court deems necessary and proper in the public interest; and

I. Award the Commission its costs in this action.

The Commission requests a jury trial on all questions of fact raised by its Complaint.

Respectfully submitted,

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General Counsel

JAMES L. LEE
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

DEBRA M. LAWRENCE
Regional Attorney

MARIA SALACUSE
Supervisory Trial Attorney

AMBER TRZINSKI FOX
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APPENDIX 4

to
Newton's Laws of Motion and the LGBT Community…What's Next?
Submitted by: Christopher A. D'Angelo

***EEOC v. Pallet Co's.* Consent Decree**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	
Plaintiff,	
v.	Civil Action No. 1:16-cv-00595-CCB
PALLET COMPANIES d/b/a IFCO SYSTEMS NA, INC.,	
Defendant.	

CONSENT DECREE

This action was instituted by Plaintiff Equal Employment Opportunity Commission (the "EEOC" or the "Commission") against Defendant Pallet Companies d/b/a IFCO Systems NA, Inc. ("IFCO" or "Defendant"), under Title VII of the Civil Rights Act of 1964 ("Title VII") and Title I of the Civil Rights Act of 1991, alleging that Defendant unlawfully discriminated against Yolanda Boone ("Ms. Boone") on the basis of her sex (female) by subjecting her to harassment, which culminated in her discharge, and that Defendant discharged Ms. Boone in retaliation for complaining about the harassment. Defendant asserts that discrimination or harassment based on sexual orientation is against both its values and its written employment policies, which policies have been in place since 2007, and Defendant denies that it discriminated in any way against Ms. Boone. The parties desire to resolve amicably the Commission's action without the time and expense of continued litigation, and, as a result of having engaged in comprehensive settlement negotiations, the Parties have agreed that this action should be finally resolved by the entry of a Consent Decree. With these understandings, the Parties have jointly formulated a plan to be

embodied in a Decree which will promote and effectuate the purposes of Title VII.

The Court has examined this Decree and finds that it is reasonable and just and in accordance with the Federal Rules of Civil Procedure and Title VII. Therefore, upon due consideration of the record herein and being fully advised in the premises, it is ORDERED, ADJUDGED AND DECREED:

Scope of Decree

1. This Decree resolves all issues and claims in the Complaint filed by the EEOC in this Title VII action ("the Complaint"), which emanated from the Charge of Discrimination filed by Ms. Boone. This Decree in no way affects the EEOC's right to process any other pending or future charges that may be filed against Defendant and to commence civil actions on any such charges as the Commission sees fit.

2. This Decree shall be in effect for a period of two years from the date it is entered by the Court. During that time, this Court shall retain jurisdiction over this matter and the parties for purposes of enforcing compliance with the Decree, including issuing such orders as may be required to effectuate the purposes of the Decree. If the Court determines that Defendant has failed to meet the established terms at the end of two years, the duration of the Decree may be extended.

3. Unless otherwise specified in this Decree, the terms of this Decree apply to Defendant's seven plants in the North Region of IFCO's Third-Party Operations Division (the "Region") located in the following cities: Baltimore, MD, Barrington, NJ, Scarborough, ME, Martinsburg, VA, Wilmington, MA, and Suffolk, VA.

4. This Decree, being entered with the consent of the parties, shall not constitute an admission, adjudication, or finding on the merits of the case.

Monetary Relief

5. Within ten (10) business days of entry of this Decree, Defendant shall pay Yolanda Boone monetary relief in the total amount of $182,200, representing $7,200 in back pay with interest and $175,000 in nonpecuniary compensatory damages. Defendant will issue to Ms. Boone an IRS Form 1099 for the 2016 tax year for the non-pecuniary damages amount and an IRS W2 form for the 2016 tax year for the back pay amount. Defendant shall make all legally required withholdings from the back pay amount. The checks and IRS forms will be sent directly to Ms. Boone, and a photocopy of the checks and related correspondence will be mailed to the EEOC, Baltimore Field Office, 10 S. Howard Street, 3rd Floor, Baltimore, Maryland 21201 (Attention: Trial Attorney Amber Trzinski Fox).

6. Defendant shall provide Ms. Boone, within ten (10) days of the entry of this Decree, with a positive letter of reference, on IFCO letterhead, setting forth, at a minimum, the following: Ms. Boone's dates of employment, position, and work location. In response to any inquiry received by Defendant's automated employment and income verification provider, The Work Number, concerning Ms. Boone from a potential employer, headhunter, or other person inquiring about Ms. Boone's employment history, Defendant shall ensure that The Work Number provides a positive reference concerning Ms. Boone, indicating the following: Ms. Boone's dates of employment, position, and work location. Ms. Boone should direct all potential employers, headhunters or other persons inquiring about her employment history at Defendant to contact The Work Number by visiting its website at www.theworknumber.com or by dialing 1-800-367-5690 (1-800-424-0253 TTY). Defendant's Work Number employer name is IFCO Systems and its employer code is 16415.

7. Defendant will contribute, each year of this Decree, $10,000 to the Human Rights

Campaign Foundation to support, specifically, the Human Rights Campaign Workplace Equality Program.

Injunctive Relief

8. Defendant, its managers, officers, agents, successors, purchasers, assigns, U.S. subsidiaries, and any corporation or entity into which Defendant may merge or with which Defendant may consolidate are enjoined from engaging in sex discrimination by creating or maintaining a hostile work environment on the basis of sex. The prohibited hostile work environment includes the use of offensive or derogatory comments, or other verbal or physical conduct based on an individual's sex, which creates a severe and/or pervasive hostile working environment, or interferes with the individual's work performance that violates Title VII, which, in part, is set forth below:

> It shall be an unlawful employment practice for an employer – (1) . . . to discriminate against any individual with respect to [her] . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1).

9. Defendant, its managers, officers, agents, successors, purchasers, assigns, U.S. subsidiaries, and any corporation or entity into which Defendant may merge or with which Defendant may consolidate, are further enjoined from retaliating against any individual for asserting her or his rights under Title VII or otherwise engaging in protected activity, such as by complaining of discrimination, opposing discrimination, filing a charge, or giving testimony or assistance with an investigation or litigation, including, but not limited to, participating in this matter in any way including by giving testimony, as set forth in the following provision of Title VII:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [she] has opposed any practice made an unlawful

> employment practice by this subchapter, or because [she] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

Sexual Orientation and No Retaliation Policy

10. Within thirty (30) days of the entry of this Decree, Defendant shall distribute to all employees in the Region copies of its existing EEO and Speaking Up policies ("Policies") and wallet cards containing the Speaking Up hotline's toll-free number and web address ("Wallet Card"). In addition, Defendant will distribute the Policies and the Wallet Card in hard copy form to any new employees of the Region within seven (7) days of hire. Defendant must also immediately post the Policies in a manner easily visible to all employees in the Region and immediately forward a copy of any amended policy to the EEOC.

Training

11. Defendant shall retain, at its expense, a subject matter expert ("SME") on sexual orientation, gender identity, and transgender training to assist Defendant in development of a training program on LGBT workplace issues. The SME shall be identified to the EEOC within 30 days of the entry of this Decree and Defendant must obtain the EEOC's approval of the SME. The EEOC's approval of the SME will not be unreasonably withheld. Within 90 days of the entry of this Decree, Defendant and its SME will develop a specific training module on sexual orientation and sexual identity issues in the workplace ("LGBT Module") and provide the LGBT Module to the EEOC for its approval. The LGBT Module, which will take no less than thirty minutes and no more than forty-five minutes to complete, will address FAQs, acceptance of diversity of all individuals in the workplace, and how the Policies provide protection for all LGBT employees, together with other topics or issues determined appropriate by the SME,

subject to the EEOC's approval. The EEOC may edit and comment on the draft module. Defendant will finalize the LGBT Module after receiving input from the EEOC, and will provide a final copy of the LGBT Module to the EEOC for the EEOC's final approval. The EEOC's approval of the LGBT Module will not be unreasonably withheld. The EEOC may provide the LGBT Module (after deleting all references to Defendant) to other companies and agencies as it deems necessary. Defendant and the SME will not claim any copyright or other ownership interest in the LGBT Module.

12. Defendant will present two types of training programs incorporating the LGBT Module:

A. Nationwide Plant Management and Human Resources Training. The LGBT Module will be presented, either live or via webinar, as part of an hour-long EEO and Harassment training program, to Defendant's General Manager, Vice President of Operations, Regional Operations Directors, Plant Managers, Assistant Plant Managers, Human Resource Directors and Human Resources Regional Field Operations Managers in the United States. This training session will include Defendant's Policies, including its anti-retaliation policy, as well as the requirements of Title VII's prohibitions against sexual harassment and retaliation and the requirements and prohibitions of this Decree. A copy of the entire program will be provided to the EEOC. The training shall be conducted by the SME (or his/her designee) and Kevin W. Shaughnessy or another lawyer selected by Defendant and approved by the EEOC.

B. Region Training. The LGBT Module will be presented to all employees in the Region as part of a live, hour-long EEO and Harassment training program. This training session will include Defendant's Policies, including its anti-retaliation policy, as well as

the requirements of Title VII's prohibitions against sexual harassment and retaliation and the requirements and prohibitions of this Decree. A copy of the entire program will be provided to the EEOC. The training shall be conducted by the SME (or his/her designee) and Kevin W. Shaughnessy or another lawyer selected by Defendant and approved by the EEOC.

13. The training for both groups of employees set forth in Section 12A and Section 12B must be completed within one hundred eighty (180) days of the entry of this Decree, or 30 days after the EEOC's approval of the final LGBT Module is received by Defendant, whichever is later. During the effective dates of this Decree, Defendant will also provide the training program in Section 12A to all new Plant Managers, Assistant Plant Managers, Human Resource Directors and Human Resources Regional Field Operations Managers within thirty (30) days of their hire or promotion and the training program in Section 12B to all new Region employees within thirty (30) days of their hire. Training for new employees covered by this Section 13 may be pre-recorded.

14. In year two of the Decree, Defendant shall provide one hour of EEO and LGBT training, via an on-line module, to all of its Plant Managers, Assistant Plant Managers, Human Resource Directors and Human Resources Regional Field Operations Managers in the United States, including a quiz or a test to be passed by all participants. To pass the quiz or test, the participants must achieve a score of 80 percent or greater.

15. Within ten (10) business days of completing the training described in Paragraphs 12A and 12B above, Defendant will provide the EEOC with written documentation that the training occurred, including a list of participants and their job titles, the date the training was completed, and where the training was delivered through a live session, a signed (either manual

or electronic) attendance sheet. Defendant will provide written documentation of the training of all new employees in the Region, and those trained as described in Paragraph 14, has occurred with its next due semi-annual report.

Notice and Postings

16. Within ten (10) business days of entry of this Decree, Defendant will post, at all of Defendant's locations, the posters required to be displayed in the workplace by Commission Regulations, 29 C.F.R. § 1601.30.

17. Within fifteen (15) business days of entry of this Decree, Defendant will also post in all places where notices are customarily posted for employees at its Baltimore Plant at 3030 Waterview Avenue, Suite #200, Baltimore, MD 21230, the Notice attached as Attachment A. The Notice shall be posted and maintained for the duration of the Decree and shall be signed by Defendant's owner or corporate representative with the date of actual posting shown. Should the Notice become defaced, marred, or otherwise made unreadable, Defendant will ensure that new readable copies of the Notice are posted in the same manner as specified above. Within its first semi-annual report, Defendant shall provide to the EEOC a copy of the signed Notice, written confirmation that the Notice has been posted, and a description of the location and date of the posting.

Monitoring Provisions

18. The EEOC has the right to monitor and review compliance with this Decree.

19. On a semi-annual basis, for the duration of this Decree, and one month before the expiration of this Decree, Defendant must submit written proof via affidavit to the EEOC that it has complied with each of the requirements set forth above. Such proof must include, but need not be limited to, an affidavit by a person with knowledge establishing: (a) the completion of

training; (b) that the sexual orientation and retaliation policy has been distributed and remains posted in accordance with this Consent Decree; (c) that it has complied with the injunctive relief requested in this Decree; and (d) notifying the Commission of all reported complaints alleging sexual orientation discrimination in the Region. The notification required by section 19(d) will include, if the information is available to Defendant, each name of the individual lodging the complaint; home address; home telephone number; nature of the individual's complaint; the name of individual who received the complaint or report; the date the complaint or report was received; description of Defendant's actions taken in response to the complaint or report, including the name of each manager or supervisor involved in those actions. If no complaints of alleged sexual orientation discrimination or harassment were reported, Defendant will confirm in writing to the EEOC that no such complaints were made.

20. The EEOC may monitor compliance during the duration of this Decree by inspection of Defendant's Regional premises, records, and interviews with employees at reasonable times. Upon thirty (30) days' notice by the EEOC, Defendant will make available for inspection and copying any records requested by the EEOC from the Region.

21. For the duration of this Consent Decree, Defendant must create and maintain such records as are necessary to demonstrate its compliance with this Consent Decree and 29 C.F.R. §1602 *et seq.* and maintain an updated EEO poster in compliance with 42 U.S.C. § 2000e-10.

Miscellaneous Provisions

22. All materials required by this Decree to be provided to the EEOC shall be sent by e-mail to Amber Trzinski Fox, EEOC Trial Attorney, at amber.fox@eeoc.gov, and by certified mail to Amber Trzinski Fox, EEOC Trial Attorney Baltimore Field Office, 10 South Howard Street, 3rd Floor, Baltimore, MD 21201. Any notice to Defendant shall be sent by email to

Kevin W. Shaughnessy at kshaughnessy@bakerlaw.com, and by certified mail to Kevin W. Shaughnessy, Baker & Hostetler LLP, 200 South Orange Avenue, Suite 2300, Orlando, FL 32801,

23. This Consent Decree will operate as a full and final resolution of this action. The EEOC and Defendant shall bear their own costs and attorneys' fees.

24. The EEOC and Defendant shall have independent authority to seek the judicial enforcement of any aspect, term or provision of this Decree. In the event that either party to this Decree believes that the other party has failed to comply with any provision(s) of this Decree, the complaining party shall notify the alleged non-compliant party in writing of such non-compliance and afford the alleged non-compliant party thirty (30) business days to remedy the non-compliance or satisfy the complaining party that it has complied. If the dispute is not resolved within thirty (30) business days, the complaining party may apply to the Court for appropriate relief.

25. The undersigned counsel of record in the above-captioned action hereby consent, on behalf of their respective clients, to the entry of this Consent Decree.

FOR PLAINTIFF:

/s/ Debra M. Lawrence
Debra M. Lawrence
Regional Attorney

/s/ Maria Salacuse
Maria Salacuse
Supervisory Trial Attorney

/s/ Amber Trzinski Fox
Amber Trzinski Fox
Trial Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Baltimore Field Office

FOR DEFENDANT:

/s/ Kevin W. Shaughnessy
Kevin W. Shaughnessy
(with permission)
Baker & Hostetler LLP
200 South Orange Avenue
Suite 2300
Orlando, FL 32801
Phone: (407) 649-4014
Email: Kshaughnessy@bakerlaw.com

Counsel for Defendant Pallet Companies d/b/a/ IFCO Systems NA, Inc.

10 S. Howard Street, 3rd Floor
Baltimore, MD 21201
Phone: (410) 209-2763
Email: amber.fox@eeoc.gov

Counsel for Plaintiff Equal Employment Opportunity Commission

SO ORDERED.

Signed and entered this 28th day of June, 2016.

CCB

The Honorable Catherine C. Blake
United States District Court Judge

ATTACHMENT A

NOTICE TO EMPLOYEES POSTED PURSUANT TO A CONSENT DECREE BETWEEN THE EEOC AND PALLET COMPANIES d/b/a IFCO SYSTEMS NA, INC.

This Notice is being posted as part of the resolution of a lawsuit filed by the Equal Employment Opportunity Commission (EEOC) against Pallet Companies d/b/a IFCO Systems NA, Inc. ("IFCO") in the United States District Court for the District of Maryland, Baltimore Division (*EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc. ("IFCO")*), Civil Action No. 1:16-cv-00595-CCB). The EEOC brought this action to enforce provisions of Title VII of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the basis of sex and retaliation.

IFCO will conduct its hiring and employment practices without regard to the sex or sexual orientation of an applicant or employee and ensure that no employees are retaliated against for complaining of any such discrimination.

IFCO will take all complaints of discrimination in the workplace seriously and address them appropriately.

IFCO will not engage in any acts or practices made unlawful under Title VII, including retaliation against one who exercises his or her rights under Title VII.

Employees or job applicants should feel free to report instances of discriminatory treatment to a supervisor or a manager, at any time. IFCO has established policies and procedures to promptly investigate any such reports and to protect the person making the reports from retaliation, including retaliation by the person allegedly guilty of the discrimination.

Individuals are also free to make complaints of employment discrimination directly to the Baltimore Field Office, 10 South Howard Street, 3rd Floor, Baltimore, Maryland 21201 or by calling 866-408-8075 / TTY 800-669-6820. General information may also be obtained on the Internet at www.eeoc.gov.

_____

Owner

Date Posted:

APPENDIX 5

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 8-18-16 Opinion & Order**
of
Judge Sean F. Cox

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,

Plaintiff,

v.

R.G. & G.R. Harris Funeral Homes, Inc.,

Defendant.
_____/

Case No. 14-13710

Sean F. Cox
United States District Court Judge

OPINION & ORDER

In enacting Title VII of the Civil Rights Act of 1964, Congress prohibited employers from discharging or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1).

In filing this action against Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), the Equal Employment Opportunity Commission sought to expand Title VII to include transgender status or gender identity as protected classes. The EEOC asserted two Title VII claims. First, it asserted a wrongful termination claim on behalf of the Funeral Home's former funeral director Stephens, who is transgender and transitioning from male to female, claiming that it "fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." Second, it alleges that the Funeral

Home engaged in an unlawful employment practice by providing work clothes to male but not female employees.

This Court previously rejected the EEOC's position that it stated a Title VII claim by virtue of alleging that Stephens's termination was due to transgender status or gender identity – because those are not protected classes. The Court recognized, however, that under Sixth Circuit precedent, a claim was stated under the *Price Waterhouse* sex/gender-stereotyping theory of sex discrimination because the EEOC alleges the termination was because Stephens did not conform to the Funeral Home's sex/gender based stereotypes as to work clothing.

The matter is now before the Court on cross-motions for summary judgment. Neither party believes there are any issues of fact for trial regarding liability and each party seeks summary judgment in its favor. The motions have been fully[1] briefed by the parties. The motions were heard by the Court on August 11, 2016.

The Court shall deny the EEOC's motion and shall grant summary judgment in favor of the Funeral Home as to the wrongful termination claim. The Funeral Home's owner admits that he fired Stephens because Stephens intended to "dress as a woman" while at work but asserts two defenses.

First, the Funeral Home asserts that its enforcement of its sex-specific dress code, which requires males to wear a pants-suit with a neck tie and requires females to wear a skirt-suit, cannot constitute impermissible sex stereotyping under Title VII. Although pre-*Price*

[1]This Court granted all requests by the parties to exceed the normal page limitations for briefs. The Court also granted the sole request for leave to file an amicus brief. Thus, the American Civil Liberties Union and the American Civil Liberties Union of Michigan filed an Amicus Curiae Brief.

Waterhouse decisions from other circuits upheld dress codes with slightly differing requirements for men and women, the Sixth Circuit has not provided any guidance on how to reconcile that previous line of authority with the more recent sex/gender-stereotyping theory of sex discrimination. Lacking such authority, and having considered the post-*Price Waterhouse* views that have been expressed by the Sixth Circuit, the Court rejects this defense.

Second, the Funeral Home asserts that it is entitled to an exemption under the federal Religious Freedom Restoration Act ("RFRA"). The Court finds that the Funeral Home has met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on its ability to conduct business in accordance with its sincerely-held religious beliefs. The burden then shifts to the EEOC to show that application of the burden "to the person:" 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest. The Court assumes without deciding that the EEOC has shown that protecting employees from gender stereotyping in the workplace is a compelling governmental interest.

Nevertheless, the EEOC has failed to show that application of the burden on the Funeral Home, under these facts, is the least restrictive means of protecting employees from gender stereotyping. If a least restrictive means is available to achieve the goal, the government must use it. This requires the government to show a degree of situational flexibility, creativity, and accommodation when putative interests clash with religious exercise. It has failed to do so here. The EEOC's briefs do not contain any indication that the EEOC has explored the possibility of any accommodations or less restrictive means that might work under these facts. Perhaps that is

because it has been proceeding as if gender identity or transgender status are protected classes under Title VII, taking the approach that the only acceptable solution would be for the Funeral Home to allow Stephens to wear a skirt-suit at work, in order to express Stephens's female gender identity.

In *Price Waterhouse*, the Supreme Court recognized that the intent behind Title VII's inclusion of sex as a protected class expressed "Congress' intent to forbid employers to take gender into account" in the employment context. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). That is, the goal of the sex-stereotyping theory of sex discrimination is that "gender" "be *irrelevant*" with respect to the terms and conditions of employment and to employment decisions. *Id.* (emphasis added).

The EEOC claims the Funeral Home fired Stephens for failing to conform to the masculine gender stereotypes expected as to work clothing and that Stephens has a Title VII right *not to be subject to gender stereotypes* in the workplace. Yet the EEOC has not challenged the Funeral Home's sex-specific dress code, that requires female employees to wear a skirt-suit and requires males to wear a pants-suit with a neck tie. Rather, the EEOC takes the position that Stephens has a Title VII right to "dress as a woman" (*ie*., dress in a stereotypical feminine manner) while working at the Funeral Home, in order to express Stephens's gender identity. If the compelling interest is truly in eliminating gender stereotypes, the Court fails to see why the EEOC couldn't propose a gender-neutral dress code as a reasonable accommodation that would be a *less restrictive* means of furthering that goal under the facts presented here. But the EEOC has not even discussed such an option, maintaining that Stephens must be allowed to wear a skirt-suit in order to *express* Stephens's gender identity. If the compelling governmental interest

is truly in *removing or eliminating* gender stereotypes in the workplace in terms of clothing (*i.e.*, making gender "irrelevant"), the EEOC's chosen manner of enforcement in this action does not accomplish that goal.

This Court finds that the EEOC has not met its demanding burden. As a result, the Funeral Home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.

As to the clothing allowance claim, the underlying EEOC administrative investigation uncovered possible unlawful discrimination of a kind not raised by the charging party and not affecting the charging party. As such, under the Sixth Circuit precedent, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim. Because the EEOC did not do that, it cannot proceed with that claim in this action. The clothing allowance claim shall be dismissed without prejudice.

BACKGROUND

The EEOC filed this action on September 25, 2014. The First Amended Complaint is the operative complaint. The EEOC asserts two different Title VII claims against the Funeral Home. First, it asserts that the Funeral Home violated Title VII by terminating Stephens because of sex. That is, the EEOC alleges that the Funeral Home's "decision to fire Stephens was motivated by sex-based considerations. Specifically, [the Funeral Home] fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Am. Compl. at ¶ 15). Second, the EEOC alleges that the Funeral Home violated Title VII "by providing a clothing allowance / work clothes to male employees but failing to

provide such assistance to female employees because of sex." (*Id.* at ¶ 17).

Following the close of discovery, each party filed its own motion for summary judgment. This Court's practice guidelines, which are expressly included in the Scheduling Order issued in this case, provide, consistent with Fed. R. Civ. P. 56 (c) and (e), that:

> a. The moving party's papers shall include a separate document entitled Statement of Material Facts Not in Dispute. The statement shall list in separately numbered paragraphs concise statements of each undisputed material fact, supported by appropriate citations to the record. . .
>
> b. In response, the opposing party shall file a separate document entitled Counter-Statement of Disputed Facts. The Counter-Statement shall list in separately numbered paragraphs following the order or the movant's statement, whether each of the facts asserted by the moving party is admitted or denied and shall also be supported by appropriate citations to the record. The Counter-Statement shall also include, in a separate section, a list of each issue of material fact as to which it is contended there is a genuine issue for trial.
>
> c. All material facts as set forth in the Statement of Material Facts Not in Dispute shall be deemed admitted unless controverted in the Counter-Statement of Disputed Facts.

(D.E. No. 19 at 2-3).

In compliance with this Court's guidelines, in support of its motion, the EEOC filed a "Statement of Material Facts Not In Dispute" (D.E. No. 52) ("Pl.'s Stmt. A"). In response to that submission, the Funeral Home filed a "Counter-Statement of Disputed Facts" (D.E. No. 61) ("Def's Stmt. A"). In support of its motion, the Funeral Home filed a "Statement of Material Facts Not In Dispute" (D.E. No. 55) (Def.'s Stmt. B"). In response, the EEOC filed a Counter-Statement of Disputed Facts" (D.E. No. 64) ("Pl.'s Stmt. B").

Notably, neither party believes that there are any genuine issues of material fact for trial regarding liability. (*See* D.E. 64 at Pg ID 2087, "The Commission does not believe there are any

genuine issues of material fact regarding liability for trial;" D.E. No. 61 at Pg ID 1841, "[the Funeral Home] avers that none of the facts in dispute is material to the legal claims at issue.").

The following relevant facts are undisputed.

The Funeral Home and Its Ownership

The Funeral Home has been in business since 1910. The Funeral Home is a closely-held, for-profit corporation owned and operated by Thomas Rost ("Rost"). (Stmts. B at ¶ 1). Rost owns 94.5 % of the shares of the Funeral Home. (Stmts. A at ¶ 19). The remaining shares are owned by his children. (Stmts. B at ¶ 8). Rost's grandmother was a funeral director for the business up until 1950. (Rost Aff. at ¶ 52). Rost has been the owner of the Funeral Home for over thirty years. Rost has been the President of the Funeral Home for thirty-five years and is the sole officer of the corporation. (Stmts. B at ¶¶ 9-10). The Funeral Home has three locations in Michigan: Detroit, Livonia, and Garden City.

The Funeral Home is not affiliated with or part of any church and its articles of incorporation do not avow any religious purpose. (Stmts. A at ¶¶ 25-26). Its employees are not required to hold any religious views. (*Id*. at ¶ 27). The Funeral Home serves clients of every religion (various Christian denominations, Hindu, Muslim, Jewish, native Chinese religions) or none at all. (Stmts. A at ¶ 30). It employs people from different religious denominations, and of no religious beliefs at all. (*Id*. at ¶ 37).

The Funeral Home's Dress Code

Both parties attached the Funeral Home's written Employee Manual as an exhibit to the pending motions. It contains the following regarding dress code:

DRESS CODE

September 1998

For all Staff:

To create and maintain our reputation as "Detroit's Finest", it is fundamentally important and imperative that every member of our staff shall always be distinctively attired and impeccably groomed, whenever they are contacting the public as representatives of The Harris Funeral Home. Special attention should be given to the following consideration, on all funerals, all viewings, all calls, or on any other funeral work.

MEN

SUITS — BLACK GRAY, OR DARK BLUE ONLY (as selected) with conservative styling. Coats should be buttoned at all times. Fasten only the middle button on a three button coat.

If vests are worn, they should match the suit. Sweaters are not acceptable as a vest. NOTHING should be carried in the breast pocket except glasses which are not in a case.

SHIRTS — WHITE OR WHITE ON WHITE ONLY, with regular medium length collars. (Button-down style collars are NOT acceptable). Shirts should always be clean. Collars must be neat.

TIES — As selected by company, or very similar.

SOCKS — PLAIN BLACK OR DARK BLUE SOCKS.

SHOES — BLACK OR DARK BLUE ONLY. (Sport styles, high tops or suede shoes are not acceptable). Shoes should always be well polished.

. . . .

PART TIME MEN - Should wear conservative, dark, business suits, avoiding light brown, light blue, light gray, or large patterns. All part time personnel should follow all details of dress as specified, as near as possible.

FUNERAL DIRECTORS ON DUTY – Are responsible for the appearance of the staff assisting them on services and are responsible for personnel on evening duty.

WOMEN

> Because of the particular nature of our business, please dress conservatively. A suit or a plain conservative dress would be appropriate, or as furnished by funeral home. Avoid prints, bright colored materials and large flashy jewelry. A sleeve is necessary, a below elbow sleeve is preferred.
>
> Uniformity creates a good impression and good impressions are vitally important for both your own personal image and that of our Company. Our visitors should always associate us with clean, neat and immaculately attired men and women.

(D.E. No. 54-20 at Pg ID 1486-87) (underlining and capitalization in original).

In addition, it is understood at the Funeral Home that men who interact with the public are required to wear a business suit (pants and jacket) with a neck tie, and women who interact with the public are generally[2] required to wear a business suit that consists of a skirt and business jacket. (Stmts. B at 51; D.E. No. 54-11 at Pg ID 1423).

The Funeral Home administers its dress code based upon its employees' biological sex. (Stmts. B at ¶ 51). Employees at the Funeral Home have been disciplined in the past for failing to abide by the dress code. (Stmts. B at ¶ 60).

Stephens's Employment And Subsequent Termination

The Funeral Home hired Stephens in October of 2007. At that time, Stephens's legal name was Anthony Stephens. All of the Funeral Home's employment records pertaining to Stephens – including driver's license, tax records, and mortuary science license – identify Stephens as a male. (Stmts. B at ¶ 63).

Stephens served as a funeral director/embalmer for the Funeral Home for nearly six years

[2]Rost testified that female employees at the Detroit location do not wear a skirt and jacket "all the time over there," and sometimes wear pants and a jacket. (Rost Dep., D.E. No. 54-11 at Pg ID 1423).

under the name Anthony Stephens. (Stmts. A at ¶¶ 1-2).

On July 31, 2013, Stephens provided the Funeral Home/Rost with a letter that stated, in pertinent part:

> Dear Friends and Co-Workers:
>
> I have known many of you for some time now, and I count you all as my friends. What I must tell you is very difficult for me and is taking all the courage I can muster. I am writing this both to inform you of a significant change in my life and to ask for your patience, understanding, and support, which I would treasure greatly.
>
> I have a gender identity disorder that I have struggled with my entire life. I have managed to hide it very well all these years . . .
>
> . . . It is a birth defect that needs to be fixed. I have been in therapy for nearly four years now and have been diagnosed as a transexual. I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness. With the support of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have lived with. Toward that end, I intend to have sex reassignment surgery. *The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee Australia Stephens, in appropriate business attire*.
>
> I realize that some of you may have trouble understanding this . . . It is my wish that I can continue my work at R.G. & G. R. Harris Funeral Homes doing what I have always done, which is my best!

(D.E No. 53-22) (emphasis added).

It is undisputed that Stephens intended to abide by the Funeral Home's dress code for its female employees – which would be to wear a skirt-suit. (Stmts. A at ¶ 8; Stmts. B at ¶ 51; D.E. No. 54-11 at Pg ID 1423; *see also* D.E. No. 51 at Pg ID 605, and First Am. Compl. at 4).

Stephens hand-delivered a copy of the letter to Rost. (Rost Dep. at 110). Rost made the decision to fire Stephens by himself and did so on August 15, 2013. (Stmts. A at ¶¶ 10, 12-13;

Rost Dep. at 117-18). Rost privately fired Stephens in person. (Stmts. A at ¶ 11). Rost testified:

> Q. Okay. How did you fire Stephens: how did you let Ms. Stephens know that she was being released?
> A. Well, I said to him, just before he was – it was right before he was going to go on vacation and I just – I said – I just said "Anthony, this is not going to work out. And that your services would no longer be needed here."

(Rost Dep. at 126). Stephens also testified that Rost said it was not going to work out. (Stephens Dep. at 80). Stephens's understanding from that conversation was that "coming to work dressed as a woman was not going to be acceptable." (*Id.*). It was a brief conversation and Stephens left the facility. (Rost Dep. at 127).

After being terminated, Stephens met with an attorney and ultimately filed a charge of discrimination with the EEOC. (Stephens Dep. at 79-80; D.E. No. 54-22). The EEOC charge filed by Stephens checked the box for "sex" discrimination and indicated that the discrimination took place from July 31, 2013 to August 15, 2013. (D.E. No. 54-22 at Pg ID 1497). The charge stated "the particulars" of the claimed sex discrimination as follows:

> I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.
>
> On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition. Moreover, during my entire employment I know there are no other female Funeral Directors/Embalmers.
>
> I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(*Id.*).

Administrative EEOC Proceedings

During the EEOC administrative proceedings, the Funeral Home filed a response to the Charge of Discrimination that stated, among other things, that it has a written dress code policy and that Stephens was terminated because Stephens refused to comply with that dress code. (D.E. No. 63-16).

During the administrative investigation, the EEOC discovered that male employees at the Funeral Home were provided with work clothing and that female employees were not. (D.E. No. 63-3, March 2014 Onsite Memo).

On June 5, 2014, the EEOC issued its "Determination." (D.E. No. 63-4). It stated, in pertinent part:

> The Charging Party alleged that she was discharged due to her sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> Evidence gathered during the course of the investigation reveals that there is reasonable cause to believe that the Charging Party's allegations are true.
>
> Like and related and growing out of this investigation, the Commission found probable cause to believe that the Respondent discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(D.E. No. 63-4).

Complaint, Amended Complaint, and Affirmative Defenses

The EEOC filed this civil action against the Funeral Home on September 25, 2014, asserting its two claims.

As its first responsive pleading, the Funeral Home filed a Motion to Dismiss seeking dismissal of the wrongful termination claim. This Court denied that motion, ruling that the

EEOC's complaint stated a claim on behalf of Stephens for sex-stereotyping sex-discrimination under binding Sixth Circuit authority. (*See* 4/23/15 Opinion, D.E. No. 13). This Court rejected, however, the EEOC's position that its complaint stated a Title VII claim on behalf of Stephens by virtue of alleging that the Funeral Home fired Stephens because of transgender status or gender identity. (*See* D.E. No. 13 at Pg ID 188) (noting that "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII.").

On April 29, 2015, the Funeral Home filed its Answer and Affirmative Defenses. (D.E. No. 14).

On May 15, 2015, the EEOC sought to file a First Amended Complaint, in order to correct the spelling of Stephens's first name. That First Amended Complaint, that contains the same two claims, was filed on June 1, 2015. (D.E. No. 21).[3]

On June 4, 2015, the Funeral Home filed its Answer and Affirmative Defenses to the EEOC's First Amended Complaint, (D.E. No. 22). In it, the Funeral Home included additional affirmative defenses, including: 1) "The EEOC's claims violate the Funeral Home's right to free exercise of religion under the First Amendment to the United States Constitution;" and 2) "The EEOC's claims violate the Funeral Home's rights under the federal Religious Freedom Restoration Act (RFRA)." (*Id*. at Pg ID 254).

[3]Although this Court rejected the EEOC's position that it could pursue a Title VII claim based on transgender status or gender identity, the EEOC kept those allegations in the First Amended Complaint because it wished to preserve its right to appeal this Court's ruling. (*See* D.E. No. 37 at Pg ID 462-63).

Relevant Discovery In This Action

a. Termination Decision

Again, Rost made the decision to terminate Stephens. (Stmts. A at ¶¶ 12-13). It is undisputed that job performance did not motivate Rost's decision to terminate Stephens. (Stmts. A at ¶ 16). During his deposition in this action, Rost testified:

Q. Okay. Why did you – *what was the specific reason that you terminated Stephens?*
A. *Well, because he – he was no longer going to represent himself as a man. He wanted to dress as a woman.*
Q. Okay. So he presented you this letter . . .
A. Number 7, yes.
Q. Yeah, Exhibit 7. So just for a little background and pursuant to the question of Mr. Price, you were presented that letter from Stephens?
A. Correct.
Q. Okay. And did anywhere in that letter indicate that Stephens would continue to dress under your dress code as a man in the workplace?
A. No.
Q. Did he ever tell you during your meeting when he handed you that letter that he would continue to dress as a man?
A. No.
Q. *Did he indicate that he would dress as a woman?*
A. *Yes. Yes.*
Q. Okay. *Is it – the reason you fired him*, was it because he claimed that he was really a woman; is that why you fired him or was it because he claimed – or that he would no longer dress as a man?
A. *That he would no longer dress as a man.*
Q. And why was that a problem?
A. Well, because we – *we have a dress code that is very specific that men will dress as men*; *in appropriate manner, in a suit and tie* that we provide and that women will conform to their dress code that we specify.
Q. So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
A. No.

(Rost Dep. at 135-37) (emphasis added).

b. Rost's Religious Beliefs

Rost also testified that the Funeral Home's dress code comports with his religious views. (Stmts. A at ¶ 18).

Rost has been a Christian for over sixty-five years. (Stmts. B at ¶ 17). He attends both Highland Park Baptist Church and Oak Pointe Church. For a time, Rost was on the deacon board of Highland Park Baptist Church. Rost is on the board of the Detroit Salvation Army, a Christian nonprofit ministry, and has been for 15 years; he was the former Chair of the advisory board. (Smts. B at ¶¶ 18-19).

The Funeral Home's mission statement is published on its website, which reads "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." (Smts. B at ¶ 21). The website also contains a Scripture verse at the bottom of the mission statement page:

> "But seek first his kingdom and righteousness, and all these things shall be yours as well."
>
> Matthew 5:33

(Stmts. B at ¶ 22 ; D.E. No. 54-16).

In operating the business, Rost places, throughout the funeral homes, Christian devotional booklets called "Our Daily Bread" and small cards with Bible verses on them called "Jesus Cards." (Stmts. B at ¶ 23).

Rost sincerely believes that God has called him to serve grieving people. He sincerely believes that his "purpose in life is to minister to the grieving, and his religious faith compels him to do that important work." (Stmts. B. at ¶ 31). It is also undisputed that Rost sincerely believes that the "Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex." (Stmt. B at ¶ 28).

In support of the Funeral Home's motion, Rost submitted an affidavit. (D.E. No. 54-2). Rost operates the Funeral Home "as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives." (*Id*. at ¶ 7).

At the Funeral Home, the funeral directors are the most "prominent public representatives" of the business and are "the face that [the Funeral Home] presents to the world." (*Id*. at ¶ 32). The Funeral Home "administers its dress code based on our employees' biological sex, not based on their subjective gender identity." (*Id*. at ¶ 35).

Rost believes "that the Bible teaches that God creates people male or female." (*Id*. at ¶ 41). He believes that "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex." (*Id*. at ¶ 42). Rost believes that he "would be violating God's commands if [he] were to permit one of the [Funeral Home's] funeral directors to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [he] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 43). Rost believes that "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." (*Id*. at ¶ 44). Rost believes that he "would be violating

God's commands" if he were to permit one of the Funeral Home's male funeral directors to wear the skirt-suit uniform for female directors while at work because Rost "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 45). If Rost "were forced as the owner of [the Funeral Home] to violate [his] sincerely held religious beliefs by paying for or otherwise permitting one of [his] employees to dress inconsistent with his or her biological sex, [Rost] would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." (*Id*. at ¶ 48).

Rost's Affidavit also states that he "would not have dismissed Stephens if Stephens had expressed [to Rost] a belief that he is a woman and an intent to dress or otherwise present as a woman outside of work, so long as he would have continued to conform to the dress code for male funeral directors while at work. It was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in [his] employment decision." (*Id*. at ¶ 50). Rost "would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job." (*Id*. at ¶ 51).

c. Clothing Benefits

The Funeral Home provides its male employees who interact with clients, including funeral directors, with suits and ties free of charge. (Stmts. A at ¶ 42). Upon hire, full-time male employees who interact with the public are provided two suits and two ties, while part-time male employees who interact with the public are provided one suit and tie. (Stmts. A at ¶ 47). After those initial suits are provided, the Funeral Home replaces them as needed. (*Id*. at ¶ 48). The

Funeral Home spends about $225 per suit and $10 per tie. (*Id*. at ¶ 52).

It is undisputed that benefits were not always provided to female employees. Starting in October of 2014, however, the Funeral Home began providing female employees who interact with the public with an annual clothing stipend that ranged from $75.00 for part-time employees to $150.00 for full-time employees. (*See* Stmts. A at ¶ 54; Rost Dep. at 15-16).

In addition, the Funeral Home affirmatively states that it will offer the same type of clothing allowance that it provides to male funeral directors to any female funeral directors in the future: the Funeral Home "will provide female funeral directors with skirt suits in the same manner that it provides pant suits to male funeral directors." (Rost Aff. at ¶ 54).

STANDARD OF DECISION

Summary judgment will be granted where there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

ANALYSIS

Under Title VII, it is an "unlawful employment practice" for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of such individual's sex. 42 U.S.C. § 2000e-2(a). "We take these words to mean that *gender must be irrelevant* to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (emphasis added).

Here, the EEOC asserts that the Funeral Home violated Title VII in two ways.

I. Title VII Wrongful Termination Claim On Behalf Of Stephens

The EEOC alleges that Stephens was terminated in violation of Title VII under a *Price Waterhouse* sex-stereotyping theory of sex discrimination. That is, the EEOC alleges that the Funeral Home violated Title VII by firing Stephens because Stephens did not conform to the Funeral Home's sex/gender based stereotypes as to work clothing.[4]

This Court previously denied a Motion to Dismiss filed by the Funeral Home and ruled that the EEOC's complaint stated a *Price Waterhouse* sex/gender-stereotyping claim under Title VII. (*See* D.E. No. 13). That ruling was based on several Sixth Circuit cases that establish that a transgender person – just like anyone else – can bring such a claim under Title VII. *See Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Myers v. Cuyahoga County, Ohio*, 182 F. App'x 510, 2006 WL 1479081 (6th Cir. 2006).

The Court includes here some aspects of those decisions that bear on the positions advanced by the parties in the pending motions. First, the Sixth Circuit has gone a bit further than other courts in terms of the reach of a sex-stereotyping claim after *Price Waterhouse* and

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[4]Notably, the parties have confined their claims, defenses, and analysis to *clothing alone*. In addition, unlike many sex-stereotyping cases, this case does not involve any allegations that the Funeral Home discriminated against Stephens based upon any gender-nonconforming *behaviors*.

spoke of discrimination against men who wear dresses:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses[5] and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

Smith, 378 F.3d at 574 (emphasis in original). Second, the cases indicate that Title VII sex-stereotyping claims follow the same analytical framework followed in other Title VII cases, including the *McDonnell Douglas* burden-shifting paradigm. *See e.g., Myers*, 182 F. App'x at 519.

It is well-established that, at the summary judgment stage, a plaintiff must adduce either direct or circumstantial evidence to proceed with a Title VII claim. *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009); *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004).

The EEOC's Motion for Summary Judgment asserts that, based on Rost's testimony, it has direct evidence that the Funeral Home fired Stephens based on sex stereotypes and it is therefore entitled to summary judgment. That appears to be a solid argument, as the "ultimate question" as to the Title VII sex-stereotyping claim is whether the Funeral Home fired Stephens "because of [Stephens's] failure to conform to sex stereotypes," *Barnes*, 401 F.3d at 738, and Rost testified:

> Q. Okay. Why did you – *what was the specific reason that you terminated Stephens?*
> A. *Well, because he – he was no longer going to represent himself as a man.*

---

[5]Neither *Smith* nor *Barnes* appeared to involve a person who was born male wearing a dress in the workplace. *See, e.g., Barnes*, 401 F.3d at 738 (noting the plaintiff had a "practice of dressing as a woman outside of work.").

He wanted to dress as a woman.

. . . .

Q. *Did he indicate that he would dress as a woman?*
A. *Yes. Yes.*
Q. Okay. *Is it – the reason you fired him*, was it because he claimed that he was really a woman; is that why you fired him or was it because he claimed – or that he would no longer dress as a man?
A. *That he would no longer dress as a man.*
Q. And why was that a problem?
A. Well, because we – *we have a dress code that is very specific that men will dress as men*; *in appropriate manner*, in a suit and tie that we provide and that women will conform to their dress code that we specify.
Q. So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
A. No.

(Rost Dep. at 135-37) (emphasis added). Thus, while this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here.

The Funeral Home asserts that the EEOC's motion should be denied, and that summary judgment should be entered in its favor, based upon two defenses. First, it asserts that its enforcement of its sex-specific dress code does not constitute impermissible sex stereotyping under Title VII. Second, the Funeral Home asserts that RFRA prohibits the EEOC from applying Title VII to force the Funeral Home to violate its sincerely held religious beliefs.[6]

A. The Court Rejects The Funeral Home's Sex-Specific Dress-Code Defense.

The Funeral Home argues that its enforcement of its sex-specific dress code cannot constitute impermissible sex stereotyping under Title VII. It asserts that several courts have

[6]The EEOC's Motion, and the ACLU's brief, both address a First Amendment Free Exercise defense by the Funeral Home. (*See, e.g.*, EEOC's motion at 13). The Funeral Home, however, did not respond to the arguments concerning that defense because it believes that RFRA provides it more expansive protection. (*See* D.E. No. 60 at Pg ID 1797, n.4).

concluded that sex-specific dress codes and grooming policies that impose equal burdens on men and women do not violate Title VII. The Funeral Home essentially asks the Court to rule that its sex-specific dress code operates as a defense to the wrongful termination claim because the Funeral Home's dress code does not impose an unequal burden on male and female employees. The Funeral Home relies primarily on two cases to support its position: 1) *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (*en banc*); and 2) *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977).

As explained below, the Court concludes that this defense must be rejected because: 1) the sex-specific dress code cases that the Funeral Home relies on involved claims that challenged an employer's dress code as violative of Title VII, and this case involves no such claim; 2) the Funeral Home's argument is based upon a non-binding decision of the Ninth Circuit; 3) the Ninth Circuit decision is divided and the dissent is more in line with the views expressed by the Sixth Circuit as to *post-Price Waterhouse* sex-stereotyping claims; and 4) the only Sixth Circuit case on dress codes cited by the Funeral Home is from 1977 – a decade before *Price Waterhouse* was decided.

Unlike the cases that the Funeral Home relies on, as the EEOC and ACLU both note, the EEOC has not asserted any claims in this action based upon the Funeral Home's dress code policy. That is, the Funeral Home's sex-specific dress code policy *has not* been challenged by the EEOC in this action. Rather, the dress code is only being injected because the Funeral Home is using its dress code as a *defense* to the Title VII sex-stereotyping claim asserted on behalf of Stephens. Indeed, the Funeral Home listed this as an affirmative defense:

The EEOC's claims are barred by virtue of the fact that the Funeral Home was

> legally justified in any and all acts of which the EEOC complains, including but not limited to the Funeral Home's right to impose sex-specific dress codes on its employees.

(D.E. No. 14 at Pg ID 202).

The primary case the Funeral Home relies on is *Jespersen.* In that case, the Ninth Circuit issued an *en banc* decision in order to clarify its "circuit law concerning appearance and grooming standards, and to clarify [its] evolving law of sex stereotyping claims." *Jespersen*, 444 F.3d at 1105. In that case, the plaintiff was a female bartender who was terminated from her position after she refused to follow the company's "Personal Best" policy, which required female employees to wear specified make-up[7] and prohibited male employees from wearing any makeup. The plaintiff alleged that the policy discriminated against women by: 1) subjecting them to terms and conditions of employment to which men are not similarly subjected; and 2) requiring that women conform to sex-based stereotypes as a term and condition of employment.

The majority affirmed the district court's dismissal of the plaintiff's claims. In doing so, the majority stated:

> We agree with the district court and the panel majority that on this record, Jespersen has failed to present evidence sufficient to survive summary judgment on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, *we hold that appearance standards,* including makeup requirements*, may well be the subject of a Title VII claim for sexual stereotyping*, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping. We therefore affirm.

Id. at 1106 (emphasis added). Even though the majority affirmed the district court, it emphasized that it was "not preclud[ing], as a matter of law, a claim of sex-stereotyping on the basis of dress

[7]Face powder, blush, mascara, and lip color.

or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves." *Id*. at 1113.

Moreover, the dissent lays out a cogent explanation as to why the plaintiff in that case had a sex-stereotyping claim under *Price Waterhouse*:

> I agree with the majority that appearance standards and grooming policies may be subject to Title VII claims. . . I part ways with the majority, however, inasmuch as I believe that the "Personal Best" program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was "because of" her sex. Accordingly, I dissent from Part III of the majority opinion and from the judgment of the court.
>
> Jespersen's evidence showed that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders. Harrah's stringent "Personal Best" policy required female beverage servers to wear foundation, blush, mascara, and lip color, and to ensure that lip color was on at all times. Jespersen and her female colleagues were required to meet with professional image consultants who in turn created a facial template for each woman. Jespersen was required not simply to wear makeup; in addition, the consultants dictated where and how the makeup had to be applied. Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination "because of" sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that "gender must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) (emphasis added).

Jespersen, 444 F.3d at 1113-14. The dissent noted that "*Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves" and cited the Sixth Circuit's decision in *Smith*, wherein it had stated "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Jespersen,* 444 F.3d at 1115 (quoting *Smith, supra*). The dissent further stated, "I believe that the fact that Harrah's designed and promoted a policy

that required women to conform to a sex stereotype by wearing full makeup is sufficient 'direct evidence' of discrimination." *Id*. The dissent concluded that the plaintiff presented a "classic case" of *Price Waterhouse* discrimination. *Id.* at 1116.

The Funeral Home has not directed the Court to any cases wherein the Sixth Circuit has endorsed the majority view in *Jespersen*. And the only Sixth Circuit dress-code case that it cites is from 1977 – a decade before *Price Waterhouse* was decided.

In pre-*Price Waterhouse* decisions, dating back to the 1970's, other circuits have held that employer personal appearance codes with differing requirements for men and women do not violate Title VII as long as there is "some justification in commonly accepted social norms and are reasonably related to the employer's business needs." *Carroll v. Talman Fed. Savings & Loan*, 604 F.2d 1028, 1032 (7th Cir. 1979); *see also Fountain v. Safeway Stores, Inc*., 555 F.2d 753, 755 (9th Cir. 1977) ("regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII."). In *Barker v. Taft Broadcasting, Co.,* 549 F.2d 400 (6th Cir. 1977), a majority of a Sixth Circuit panel expressed a similar view, ruling that an employer's grooming code that required a shorter hair length for men than women did not violate Title VII, while the dissent concluded that a Title VII claim was stated.

But the Sixth Circuit has not provided any post-*Price Waterhouse* guidance as to whether sex-specific dress codes, that have slightly differing clothing requirements for men and women, either violate Title VII or provide a defense to a sex stereotyping claim. This evolving area of the law – how to reconcile this previous line of authority regarding sex-specific dress/grooming codes with the more recent sex/gender-stereotyping theory of sex discrimination under Title VII

– has not been addressed by the Sixth Circuit.

Lacking such guidance, this Court finds that the dissent in *Jespersen* appears more in line with the post-*Price Waterhouse* views that *have been* expressed by the Sixth Circuit. This is illustrated by a comparison of the majority's ruling in *Jespersen* to the portion of the Sixth Circuit's decision in *Smith* that was quoted by the dissent in *Jespersen:*

The majority in *Jespersen* upheld the dismissal of a sex discrimination claim where the female plaintiff was terminated for not complying with a policy that required women (but not men) to wear makeup.	"After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Smith, supra*, at 1115.

It appears unlikely that the *Smith* court would allow an employer like the employer in *Jespersen* to avoid liability for a Title VII sex-stereotyping claim simply by virtue of having put its gender-based stereotypes into a formal policy.

Accordingly, for all of these reasons, the Court rejects the Funeral Home's sex-specific dress code defense to the Title VII sex-stereotyping claim asserted on behalf of Stephens in this case.

B. The Funeral Home Is Entitled To A RFRA Exemption Under The Unique Facts And Circumstances Presented Here.

The Funeral Home also argues that the Religious Freedom Restoration Act of 1993 ("RFRA") prohibits the EEOC from applying Title VII to force the Funeral Home to violate its sincerely held religious beliefs. It asserts this defense on the heels of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751 (2014).

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious

liberty. RFRA's enactment came three years after" the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), "which largely repudiated the method of analyzing free-exercise claims that had been used" in cases such as *Sherbert v. Verner* and *Wisconsin v. Yoder*. *Hobby Lobby*, 134 S.Ct. 2760. In short, in *Smith*, the Supreme Court rejected the previous balancing test set forth in *Sherbert* and "held that, under the First Amendment, 'neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.'" *Id.*

"Congress responded to *Smith* by enacting RFRA." *Hobby Lobby*, 134 S.Ct. at 2761. "RFRA prohibits the "Government [from] substantially burden[ing] a *person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added). The majority in *Hobby Lobby* further held:

> "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2); *see also* § 2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." § 2000bb–1(a). If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b).

Id. at 2761.

One of the stated purposes of RFRA is to provide a "defense to persons whose religious

exercise is substantially burdened by the government." 42 U.S.C. § 2000bb(b)(2). RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or *defense in a judicial proceeding*." 42 U.S.C. § 2000bb-1(c) (emphasis added).

By its terms, RFRA "applies to *all Federal law*, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a) (emphasis added).

1. The Funeral Home Is Entitled To Protection Under RFRA And RFRA Applies To The EEOC, A Federal Agency.

The majority in *Hobby Lobby* concluded that a for-profit corporation is considered a "person" for purposes of RFRA protection. *Hobby Lobby*, 134 S.Ct. at 2768-69. The Funeral Home, a for-profit, closely-held corporation, is therefore entitled to protection under RFRA.

RFRA applies to the "government," which is defined to include "a branch, department, *agency*, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb–2(1) (emphasis added). On its face, the statute applies to the EEOC, a federal agency, and the EEOC has not argued otherwise.

2. The Funeral Home Has Met Its Initial Burden Of Establishing That Compliance With Title VII "Substantially Burdens" Its Exercise Of Religion.

If RFRA applies in this case, then the Court "must next ask" whether the law at issue "substantially burdens" the Funeral Home's exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2775. "Whether a government action substantially burdens a plaintiff's religious exercise is a question of law for a court to decide." *Singh v. McHugh*, __ F. Supp.3d __, 2016 WL 2770874 at

*5 (D.C. Cir. 2016).

As the challenging party, the Funeral Home has the initial burden of showing a substantial burden on its exercise of religion. For purposes of RFRA, "exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs." *Hobby Lobby*, 134 S.Ct. at 2762.

Moreover, the majority in *Hobby Lobby* explained that the "question that RFRA presents" is whether the law at issue "imposes a substantial burden on the *ability of the objecting parties to conduct business in accordance with their religious beliefs*."[8] *Hobby Lobby*, 134 S.Ct. at 2778 (emphasis in original). Thus, the question becomes whether the law at issue here, Title VII and the body of sex-stereotyping case law that has developed under it, imposes a substantial burden on the ability of the Funeral Home to conduct business in accordance with its religious beliefs. The Court concludes that the Funeral Home has shown that it does.

Rost has been a Christian for over sixty-five years. The Funeral Home's mission statement is published on its website, which reads "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." (Smts. B at ¶ 21).

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[8]The EEOC's brief asserts that RFRA protects only specific religious activities, not beliefs, and that the Funeral Home is still able to engage in its limited religious activities, like the placing of devotional cards in the funeral homes. The EEOC's limited view is not supported by the majority opinion in *Hobby Lobby*.

Rost believes that God has called him to serve grieving people and that his purpose in life is to minister to the grieving, and his religious faith compels him to do that important work. (Stmts. B. at ¶ 31). Rost believes that the "Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex." (Stmt. B at ¶ 28).

The EEOC attempts to cast the Funeral Home as asserting that it would only be substantially burdened if it were required to provide female work clothing to Stephens. (D.E. 63 at Pg ID 1935). The Funeral Home's position is not so limited.

Rost believes "that the Bible teaches that God creates people male or female." (*Id*. at ¶ 41). He believes that "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex." (*Id*. at ¶ 42). Rost believes that he "would be violating God's commands" if he were to permit one of the Funeral Home's funeral directors "to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [Rost] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 43). Rost believes that "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." (*Id*. at ¶ 44). Rost believes that he "would be violating God's commands" if he were to permit one of the Funeral Home's biologically-male-born funeral directors to wear the skirt-suit uniform for female directors while at work, because Rost "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 45).

Such beliefs implicate questions of religion and moral philosophy. *Hobby Lobby*, 134

S.Ct. at 2779. Rost sincerely believes that it would be violating God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at the funeral home because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift. The Supreme Court has directed that it is not this Court's role to decide whether those "religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S.Ct. at 2779. Instead, this Court's "narrow function" is to determine if this is "an honest conviction" and, as in *Hobby Lobby*, there is no dispute that it is.

Notably, the EEOC concedes that the Funeral Home's religious beliefs are sincerely held. (*See* D.E. No. 51 at Pg ID 596 & 612, "The Commission does not contest Defendant's religious sincerity.").

The Court finds that the Funeral Home has shown that the burden is "substantial." Rost has a sincere religious belief that it would be violating God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at one of his funeral homes because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift. Rost objects on religious grounds to: 1) being compelled to provide a skirt to an employee who was born a biological male; and 2) being compelled to allow an employee who was born a biological male to wear a skirt while working as a funeral director for his business. To enforce Title VII (and the sex stereotyping body of case law that has developed under it) by requiring the Funeral Home to provide a skirt to and/or allow an employee born a biological male to wear a skirt at work would impose a substantial burden on the ability of Rost to conduct his business in accordance with his sincerely-held religious beliefs.

If Rost and the Funeral Home do not yield to Title VII and the body of sex stereotyping

case law under it, the economic consequences for the Funeral Home could be severe – having to pay back and front pay to Stephens in connection with this case.

Moreover, Rost testified that if he "were forced as the owner of [the Funeral Home] to violate [his] sincerely held religious beliefs by paying for or otherwise permitting one of [his] employees to dress inconsistent with his or her biological sex, [Rost] would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." (Rost Aff. at ¶ 48).

The Court concludes that the Funeral Home has met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on the ability of the Funeral Home to conduct business in accordance with its sincerely-held religious beliefs.

3. The Funeral Home Is Entitled To An Exemption Unless The EEOC Meets Its Demanding Two-Part Burden.

Once a claimant demonstrates a substantial burden to his religious exercise, that person "is entitled to an exemption from" the law unless the Government can meet its burden of showing that application of the burden "to the person:" 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest. *Hobby Lobby,* 134 S.Ct. at 2761.

The Supreme Court has described the dual justificatory burdens imposed on the government by RFRA as "the most demanding test known to constitutional law." *City of Boerne v. P.F. Flores*, 117 S.Ct. 2157, 2171 (1997).

a. The Court Assumes, Without Deciding, That The EEOC Has Met Its Compelling Governmental Interest Burden.

The EEOC appears to take the position that RFRA can never succeed as a defense to a Title VII claim or that Title VII will always be presumed to serve a compelling governmental interest and be narrowly tailored for purposes of a RFRA analysis. (*See* D.E. No. 63 at Pg ID 1899, asserting that RFRA "does not protect employers from the mandates of Title VII" and D.E. No. 51 at Pg ID 628, asserting that the majority in *Hobby Lobby* "*suggested* in a colloquy" with the principal dissent "that Title VII serves a compelling governmental interest which cannot be overridden by RFRA.") (emphasis added).

The majority did reference employment discrimination, in discounting the dissent's concern that the majority's ruling may lead to widespread discrimination cloaked in religion, stating:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. *See post*, at 2804 – 2805. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Hobby Lobby, 134 S.Ct. at 2784. This Court does not read that paragraph as indicating that a RFRA defense can never prevail as a defense to Title VII or that Title VII is exempt from the focused analysis set forth by the majority. If that were the case, the majority would presumably have said so. It did not.

Moreover, the majority stated "[t]he dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally

applicable laws, and the dissent expresses a desire to keep the courts out of this business" but noted that it was Congress that enacted RFRA and explained "[t]he wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written." *Id*. at 2784-85.[9]

And the dissent surely does not read the majority opinion as exempting Title VII (or other generally-applicable anti-discrimination laws) from a RFRA defense or the focused analysis set forth in the majority opinion:

> Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. *See, e.g., Newman v. Piggie Park Enterprises, Inc*., 256 F.Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (C.A.4 1967), *aff'd and modified on other grounds*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn.1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), *appeal dismissed*, 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); *Elane Photography, LLC v. Willock*, 2013–NMSC–040, —— N.M. ——, 309 P.3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), *cert. denied*, 572 U.S. ——, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine ... the plausibility of a religious claim"? *Ante,* at 2778.

Id. at 2804-05.

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[9]The same is true of this Court.

Without any authority to indicate that Title VII is exempted from the analysis set forth in *Hobby Lobby*, this Court concludes that it must be applied here. *See also Holt v. Hobbs*, 135 S. Ct. 853, 858 (2015) (discussing, in a RLUIPA case, how the lower court believed it was somehow bound to defer to the Department of Correction's security policy as a compelling interest that is narrowly tailored and explaining that the statute "does not permit such *unquestioning deference*. RLUIPA, like RFRA, 'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'") (emphasis added).

The majority in *Hobby Lobby* instructed that when determining whether a challenged law serves a compelling interest, it is not sufficient to use "very broad terms," such as "promoting" "gender equality." *Hobby Lobby*, 134 S.Ct. at 2779. That is because "RFRA contemplates a '*more focused inquiry*: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Id*. (citations omitted) (emphasis added). This is critical because it means the Government's showing must focus on justification of the particular person burdened – here, the Funeral Home. In other words, even if the Government can show that the law is in furtherance of a generalized or broad compelling interest, it must still demonstrate the compelling interest is satisfied through application of the law *to the Funeral Home under the facts of this case*.

The majority in *Hobby Lobby* held that this requires this Court to scrutinize "the asserted harm of granting specific exemptions to [the] particular religious claimant" and "look to the marginal interest in enforcing" the challenged law in this particular context. *Hobby Lobby*, 134

S.Ct. at 2779. The majority in *Hobby Lobby*, however, assumed without deciding that the requisite "to the person" compelling interest existed. Thus, it did not provide any real guidance for how to go about doing that. As the principal dissent noted, the majority opinion provides "[n]ot much help" for "the lower courts bound by" it. *Id*. at 2804.

Here, in response to the Funeral Home's motion, the EEOC very broadly asserts that "Congress's mandate to eliminate workplace discrimination" is the compelling governmental interest that warrants burdening the Funeral Home's exercise of religion. (D.E. No. 63 at Pg ID 1934). In the section of its own motion that deals with the government's burden, the EEOC more specifically asserts that Title VII's prohibitions against sex discrimination establish that the government has a compelling interest in protecting employees from gender stereotyping in the workplace. (D.E. No. 51 at Pg ID 629).

The Court fails to see how the EEOC has met its requisite "to the person"-focused showing here. But this Court is also at a loss for how this Court is supposed to scrutinize "the asserted harm of granting specific exemptions to [the] particular religious claimant" and "look to the marginal interest in enforcing" the challenged law in this particular context. *Hobby Lobby*, 134 S.Ct. at 2779. This Court will therefore assume without deciding that the EEOC has met its first burden and proceed to the least restrictive means burden.

b. The EEOC Has Failed To Meet Its Burden Of Showing That Application Of The Burden On The Funeral Home, Under The Facts Presented Here, Is The Least Restrictive Means Of Furthering The Compelling Governmental Interest Of Protecting Employees From Gender Stereotyping In The Workplace.

If the EEOC meets its burden regarding showing a compelling interest, then the Court

must determine if the EEOC has met its additional, and separate, burden of showing that application of the burden "to the person" is the least restrictive means of furthering that compelling governmental interest. *Hobby Lobby,* 134 S.Ct. at 2761.

The "least-restrictive means standard is exceptionally demanding." *Hobby Lobby*, 134 S.Ct. at 2780. That standard requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Id*. at 2780.

If a less restrictive means is available for the government to achieve the goal, the government must use it. *Holt v. Hobbs*, 135 S.Ct. 853, 864 (2015). As another district court within the Sixth Circuit has explained, "[t]his 'exceptionally demanding' standard, *Burwell*, 134 S.Ct. at 2780, begs for the Government to show *a degree of situational flexibility, creativity, and accommodation* when putative interests clash with religious exercise." *United States v. Girod*, __ F. Supp.3d __, 2015 WL 10031958 at *8 (E.D. Ky. 2015) (emphasis added).

Again, it is the EEOC that has the burden of showing that enforcement of the religious burden on the Funeral Home is the least restrictive means of furthering its compelling interest of protecting employees from gender stereotyping in the workplace.

As to this burden, the EEOC's position is stated in: 1) a page and a half in its own motion (D.E. No. 51 at Pg ID 629-30); and 2) two paragraphs that respond to the Funeral Home's motion. (D.E. No. 63 at Pg ID 1939). Essentially, the EEOC asserts, in a conclusory fashion, that Title VII is narrowly tailored:

> Title VII's prohibitions against sex discrimination in the workplace demonstrate that the government has a compelling interest in protecting employees from losing their jobs on the basis of an employer's gender stereotyping, and they are precisely

tailored to ensure this.

(D.E. No. 51 at Pg ID 629).[10]

Thus, the EEOC has not provided a focused "to the person" analysis of how the burden on the Funeral Home's religious exercise is the least restrictive means of eliminating clothing[11] gender stereotypes at the Funeral Home under the facts and circumstances presented here.

The Funeral Home argues that "the EEOC does not even attempt to explain" how requiring the Funeral Home to allow a funeral director who was born a biological male to wear a skirt-suit to work could be found to satisfy RFRA's least-restrictive means requirement. (D.E. No. 60 at Pg ID 1797).[12]

Indeed, the EEOC's briefs do not contain *any discussion* to indicate that the EEOC has ever (in either the administrative proceedings or during the course of this litigation) explored the possibility of any solutions or potential accommodations that might work under the unique facts

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[10]The Sixth Circuit could conclude, on appeal, that the more focused analysis set forth in *Hobby Lobby* should not apply in a Title VII case. There is no existing authority to support such a position and it is not this Court's role to create such an exception.

[11]Again, because the parties have confined their claims, defenses, and analysis to work place clothing, and have not discussed hair styles or makeup, this Court also confines its analysis to clothing.

[12]Although it is not its burden, the Funeral Home asserts that "[a] number of available alternatives" could allow the government to achieve its stated goal without violating the Funeral Home's religious rights. In response to those least-restrictive-means arguments, the EEOC states that the Funeral Home never proposed that Stephens could continue to dress in "men's clothing" while at work, but could dress in "female clothing" outside of work, prior to Rost's deposition. (D.E. No. 63 at 1924). The EEOC further asserts that the Funeral Home was "free to offer counter-proposals" but failed to do so. (D.E. No. 69 at Pg ID 2131). Such arguments overlook that it is *the EEOC's burden* to establish that enforcement of the burden on the Funeral Home is the least restrictive means of furthering its compelling interest under the facts presented here.

and circumstances presented here. As a practical matter, the EEOC likely did not do so because it has been proceeding as if gender identity or transgender status is a protected class under Title VII,[13] taking the approach that the Funeral Home cannot prohibit Stephens from dressing as a female, in order to express her female gender identity. This is one of the first two cases that the EEOC has ever brought on behalf of a transgender person.[14] The EEOC appears to have taken the position that the only acceptable solution would be for the Funeral Home to allow Stephens to wear a skirt while working as a funeral director at the Funeral Home in order to express Stephens's female gender identity. (*See, e.g.*, D.E. No. 69 at Pg ID, arguing that the Funeral Home cannot require that "an employee dress inconsistently with his or her gender identity;" D.E. No. 63 at Pg ID 1923, arguing that "Defendant's insistence that Stephens wear men's clothing at work, despite knowledge that [Stephens] now identifies as female," violates Title VII; D.E. No. 63 at Pg ID 1927, stating that Stephens would present according to the dress code for females; D.E. No. 63 at Pg ID 1936-37, arguing that the Funeral Home having to provide "female clothing to Stephens" would not impose a substantial burden because doing so would not be unduly costly.).

Understanding the narrow context of the discrimination claim stated in this case is important. The wrongful discharge claim in this case is brought under a very specific theory of

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[13]*See, e.g.*, EEOC Determination, finding reasonable cause to believe that charging party was discharged due to sex and "gender identity" (D.E. No. 63-4); Amended Complaint (D.E. No. 21 at Pg ID 244-45), alleging that the Funeral Home discharged Stephens "because Stephens is transgender," and "because of Stephens's transition from male to female."

[14]*See, e.g.*, EEOC's 9/25/14 Press Release (stating that this "Lawsuit is One of Two the Agency Filed Today – the First Suits in its History – Challenging Transgender Discrimination Under 1964 Civil Rights Act.").

sex discrimination under Title VII. The EEOC's claim on behalf of Stephens is brought under a *Price Waterhouse* sex/gender stereotyping theory. *Price Waterhouse* recognized that sex discrimination may manifest itself in stereotypical notions as to how women and men should dress and present themselves in the workplace.

As the Supreme Court recognized in *Price Waterhouse*, the intent behind Title VII's inclusion of sex as a protected class expressed "Congress' intent to forbid employers to take gender into account" in the employment context. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). The goal of the sex-stereotyping theory of sex discrimination is that "gender" "be *irrelevant*" with respect to the terms and conditions of employment and to employment decisions. *Id.* (emphasis added).

Significantly, neither transgender status nor gender identity are protected classes under Title VII. [15] The only reason that the EEOC can pursue a Title VII claim on behalf of Stephens in this case is under the theory that the Funeral Home discriminated against Stephens because Stephens failed to conform to the "masculine gender stereotypes that Rost expected" in terms of the clothing Stephens would wear at work. The EEOC asserts that Stephens has a "Title VII right *not to be subject to gender stereotypes* in the workplace." (D.E. No. 51 at Pg ID 607) (emphasis added).

Yet the EEOC has not challenged the Funeral Home's sex-specific dress code, that requires female employees to wear a skirt-suit and requires male employees to wear a suit with pants and a neck tie, in this action. If the EEOC were truly interested in eliminating gender

[15]Congress can change that by amending Title VII. It is not this Court's role to create new protected classes under Title VII.

stereotypes as to clothing in the workplace, it presumably would have attempted to do so.

Rather than challenge the sex-specific dress code, the EEOC takes the position that Stephens has the right, under Title VII, to "dress as a woman" or wear "female clothing"[16] while working at the Funeral Home. That is, the EEOC wants Stephens to be permitted to dress in a stereotypical feminine manner (wearing a skirt-suit), in order to express Stephens's gender identity.

If the EEOC truly has a compelling governmental interest in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral Home,[17] couldn't the EEOC propose a gender-neutral dress code (dark-colored suit, consisting of a matching business jacket and pants, but without a neck tie) as a reasonable accommodation that would be a less restrictive means of furthering that goal under the facts presented here?[18] Both women and men wear professional-looking pants and pants-suits in the workplace in this country, and do so across virtually all professions.

The following deposition testimony from Rost supports that such an accommodation could be a less restrictive means of furthering the goal of eliminating sex stereotypes as to the clothing worn at the Funeral Home:

Q. Now, do you currently have any female funeral directors?

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[16]This is the language used by the parties. (*See, e.g.*, D.E. No. 21 at Pg ID 244; D.E. No. 63 at 1935; D.E. No. 59 at Pg ID 1749).

[17]Rost's Affidavit states that he would not dismiss Stephens or other employees if they dressed as members of the opposite sex while *outside* of work. (Rost Affidavit at ¶¶ 50-51). Rost also so testified. (*See* Rost Dep., D.E. No. 54-5 at Pg ID 1372).

[18]Similar to the gender-neutral pants, business suit jackets, and white shirts that the male and female Court Security Officers in this building wear.

A. I do not.
Q. If you did have a female funeral director, what would describe what her uniform would be or what she would be required to wear?
MR. PRICE: Objection, speculation. But go ahead.
THE WITNESS: She would have a dark jacket and a dark skirt, matching. Matching.
BY MR. KIRKPATRICK:
Q. Okay. A skirt. So just like the male funeral director she would have a business suit, but a female business suit?
A. Yes.
Q. As a skirt?
A. Yes.
. . . .
Q. Okay. Why do you have a dress code?
A. Well, we have a dress code because it allows us to make sure that our staff – is dressed in a professional manner that's acceptable to the families that we serve, and that is understood by the community at-large what these individuals would look like.
Q. Is that based on the specific profession that you're in?
A. It is.
Q. And again, tell us why it fits into the specific profession that you're in that you have a dress code?
A. Well, it's just the funeral profession in general, if you went to all funeral homes, would have pretty much the same look. Men would be in a dark suit, white shirt and a tie and women would be appropriately attired in a professional manner.
. . . .
Q. Okay. Now, have you been to funeral homes where there have been women wearing businesslike pants before?
A. I believe I have.
Q. Okay. So, the fact that you require women to wear skirts is something that you prefer, it's not necessarily an industry requirement?
A. That's correct.
Q. Okay. But women could look businesslike and appropriate in pants, correct?
A. They could.

(D.E. No. 63-11 at Pg ID 1999-2000; *see also* Rost Dep., D.E. 54-11 at Pg ID 1423, wherein Rost testified that female employees at the Funeral Home's Detroit location sometimes wear pants with a jacket to work). In addition, Stephens testified:

Q. Okay. Did you have a uniform or a dress code that you had to follow while with R.G. & G.R. Funeral Home?
A. They bought suits.
Q. Okay.
A. I wore it.
Q. So they being the company, bought you a suit or suits?
A. Yes.
Q. Were they male suits?
A. I would assume they were.
Q. Okay.
A. I guess a female could have dressed in them.

(Stephens's Dep., D.E. No. 54-15 at Pg ID 1453).[19]

But the EEOC has not even discussed the possibility of any such accommodation or less restrictive means as applied to this case.[20] Rather, the EEOC takes the position that Stephens must be allowed to wear a skirt-suit in order to *express* Stephens's female gender identity. That is, the EEOC wants Stephens to be able to dress in a *stereotypical feminine* manner. If the compelling governmental interest is truly in *removing or eliminating* gender stereotypes in the workplace in terms of clothing (*i.e.*, making gender "irrelevant"), the EEOC's manner of enforcement in this action (insisting that Stephens be permitted to dress in a stereotypical feminine manner at work) does not accomplish that goal.

This Court concludes that the EEOC has not met its demanding burden. As a result, the

[19]The Court notes that Rost's affidavit appears to indicate that he would be opposed to allowing a funeral director who was born a biological female to wear a male funeral director uniform (which consists of a pant-suit with a neck tie) while at work. (Rost Aff. at ¶ 45). Notably, however, Rost has *already allowed* female employees to wear a pants-suit to work without a neck tie.

[20]This potential accommodation or least restrictive means of requiring a gender-neutral uniform may actually be consistent with what the EEOC proposed in the administrative proceedings. (*See* D.E. No. 74-1 at Pg ID 2171, proposing that the Funeral Home reinstate Stephens and agree to "implement a Dress Code policy that *affords equivalent consideration to all sexes with respect to uniform requirements* and allowance/benefits.") (emphasis added).

Funeral Home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.

In its amicus brief, the ACLU asserts that the implications of allowing a RFRA exemption to the Funeral Home in this case "are staggering" and essentially restates the *Hobby-Lobby* principal dissenting opinion's fears about the impact of the majority's decision on employment discrimination and other laws. (*See* D.E. No. 59 at Pg ID 1767). This Court is bound by the majority opinion in *Hobby Lobby* and it makes clear that RFRA exemptions are considered on a case-by-case basis.

Moreover, in *General Conf. of Seventh-Day Adventists*, 617 F.3d 402 (6th Cir. 2010), the Sixth Circuit held, as a matter of first impression, that a RFRA defense does not apply in a suit between private parties.[21] The Seventh Circuit has also so ruled. *See Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736-37 (7th Cir. 2015). In the vast majority of Title VII employment discrimination cases, the case is brought by the employee, not the EEOC. Accordingly, at least in the Sixth and Seventh Circuits, it appears that there cannot be a RFRA defense in a Title VII case brought by an employee against a private[22] employer because that would be a case between private parties. *See, e.g., Mathis v. Christian Heating and Air Conditioning, Inc.*, 2016 WL 304766 (E.D. PA 2016) (district court ruled, in Title VII case

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[21]The ACLU noted this ruling in a footnote in its brief. (D.E. No. 59 at Pg ID 1761). None of the parties addressed how that ruling by the Sixth Circuit, as a practical matter, appears to prohibit a RFRA defense in a Title VII case brought by an employee against a private employer.

[22]In Title VII cases brought by an employee against a governmental employer, such as the United States Postal Service, there could not be a RFRA defense because the United States federal government does not hold religious views.

brought by employee against private employer, that a RFRA defense is not available "because RFRA protects individuals only from the federal government's burden on the free exercise of religion.").[23]

II. Title VII Discriminatory Clothing Allowance Claim

As the second claim in this action, the EEOC alleges that the Funeral Home has violated Title VII by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees. (Am. Compl. at ¶¶ 15 & 17). The EEOC asserts that the effect of the Funeral Home's unlawful practice "has been to deprive a class of female employees of equal employment opportunities and otherwise adversely affect their status as employees because of their sex." (*Id*. at ¶ 18). The EEOC alleges that "[s]ince at least September 13, 2011," the Funeral Home has provided a clothing allowance to male employees but not female employees. (Am. Compl. at ¶ 12).

In the pending motions, each party contends that it is entitled to summary judgment as to this claim. Before reaching the merits of the second claim, however, the Court must address the Funeral Home's assertion that the EEOC lacks the authority to bring the second claim in this action.

A. Under *Bailey,* The EEOC Cannot Bring The Second Claim In This Action.

Relying on *EEOC v. Bailey*, 563 F.2d 439 (6th Cir. 1977), the Funeral Home notes that the EEOC may include in a Title VII suit only claims that fall within an "investigation reasonably

[23]This Court recognizes that this appears to produce an odd result. Under existing Sixth Circuit precedent, the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf because no federal agency would be a party to the case. But, because this is one of those rare instances where the EEOC (a federal agency) chose to bring suit on behalf of an individual, a RFRA defense can be asserted.

expected to grow out of the charge of discrimination." (D.E. No. 54 at Pg ID 1317). The Funeral Home asserts that, under *Bailey*, a claim falls outside that scope if: 1) the claim is unrelated to the charging party; and 2) it involves discrimination of a kind other than raised by the charging party. It asserts that those considerations show that the EEOC's clothing allowance claim does not result from an investigation reasonably expected to grow out of Stephens's EEOC charge. In making this argument, the Funeral Home states that the clothing allowance claim on behalf of a class of women is unrelated to Stephens – who *received and accepted* the clothing provided by the Funeral Home at all relevant times. The Funeral Home asserts that the clothing allowance claim alleges discrimination of a kind other than that raised by Stephens, wrongful discharge. In support of that proposition, it directs the Court to *Nelson v. Gen. Elect. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001).

In response, the EEOC does not dispute that *Bailey* is good law. Rather, it attempts to distinguish this case from *Bailey*. (D.E. No. 63 at Pg ID 1942-43). It asserts that the situation here is more akin to *EEOC v. Cambridge Tile Mfg. Co.,* 590 F.2d 205 (6th Cir. 1979). That was a two-page per curiam decision that "involve[d] the scope of the investigatory and subpoena power of the EEOC." *Id.* at 205. It did not address the issue that the Court is presented with here. The EEOC does not direct the Court to any other Sixth Circuit authority regarding this challenge.

In *Bailey*, the underlying charge of discrimination that had triggered the investigation of the employer's employment practices was filed by a white female employee who alleged sex discrimination against women and race discrimination against black women. *Bailey,* 563 F.2d at 441 & 445. The EEOC later brought suit against the employer alleging racial and religious

discrimination. The district court held that the employee's charge of discrimination could not support the EEOC's lawsuit and dismissed it.

On appeal, the Sixth Circuit affirmed the dismissal of the religious discrimination charges but reversed as to the race discrimination charges. The opinion began by providing an overview of the process that leads to a civil action being filed by the EEOC:

> "In the Equal Employment Opportunity Act of 1972 Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 2451, 53 L.Ed.2d 402 (1977). The procedure is triggered when "a person claiming to be aggrieved" or a member of the EEOC files with the EEOC a charge alleging that an employer has engaged in an unlawful employment practice. Such a charge is to be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is to serve notice of the charge on the employer within ten days of filing and to investigate the charge. s 706(b) of Title VII, 42 U.S.C. s 2000e-5(b). Under s 709(a) of Title VII, 42 U.S.C. s 2000e-8(a), the EEOC may gain access to evidence that is relevant to the charge under investigation, *see Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969), and under s 710, 42 U.S.C. s 2000e-9, the EEOC may gain access to evidence that relates to any matter under investigation. The EEOC is then required to determine, "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge, whether there is reasonable cause to believe the charge is true. s 706(b), 42 U.S.C. s 2000e-5(b). If there is no reasonable cause, the charge must be dismissed and the person claiming to be aggrieved shall be notified. If there is reasonable cause, the EEOC "shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion." s 706(b), 42 U.S.C. s 2000e-5(b). When the EEOC is unable to secure a conciliation agreement acceptable to the EEOC, the EEOC may bring a civil action. s 706(f)(1), 42 U.S.C. s 2000e-5(f)(1). *See Occidental Life Insurance Co. v. EEOC, supra*, 432 U.S. at --, 97 S.Ct. at 2450-2452; Conference Committee Report, Section-by-Section Analysis of H.R. 1746, The Equal Employment Act of 1972, 118 Cong.Rec. 7168-69 (Mar. 6, 1972).

Id. at 445.

The Sixth Circuit agreed with the district court that it did not have jurisdiction over the allegations of religious discrimination in the EEOC's lawsuit because the "portion of the EEOC's

complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation [of the employer] reasonably expected to grow out of the charge of discrimination." *Id*. at 446.

The court noted that the "clearly stated rule in this Circuit is that the EEOC's complaint is 'limited to the scope of the EEOC' investigation reasonably expected to grow out of the charge of discrimination." *Id*. at 446 (citations omitted). The court explained that there are two reasons for that rule:

> There are two reasons for the rule that the EEOC complaint is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination. The first reason is that the rule permits an effective functioning of Title VII when the persons filing complaints are not trained legal technicians. "(T)his Court has recognized that Title VII of the Civil Rights Act of 1964 should not be construed narrowly," *Blue Bell Boots, Inc. v. EEOC, supra*, 418 F.2d at 358, and thus adopted the rule because "charges of discrimination filed before the EEOC will generally be filed by lay complainants who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel." *Tipler v. E. I. duPont deNemours & Co., supra*, 443 F.2d at 131. Similarly, we stated in *McBride v. Delta Air Lines, Inc., supra*, 551 F.2d at 115:
>
> > Because administrative complaints are filed by completing a form designed to elicit specificity in charges, and because the forms are not legal pleadings and are rarely filed with the advice of legal counsel, any other standard would unreasonably limit subsequent judicial proceedings which Congress has determined are necessary for effective enforcement of the legal standards established by Title VII. See House Report No. 92-238, U.S.Code Cong. and Admin.News, pp. 2141, 2147-48 (1972).
>
> The second reason for limiting the scope of the EEOC complaint to the scope of the EEOC investigation that can be reasonably expected to grow out of the private party's charge is explained in *Sanchez v. Standard Brands, Inc., supra*, 431 F.2d at 466.
>
> > The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination

> is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation.

Bailey, 563 F.2d at 446-47.

The Sixth Circuit then explained that in light of those two reasons, the allegations of religious discrimination in the EEOC's complaint could not reasonably be expected to grow out of the plaintiff's charge.

First, the case simply did not involve the "situation in which a lay person has inadequately set forth in the complaint filed with the EEOC the discrimination affecting that person." *Id.* at 447. That is because the EEOC's allegations regarding religious discrimination did not involve practices affecting the plaintiff who filed the EEOC charge. *Id.*

Second, the court concluded that the present case does not involve a situation in which it would be proper, in view of the statutory scheme of Title VII, to permit the lawsuit to include the allegations of religious discrimination. The court explained that "to allow the EEOC, as it did in the present case, to issue a reasonable cause determination, to conciliate, and to sue on allegations of religious discrimination unrelated to the private party's charge of sex discrimination would result in undue violence to the legal process that Congress established to achieve equal employment opportunities in country." *Id*. at 447-448.

The Sixth Circuit then held that "[t]he procedure to be followed when instances of discrimination, of a kind other than that raised by a charge filed by an individual party and

unrelated to the individual party, come to the EEOC's attention during the course of an investigation of the private party's charge is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that charge." *Id*. at 448. It explained its rationale for requiring a new charge by the EEOC:

> Then the employer is afforded notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation. Section 706(b) of Title VII, 42 U.S.C. s 2000e-5(b), provides for the filing of a charge by a member of the EEOC, and under such a filing, an employer will not be stripped of formal notice of the charge and of the opportunity to respond to the EEOC's inquiry into employment practices with respect to allegations of discrimination unrelated to the individual party's charge. In addition, the filing of a charge will permit settlement discussions to take place pursuant to 29 C.F.R. s 1601.19a5 after a preliminary investigation but before any finding of reasonable cause.
>
> Several reasons support this position. The filing of a charge by a member of the EEOC as urged by this Court should lead to a more focused investigation on the facts of possible discrimination by an employer when that possible discrimination is not related to the individual party's charge.

Id. Another reason for that position is "the importance of conciliation to Title VII." *Id*. at 449. The court noted that the EEOC's duty to attempt conciliation is among its "most essential functions" and explained:

> It is our belief that if conciliation is to work properly, charges of discrimination must be fully investigated after the employer receives notice in a charge alleging unlawful discriminatory employment practices. *See EEOC v. MacMillan Bloedel Containers, Inc., supra*, 503 F.2d at 1092. The requirement that a member of the EEOC file a charge when facts suggesting unlawful discrimination are discovered that are unrelated to the individual party's charge does serve the purposes of treating the employer fairly and forcing the employer and the EEOC to focus attention during investigation on the facts of such possible discrimination and thereby does serve the goal of obtaining voluntary compliance with Title VII.

Id. at 449. The court rejected the EEOC's position that "it would be a matter of placing form

over substance, resulting in the waste of administrative resources and the delay in the enforcement of rights," to require "a member of the EEOC to file a charge with respect to the allegations of discrimination uncovered in an EEOC investigation which were of a kind not raised by the individual party and which did not affect the individual party." *Id*. at 449.

Accordingly, "[i]f an EEOC investigation of an employer uncovers possible unlawful discrimination of a kind not raised by the charging party and not affecting that party, then the employer should be given notice if the EEOC intends to hold the employer accountable before the EEOC and in court." *Id*. at 450.

Finally, the court rejected the EEOC's position that it did not need to file a new charge because the employer received notice of the new alleged discrimination by virtue of having received a reasonable cause determination that included religious discrimination:

> We are unable to accept the EEOC's argument that it was immaterial that appellee received notice and opportunity to comment at the time the EEOC issued its reasonable cause determination and during conciliation rather than before the issuance of the reasonable cause determination. While a court might conclude that the Due Process Clause of the Fifth Amendment was not violated by the procedure followed by the EEOC in the present case, our concern is with the legislative judgment of due process incorporated into the specific statutory scheme of Title VII. Evidence of that legislative intent indicates a concern for fair treatment of employers.

Id. at 450.

As was the situation in *Bailey*, the EEOC investigation here uncovered possible unlawful discrimination: 1) of a kind not raised by the charging party (Stephens); and 2) not affecting Stephens. As such, under *Bailey*, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that charge.

1. The Discrimination Is Of A Kind Not Raised By Stephens In The EEOC Charge.

The Court concludes that the second discrimination claim alleged in this action is "of a kind not raised by the charging party," Stephens.

Again, the rule in this Circuit is that the EEOC's complaint is limited to the scope of the EEOC's investigation reasonably expected to grow out of the charge of discrimination. "The relevant inquiry is the scope of the investigation that the *EEOC charge* would have reasonably prompted." *EEOC v. Wal-Mart Stores, Inc.,* 2010 WL 567316 at * 2 (6th Cir. 2010) (emphasis added). Thus, the court looks to the *EEOC charge itself*. *See, eg., Nelson v. General Elec. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001).

In *Nelson*, the court looked to the EEOC charge, noting that the plaintiff's charge alleged just two discriminatory actions, that the plaintiff was given a bad performance evaluation and was laid off, because of her race and gender, and in retaliation for having complained about race discrimination. Moreover, that EEOC charge expressly confined the charged discrimination to the time period between March 30 and September 22 of 1995. After the EEOC administrative process concluded, the plaintiff filed a complaint that included that her employer failed to promote her because of her race and gender. The district court concluded that the scope of the investigation reasonably expected to grow out of her EEOC charge would not include failure to promote claims. The Sixth Circuit affirmed.

Here, the EEOC charge filed by Stephens checked the box for "sex" discrimination and indicated that the discrimination took place from July 31, 2013 to August 15, 2013 – a two week period in 2013. (D.E. No. 54-22 at Pg ID 1497). The charge stated "the particulars" of the

claimed sex discrimination Stephens experienced as follows:

> I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.
>
> On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition. Moreover, during my entire employment I know there are no other female Funeral Directors/Embalmers.
>
> I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(*Id*.).

Thus, Stephens alleged just one discriminatory action – termination – that occurred during a two-week period in 2013. The charge alleged that Stephens alone, who was undergoing a gender transition, was fired due to Stephens's gender identity and the Funeral Home's beliefs as to the public's acceptance of Stephens's transition. Even though the Funeral Home later asserted, during the administrative proceeding, its dress code as a defense to the alleged discriminatory termination, the *EEOC charge itself* mentioned nothing about clothing, a clothing allowance, or a dress code. Thus, this Court fails to see how Stephens's EEOC charge would reasonably lead to an investigation of whether or not the Funeral Home has provided its male employees with clothing that was not provided to females since September of 2011.[24] *Nelson, supra*; *see also EEOC v. Wal-Mart Stores, Inc., supra*, at * 2 (noting "this is not a case where the

[24]The EEOC attempts to characterize the clothing allowance claim as the same type of discrimination in Stephens's EEOC charge because it is alleged sex/gender discrimination. By that logic, the plaintiff in *Nelson* would have been found to have alleged the same type of discrimination (race and gender) even though her EEOC charge did not allege any failure to promote claims. That was not the case.

civil complaint alleges different kinds of discriminatory acts than the initial EEOC complaint," as was the case in *Nelson*.)

2. The Alleged Clothing Discrimination Claim Does Not Involve Stephens.

In addition, this is not a case wherein Stephens has a claim for the alleged discriminatory clothing allowance, but inadequately set forth that claim in the EEOC charge by virtue of being a lay person. *Bailey,* 563 F.2d at 447.

Stephens is not included in the class of females who were allegedly discriminated against by the Funeral Home by virtue of not having received clothing that was provided to male employees. That is because, at all relevant times, Stephens was one of the employees who *was provided* the clothing that was not provided to female employees. Stephens was fired before Stephens ever attempted to "dress as a woman" at work. Thus, Stephens cannot claim a denial of this benefit.[25]

3. As A Result, Under *Bailey,* The EEOC Cannot Proceed With The Claim In This Action.

The Court concludes that the EEOC investigation here uncovered possible unlawful discrimination: 1) of a kind not raised by the charging party (Stephens); and 2) not affecting the

[25]It would not have been a problem if Stephens had asserted a clothing allowance claim on Stephen's own behalf in the EEOC charge and then the EEOC's complaint simply broadened that same claim to assert it on behalf of a class of women. *See EEOC v. Keco Indust. Inc*., 748 F.2d 1097, 1101 (6th Cir. 1984) (explaining that in *Bailey* the "additional and distinct claim of religious discrimination required a separate investigation, reasonable cause determination, and conciliation effort by the EEOC" and distinguishing it where the EEOC "merely broadened" the scope of the charging party's charge to assert the same claim on behalf of all female employees in the same division).

charging party (Stephens). As such, under *Bailey*, the proper procedure[26] is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim of discrimination. Because the EEOC failed to do that, it cannot proceed with that claim in this civil action. Accordingly, the Court shall dismiss the clothing allowance claim without prejudice.

CONCLUSION & ORDER

For the reasons set forth above, the Court **ORDERS** that the EEOC's Motion for Summary Judgment is **DENIED.**

It is further **ORDERED** that the Funeral Home's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

The Court **GRANTS** summary judgment in favor of the Funeral Home as to the wrongful termination claim. The Court rejects the Funeral Home's sex-specific dress code defense but concludes that, under the unique facts and circumstances of this case, the Funeral Home is entitled to a RFRA exemption from Title VII (and the sex-stereotyping body of case law under it).

As to the clothing allowance claim, the Court concludes that the EEOC administrative investigation uncovered possible unlawful discrimination of a kind not raised by the charging party and not affecting the charging party. Under *Bailey*, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim of

[26]The EEOC argues that it is not required to "ignore" discrimination that it inadvertently uncovers during an administrative proceeding. *Bailey* does not require the EEOC to "ignore" discriminatory acts that it uncovers during an administrative investigation that are of a kind not raised by the charging party and not affecting the charging party; it just requires the filing of a new charge by a member of the EEOC and a full investigation of the new claim.

discrimination. Because the EEOC did not do that, it cannot proceed with that claim in this civil action. The Court therefore **DISMISSES WITHOUT PREJUDICE** the clothing allowance claim.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: August 18, 2016

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 18, 2016, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

APPENDIX 6

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,
EEOC's Summary Judgement Motion Brief

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. R.G. & G.R. HARRIS FUNERAL HOMES, INC., Defendant.	)	CIVIL ACTION NO. 2:14-CV-13710 Hon. Sean F. Cox Magistrate Judge David R. Grand

Motion for Summary Judgment

Pursuant to Fed. R. Civ. P. 56, the Plaintiff Equal Employment Opportunity Commission moves for summary judgment on the grounds that there is no material factual dispute that the Defendant discharged Aimee Stephens because of sex.

The Commission further states neither the First Amendment to the Constitution nor the Religious Freedom Restoration Act authorizes the discharge of employees on the basis of sex, thus Defendant's affirmative defenses must fail as a matter of law.

Finally, the Commission states that there is no material factual dispute with respect to Defendant's clothing allowance, which provided

free clothing benefits to male employees and nothing to females until October 2014. Since that time, Defendant has provided stipends to women which are less than the value of the benefit provided to men. Both fringe-benefit policies constitute sex discrimination in violation of Title VII.

The Commission respectfully directs the Court to the attached memorandum for the arguments supporting this Motion.

The Commission sought concurrence in this motion from defense counsel on February 1, 2016 and said concurrence was denied.

Wherefore, the Commission respectfully moves for summary judgment in its favor.

Respectfully submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

s/ Miles Shultz
MILES SHULTZ (P73555)
Trial Attorney

s/ Katie Linehan
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Dated: April 7, 2016

s/ Dale Price
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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	CIVIL ACTION NO. 2:14-CV-13710
v.	)	Hon. Sean F. Cox
	)	Magistrate Judge
R.G. & G.R. HARRIS FUNERAL HOMES, INC.,	)	David R. Grand
Defendant.	)	

Memorandum in Support of Plaintiff EEOC's Motion for Summary Judgment

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Statement of the Issues

1. Title VII is a neutral rule of general applicability which applies to businesses operated by non-religious and religious persons alike. Does the Commission's attempt to vindicate Aimee Stephens's Title VII rights violate Defendant's rights under the First Amendment Free Exercise Clause?

   The Commission answers "No."

2. The Religious Freedom Restoration Act prohibits the government from substantially burdening a sincere religious exercise unless such is done in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Defendant admits that it would not have had to change any of its religious practices if it had continued to employ Stephens, and has only asserted that Rost's beliefs have been impinged upon. Protection of the Title VII rights of employees is a compelling governmental interest, and Title VII is precisely tailored to further that interest. Does RFRA trump this enforcement action under Title VII?

   The Commission answers "No."

3. The Defendant's owner and sole decisionmaker has admitted that his decision to fire Aimee Stephens was motivated by his beliefs and attitudes about how men and women are supposed to act and present themselves. Are these testimonial admissions sufficient to warrant summary judgment in favor of the Commission as to liability for Aimee Stephens's termination?

   The Commission answers "Yes."

4. Until October 2014, Defendant provided a fringe benefit by which male employees were granted a clothing allowance of suits and ties free of charge, including free replacements as they wore out,

whereas female employees were given nothing. The approximate value of a suit and tie is $235. Since October 2014, the female employees have been given annual stipends of either $75 or $150 depending upon whether they are part- or full-time, while the male employee benefit has remained the same. Do the pre- and post-October 2014 fringe benefit policies violate Title VII, warranting summary judgment in favor of the Commission?

The Commission answers "Yes."

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Mt. Elliott Cemetery Ass'n. v City of Troy, 171 F.3d 398 (6th Cir. 1999).

Hansen v. Ann Arbor Pub. Schools, 293 F. Supp. 2d 780 (E.D. Mich. 2003).

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Exhibit R, Articles of Incorporation

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Exhibit T, Defendant's Responses to Plaintiff's First Set of Discovery Requests

Case 1, *Fabian v. Hospital of Central Connecticut*, No. 3:12-cv-1154, __ F. Supp. 3d __, 2016 WL 1089178 (D. Conn. March 18, 2016)

Case 2, *McKnight v. MTC*, 2015 WL 7730995 (N.D. Tex. Nov. 9, 2015)

Case 3, *Wilson v. James*, __ F. Supp. 3d __, 2015 WL 5952109 (D.D.C. 2015)

I. INTRODUCTION

A. Overview of the Case.

The Equal Employment Opportunity Commission brought this Title VII case alleging sex discrimination. The case stems from a Charge filed by Aimee Stephens, who is a transgender woman and served as a funeral director/embalmer for the Defendant for nearly six years under the name of Anthony Stephens. It is undisputed that Stephens was a capable, competent employee who was not fired for performance reasons.

The Commission's Complaint alleged, *inter alia*, that the Defendant discharged her because she did not conform to the Defendant's sex-based stereotypes. Despite being a good employee, she was fired after giving the Defendant's owner, Thomas Rost, a letter describing her life struggles with gender-identity issues and stating her intention to present at work as a woman in appropriate business attire. Ex. A, Stephens Letter.

Rost responded two weeks later by handing Stephens a severance agreement. Ex. B, Rost 30(b)(6) Dep. at 126:1-8. "[T]he specific reason" Rost fired Stephens was that Stephens was going to present as a female:

"he [Stephens] was no longer going to represent himself as a man. He wanted to dress as a woman." *Id.* at 135:24-136:1.

Given the testimonial admissions of Rost, there is no material dispute that Stephens was terminated because she did not conform to Rost's gender stereotypes, and summary judgment in favor of the Commission as to the termination claim is appropriate.

In addition, the Defendant has maintained a discriminatory clothing-allowance policy which until October 2014 provided suits and ties to male employees who interacted with the public and nothing to similarly situated females. Since October 2014, female employees have been given an annual stipend of either $75 or $150, but this is still inferior to that accorded to men, both in dollar value and in flexibility, as the men can replace suits as needed. Thus, summary judgment is also appropriate as to this issue.

B. The Affirmative Defenses

After eight months of litigation—including a Motion to Dismiss and an initial Answer to the Complaint—Defendant injected new defenses. Only after the Commission filed an Amended Complaint, which merely

corrected the spelling of the Charging Party's first name, Defendant first asserted that its termination of Stephens was protected by the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1 ("RFRA"). *See* Dkt. 22, Answer to Amended Complaint, p. 5 (Affirmative Defenses 12-13).

Defendant admits it discharged Stephens because she did not conform to the masculine gender stereotypes that Rost expected of her. That is sex discrimination. Yet, Defendant asserts that its religious beliefs have been burdened by Aimee Stephens's Title VII right to not be subject to gender stereotypes in the workplace.

That argument misconstrues both the Free Exercise Clause and RFRA. Controlling Supreme Court precedent makes clear that the Free Exercise Clause does not excuse compliance with a neutral and generally applicable law such as Title VII. Moreover, Defendant has identified no religious *exercise* that is substantially burdened, as is required to invoke RFRA. Even if Defendant had done so, courts have consistently recognized that preventing employment discrimination is a compelling government interest, which also takes this matter outside of RFRA's

scope. Because there are no material facts in dispute, summary judgment in favor of the Commission is appropriate on Affirmative Defenses 12 and 13.

C. Thomas Rost Limits His Religious Exercise.

Thomas Rost owns 94.5% of the shares of Defendant and was the sole decision-maker who terminated Stephens's employment. Ex. B, Rost 30(b)(6) Dep. at 26:20-26:24; 117:23-118:6 . Rost testified as to Defendant's religion-based affirmative defenses. Ex. C, Notice of 30(b)(6) Deposition, and Ex. B at 6:14-10:3. Defendant's religious exercises are those of Rost. Ex. B at 29:1-7.

Rost is a Christian. *Id.* at 29:20-22. He attends two churches with some regularity. *Id.* at 29:25-30:1-6. However, the evidence shows that Rost's exercise of his religious beliefs at or through RGGR is limited to the placement of (1) "Daily Bread" devotional books and (2) cards bearing the name of Jesus with New Testament verses on the back.

Can you think of any ways in which you
express your faith through Harris, R.G. G.R.
Harris; you exercise your faith using your
business?
A The only thing in a direct way is little things
that we leave out, we give away Daily Breads

which is a little daily devotional; it's a pick up. We have a little card that people can pick up. That would be the only thing.
Q Okay. And this is just -- as they walk out they can grab something like that?
A Yes. It's a pick up item if they so desire.
Q What about, you say a little card, what's that?
A We call it a Jesus card.
Q Okay.
A I forgot what it says on the front. It's kind of to grab your attention and then on the back it just has references, verse references.
Q Scriptural references about Jesus?
A Yes, exactly. Yes.

Id. at 39:23-40:17; Ex. D (Daily Bread Devotional); and Ex. E (Jesus card). These publications were placed on a credenza or desk at the entry place for each location for visitors to take or leave as they desire. Ex. B, Ex. B at 39:14-40:17.

Rost admitted that continuing to employ Stephens would not have interfered with these religious practices at RGGR. *Id.* at 57:2-19.

D. RGGR does not operate as a religious enterprise.

Defendant is not affiliated with or part of any church. *Id.* at 31:15-31:19. Rost employs people from different denominations and of no religious beliefs at all. *Id.* at 40:18-41; Ex. F, Shaffer Dep. at 33:10-12. He admits that employing individuals with beliefs different from his own

does not constitute an endorsement of their beliefs or activities by RGGR. Ex. B at 41:20-42:18. He does not impose his own beliefs on employees, stating that he would not, for example, terminate an employee because he or she had sex outside of marriage, had an abortion, or committed adultery. *Id.* at 138:2-138:16.

The Defendant's articles of incorporation do not avow any religious purpose. Ex. R, Articles of Incorporation at p. 6. There are no religious views or values that employees are expected to uphold. Ex. B at 81:18-21. RGGR's website contains a "mission statement" which makes two references to God, the second of which is a passage in the Gospel of Matthew (Ex. G), which Rost chose because he liked it. Ex. B at 85:7-85:21. And the Defendant's employees do not regard RGGR as a Christian business enterprise. *See*, e.g., Ex. H, Nesmith Dep. at 19:18-20:4; Ex. I, Kish Dep. at 55:10-55:25.

Defendant is open 24 hours per day, 365 days per year, and Easter is not a paid holiday. Ex. B at 88:20-89:21. It serves clients of every religion (various Christian denominations, Hindu, Muslim, Jewish, native Chinese religions) or those of no religious affiliation. Ex. J, Cash

Dep. at 41:19-42:10; Ex. K, Crawford Dep. at 32:18-34:9; Ex. B at 33:19-36:23. Indeed, employees have been known to wear Jewish head coverings when holding a Jewish funeral service. Ex. K at 34:20-35:4; Ex. J at 42:7-12. The business keeps Catholic religious items (crucifixes, kneelers, candles) in storage until requested by Catholic (or occasionally non-Catholic) clients. Ex. L, Matthew Rost Dep. at 36:20-25; Ex. J at 42:19-25; Ex. H at 26:1-10; Ex. K at 34:20-35:11; Ex. F at 34:16-35:10; Ex. M, McKie Dep at 29:12-25; 31:11-14.

While the rooms where funerals are held on site are called "chapels," they are decorated to look like living rooms and are not decorated with visible religious fixtures. Ex. B at 84:2-85:6. This is done deliberately to avoid offending people of different religions. *Id*. Although some of the chapels have statues of Jesus Christ and the Virgin Mary, these are kept hidden behind curtains unless a Catholic service is being held. Ex. J at 53:7-16; Ex. M at 29:16-25.

As far as presenting itself to the outside world, Defendant has not advertised in Christian publications or church bulletins in more than twenty years, with one exception. Ex. B at 37:25-38:9. The one exception

is a small advertisement in a Catholic parish's festival publication that Rost regards as a "gift." *Id*. at 39:2-13.

RGGR does not sponsor publications which call people to join the Christian faith or celebrate Christian holidays. *Id*. at 31:20-32:2; 39:2-16. There are no prayer groups or Bible studies at RGGR. Ex. J at 47:8-16; Ex. N, Kowalewski Dep. at 30:11-12; Ex. H at 19:18-24; Ex. I, Kish Dep. at 55:10-20; Ex. M at 27:8-15. RGGR does not have any religion-based exclusions to employee medical coverage, such as refusing to pay for abortions. Ex. B at 92:17-93:20.

Significantly, Rost admitted that the business climate causes him to act against his religious ideals: the practice of cremation instead of holding a funeral. His Christian beliefs align him toward performing funerals. *Id*. at 51:22. However, the industry has changed, with a growing preference for cremations, and he needs to do them to stay in business. *Id*. at 52:14-53:10.

E. Rost's religious beliefs about men and women motivated him to fire Stephens.

Rost's religious *beliefs*—not a religious exercise—led him to terminate Stephens's employment after she presented her transition

letter. When asked what was objectionable to him about continuing to employ Aimee Stephens, Rost stated that transgender expression violated his beliefs regarding proper behavior by men and women:

> Q So, your personal faith as a follower of Jesus Christ tells you that it would be improper or -- to employ someone like the person you knew as Anthony Stephens?
> A Absolutely.
> Q Okay. You indicated as part of the healing process, but what about your religious beliefs specifically are violated by continuing to employ Stephens?
> A I believe it would violate my faith, yes, absolutely.
> Q Okay. What aspects of it?
> A Well, I believe that God created a man as a man and God created a woman as a woman. And to -- to not honor that, I would feel it's a violation of my faith, absolutely.
> Q So Stephens would be presenting in a way that offended your religious beliefs, essentially?
> A Yes. Yes.

Ex. B at 54:21-55:19. Later, under questioning by his own attorney, Rost re-affirmed that Stephens's non-conformance with his beliefs regarding the behavior of men and women prompted the firing decision. Compare the above with *Id*. at 135:24-136:3 ("[the specific reason Stephens was fired] was [that Stephens was] no longer going to represent himself as a

man. He wanted to dress as a woman").

Rost also testified that he objected to Stephens's use of "Aimee" in the charge of discrimination, saying that this made him "uncomfortable….because he's [Stephens] a man." Ex. O, Rost Dep. at 23:4-8.

F. Defendant's Clothing-Allowance Policy

Defendant provides a different clothing allowance to its male and female employees. *Id*. at 24:8-25; Ex. I, Kish Dep. at 16:13–19:5. This dress code requires female employees to wear a suit jacket, skirt, and blouse. Ex. O at 24:8-25; Ex. I at 16:15-17:7. Male employees, including funeral directors, must wear a suit jacket, suit pants, white dress shirt, and tie. Ex. O at 13:4-21; Ex. I at 17:8-24.

For male employees who have contact with customers, Defendant provides nearly all work attire free of charge. Approximately 10 years ago, Defendant made an arrangement with a local clothier—Sam Michael's—to pay for suit jackets, suit pants, and ties for the male employees. Immediately upon hire of a full-time male, Defendant pays for two suit jackets, two suit pants, and two ties from Sam Michael's. Ex.

O at 14:9-19. For part-time males, Defendant pays for one suit jacket, one suit pant, and one tie. *Id*. These clothing benefits also include tailoring of the suit jackets and pants (Ex. I at 19:20-24) and repairs to the suit as needed (Ex. O at 19:2-24). Moreover, replacement suit jackets, suit pants, and ties are provided on an as-needed basis, which, on average, is every year or sometimes more often. Ex. K at 19:1-3; Ex. J at 21:4-8; Ex. F at 44:3-15; Ex. N at 22:21-23:1.

No work-clothing benefits were provided to any female employees until late 2014. Ex. O at 15:16-16:12; Ex. I at 20:16–21:3; Ex. P, Clothing Allowance Checks; Ex. M at 42:1-4; Ex. H at 13:5–14:4. Beginning in October 2014, Defendant began to provide female employees who have customer contact an annual clothing stipend. Ex. I at 20:16–21:23; Ex. P. The amount depends on the employee's status: full-time females are given $150 per year and part-time women receive $75 per year. Ex. I at 20:16-21:23. Defendant acknowledges, however, that the attire it provides to its male employees costs Defendant approximately $235 (part-time) to $470 (full-time) per employee. Ex. O at 15:3-6. Defendant also acknowledges that it based the amount of clothing allowance for its

female employees on what it determined was "fair," rather than the amount it paid for its male employees' clothes. *Id*. at 45:12-20. Furthermore, unlike Defendant's male employees who receive their clothing benefits immediately upon hire, Defendant's female employees are required to wait until the next clothing allowance checks are issued for all female employees. Ex. I at 25:11-15, 38:15-25.

II. RELEVANT LAW

A. Rule 56 Standard

Summary judgment is only appropriate where the record reveals there are no issues of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of "clearly and convincingly" demonstrating the absence of any genuine disputes of material fact. *Sims v. Memphis Processors, Inc.*, 926 F.2d 524 (6th Cir. 1991) (citing *Kochins v. Linden-Ailmak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986)). If Plaintiff meets this burden, the Defendant is required to present significant probative evidence showing that genuine, material disputes remain. *Sims*, 926 F.2d at 526.

B. First Amendment Free Exercise Standard

The standard for review of a free-exercise claim is well-established: a religious objector to legislative enactments must comply with neutral laws of general applicability. *Mt. Elliott Cemetery Ass'n. v City of Troy*, 171 F.3d 398, 403 (6th Cir. 1999) (quoting *Employment Division v. Smith*, 494 U.S. 872, 879 (1990)).

To determine whether a law is neutral and of general applicability, the Sixth Circuit asks if the object of the law is to target practices because of their religious motivation:

> A law is not neutral if the object of the law, whether overt or hidden, is to infringe upon or restrict practices because of their religious motivation. *See [Church of the] Lukumi Babalu [, Aye, Inc. v. City of Hialeah,]* 508 U.S. 520, 535 (1993).
>
> The requirement that the law be of general applicability protects against unequal treatment which results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

Mt. Elliott Cemetery Ass'n., 171 F.3d at 405.

Ultimately, if a religious person is being treated the same as a non-religious person under a valid and neutral law of general applicability, there is no free-exercise violation. *See Hansen v. Ann Arbor*

Pub. Schools, 293 F. Supp. 2d 780, 809 (E.D. Mich. 2003) (where no students were permitted to comment at a school panel on homosexuality, free-exercise rights of religious student were not violated).

C. RFRA Standard

The Religious Freedom Restoration Act ("RFRA") prohibits the government from substantially burdening the exercise of religion unless the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb–1(a), (b).

The standard for analyzing a RFRA claim is a two-step process:

> First, the plaintiff must make out a prima facie case by establishing Article III standing and showing that the law in question would (1) substantially burden (2) a sincere (3) religious exercise. If the plaintiff makes out a prima facie case, it falls to the government to demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest . The government carries the burdens of both production and persuasion when it seeks to justify a substantial burden on a sincere religious practice.

Michigan Catholic Conf. v. Burwell, 755 F.3d 372, 383 (6th Cir. 2014), vacated and remanded, 135 S. Ct. 1914; affirmed after remand, 807 F.3d 738 (6th Cir. 2015) (citations and internal quotation marks omitted).

Determining whether or not the government has substantially burdened an exercise of religion is a question of law. *Id*. at 385. Further, "[a] substantial burden exists when government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 717, 718 (1981)).

III. ARGUMENTS

A. The Commission Has Not Violated Defendant's Free-Exercise rights.

Defendant alleges in Affirmative Defense 12 that the EEOC's claims violate RGGR's free exercise rights, but that cannot be: the Defendant did not put the Commission on notice that religious exercise issues were involved until it filed its Answer to the Amended Complaint in June 2015. Rost admits that he did not raise such defenses during the EEOC's investigation of Stephens's charge of discrimination. Ex. B at 70:7-71:17; 141:2-142:15. Thus, the lawsuit could not have been formulated with any anti-religious motive in mind.

Even if the defense were construed to be an attack on Title VII, which it does not seem to be, Defendant's claim would be unsuccessful

under the Free Exercise Clause. Title VII is a neutral law of general applicability.[1] *See General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (there is a public interest in preventing employment discrimination). Title VII applies equally to all employers with 15 or more employees regardless of religious status—including Defendant. *See* Dkt. 22 at paragraphs 5-6 (admitting that Defendant is an employer for the purposes of Title VII).

A free-exercise claim cannot insulate an employer from liability under Title VII, and no court has so held. *See EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 620-21 (9th Cir. 1988) (elimination of mandatory attendance requirement for corporate prayer meetings to accommodate the Title VII rights of a non-religious employee did not violate Defendant's free exercise rights). In another religious claim involving Title VII enforcement, the court held that an investigation and subsequent lawsuit did not infringe upon a business owner's religious practices. *See EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002) (even assuming the effect of EEOC's

[1] Far from being intended to infringe upon religion, Title VII protects the convictions of religious institutions by allowing them to restrict employment to those of their own faith. 42 U.S.C. § 2000e–1(a).

investigation and litigation were to force conformance to Title VII's strictures against using religious criteria to make employment decisions, such would not "substantially burden" owner's religious beliefs or practices).

Consequently, summary judgment in favor of the Commission is proper as to Defendant's free-exercise defense set forth in Affirmative Defense 12.

B. Defendant's RFRA defense should be rejected.

1. The Commission does not contest Defendant's religious sincerity.

Defendant's religious exercise is limited—much more than the religious practices of other plaintiffs in RFRA disputes. *See, e.g., Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (describing the evangelical activity, religious principles and actions demonstrated by the two plaintiff corporations). And the Defendant here gave no indication that its religious beliefs were being violated until litigation had been underway for nearly eight and a half months. Nevertheless, for the purposes of this motion, the Commission will not contest the

sincerity of Defendant's religious views.

2. Defendant's Religious Exercise at RGGR is Not Affected by Title VII Enforcement.

There is nothing about enforcement of Title VII that will interfere with Rost's religious exercises at Defendant. RFRA protects religious exercise, not simply beliefs. 42 U.S.C. § 2000bb(1)(a)) In particular, RFRA does not protect Mr. Rost from having his religious beliefs offended. The Commission is not requesting that Defendant endorse Stephens's transition or otherwise affirm something to which Rost objects.

In *Wilson v. James*, __ F. Supp .3d __, 2015 WL 5952109 (D.D.C. 2015), the plaintiff, a member of the Utah National Guard, was reprimanded after he sent an email using a military account objecting to a same-sex marriage ceremony held in the Cadet Chapel at West Point. The plaintiff sued under RFRA, claiming that he was being punished for his beliefs. However, the district court rejected the RFRA claim, noting that a burden on beliefs was different from a burden on the exercise of those beliefs:

A substantial burden on one's religious beliefs—as distinct from

> such a burden on one's *exercise* of religious beliefs—does not violate RFRA. [H]ere, Plaintiff has not identified any burdened action or practice of the LDS faith. The discipline imposed did not "force[him] to engage in conduct that [his] religion forbids" or "prevent[him] from engaging in conduct [his] religion requires," *Henderson v. Kennedy,* 253 F.3d 12, 16 (D.C.Cir.2001). Nor did it "condition[ ] receipt of an important benefit upon conduct proscribed by [his] religious faith, or ... den[y] such a benefit because of conduct mandated by [his] belief," *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 717–18, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Nothing prevented Plaintiff from continuing to maintain his beliefs about same-sex marriage and homosexuality, just as he had before the [reprimand], without repercussion.

Wilson, 2015 WL 5952109 at *8.

Similarly, in *McKnight v. MTC*, 2015 WL 7730995 (N.D. Tex. Nov. 9, 2015), a prisoner filed a claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc–1, et seq.,[2] alleging that his religious freedom rights had been violated by the placement of a homosexual cellmate in his cell. In the absence of any claim that the plaintiff's religious exercise had been changed, the court held that the claim was without merit:

> Here, Plaintiff has pled no facts tending to show that Defendants' refusal to accommodate his housing request "put a substantial pressure on him to modify his behavior and to violate his beliefs."

[2] RLUIPA claims are evaluated under the same standard as RFRA claims. *See Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015).

> *Jehovah [v. Clarke],* 798 F.3d [169 (4th Cir. 2015)] at 180–181 (quotations and quoted case omitted). Plaintiff relies instead on conclusory statements that sharing a cell with a homosexual inmate is against his conscience and "religious obligation to honor God." … Thus, Plaintiff's allegations suggest that he takes issue only with the *exposure* to a homosexual cellmate, and not with any *effect* it has on his religious activities. Indeed, his filings do not identify any religious exercise apart from mentioning very general tenets of his religion to "honor God" and maintain his "human dignity."

McKnight, 2015 WL 7730995 at *4.

The facts are similar here: Rost avers that his obligation to honor God obliges him to fire Stephens, who does not act as Rost's beliefs dictate she should. In other words, the mere presence of and exposure to Stephens offends his beliefs. *See* Ex. T, Def's Answers to Plaintiff's First Set of Discovery Requests at p. 4 ("Stephens['s] intentions also violated Mr. Ros[t]'s sincerely held religious beliefs"). However, this is not sufficient to sustain a RFRA claim.

Significantly, Defendant is still able to engage in the religious activities identified by Rost—the placement of devotionals and cards for the public—regardless of whether or not one of its employees happens to violate Rost's religion-based gender stereotypes. Thus, Rost's religious exercises are not affected by the presence or employment of Stephens.

The mere fact that Rost thinks Stephens's continued employment violates his religious beliefs is legally insufficient under RFRA.

3. Enforcement of Title VII does not substantially burden Defendant.

Even if Defendant identifies a religious exercise that has been burdened, RFRA requires a "*substantial* burden" and such is a question of law for the Court. "RFRA is not a mechanism to advance a generalized objection to a governmental policy choice, even if it is one sincerely based upon religion." *Michigan Cath. Conf. v. Burwell*, 807 F.3d 738 (6th Cir. 2015) (*Burwell II*) (affirming *Burwell I*):

> But a government action does not constitute a substantial burden on the exercise of religion even if "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs" if the governmental action does not coerce the individuals to violate their religious beliefs or deny them the "rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988).

Id., 755 F.3d at 384 (6th Cir. 2014).

Here, RGGR cannot establish a substantial burden. As stated before, there is no burdened exercise. Further, the Commission is not asking Rost to adopt a different belief about transgender people, and

Rost has already admitted that employing people with religious beliefs different from his own does not constitute an endorsement of the employee's religious views.

Likewise, continued employment of Aimee Stephens does not constitute an endorsement of any religious view. As Justice O'Connor stated in a concurring opinion:

> A statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice."

Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711-712 (1985).

Instead, in this case, the EEOC has filed suit in an effort to create a workplace free of gender discrimination for a qualified funeral director and embalmer. Since no employer can discharge people for reasons grounded in sexual stereotypes, the Defendant is not being denied any right, benefit or privilege granted to an employer who does not share its views. Further, Commission investigations and lawsuits under Title VII

are not a substantial burden under RFRA. In *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763 (S.D. Ind. 2002), the Commission investigated and sued an employer under Title VII for alleged religious discrimination against employees and applicants who did not share the fundamentalist Christian views of the Defendant's management. Both the investigation and lawsuit involved extensive and searching examination of the religious viewpoints of the Defendant's decision-makers and employees. *See Preferred*, 216 F. Supp. 2d at 772-803. The defendant in *Preferred* objected to this process, claiming that it violated its rights under RFRA and the First Amendment. *Id.* at 804-805. The court held that neither the 2½-year investigation (which included 24 depositions) nor the litigation itself constituted a substantial burden on the religious rights of the employer. *Id.* at 807-809, 810.

Here, because the Defendant chose not to assert them, the Commission was entirely unaware of any potential religious issues during the investigation. Thus, there can be no claim of a substantial burden from the investigation. As to the litigation itself, Defendant injected religion into the matter, so the Commission properly probed the

religious claims at stake.

Therefore, as a matter of law, it should be held that Defendant's rights have not been substantially burdened by this action.

4. Enforcement of Title VII here furthers a compelling governmental interest in eradicating sex discrimination and is precisely tailored to further that interest.

To the Commission's knowledge, there is no case law holding that RFRA trumps Title VII. To the contrary, the Supreme Court suggested in a colloquy between the principal dissent and the majority opinion in *Hobby Lobby*, 134 S. Ct. 2751, that Title VII serves a compelling governmental interest which cannot be overridden by RFRA. While dealing with a matter far removed from the dispute here, the discussion is worth quoting in full.

In *Burwell*, the principal dissent expressed concerns about RFRA being used to trump laws regarding accommodation and hiring, especially in the context of sex-based hiring decisions informed by religion. *See Burwell* at 2804-2805 (Ginsberg, J., dissenting).

In response, the majority opinion emphasized that anti-discrimination laws with respect to hiring would not be trumped by

RFRA:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post,* at 2804 – 2805. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Id. at 2783. Title VII's prohibitions against sex discrimination in the workplace demonstrate that the government has a compelling interest in protecting employees from losing their jobs on the basis of an employer's gender stereotyping, and they are precisely tailored to ensure this.

Ultimately, the concurring opinion stated the balance most clearly in the employment context:

> Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.

Id. at 2786-87 (Kennedy, J., concurring).

Even if Title VII burdens a religious practice, there "is a 'compelling government interest' in creating such a burden: the eradication of employment discrimination based on the criteria

identified in Title VII[.]" *Preferred Mgmt.*, 216 F. Supp. 2d at 810.

In the final analysis, Thomas Rost is free to exercise his Christian religious beliefs, but he is not free to take away Aimee Stephens's livelihood in the process. Nor is he able to excuse his actions under the cloak of religious freedom. Neither the Constitution nor RFRA authorize the firing of Stephens. To the contrary, Rost's admissions warrant entry of judgment in favor of the Commission.

C. Summary Judgment as to liability for Stephens's gender-motivated termination is warranted.

Title VII violations can be established through either circumstantial or direct evidence. "Direct evidence of discrimination is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003). Rost admits that his sex-based stereotypes motivated Stephens's termination. Ex. B at 135:24-136:3. And this constitutes an admission of discrimination. Thus, the Commission respectfully requests that summary judgment as to liability for Stephens's termination be entered in favor of the Plaintiff.

As this Court discussed in its *Amended Opinion & Order Denying Defendant's Motion to Dismiss* (Dkt. 13), an employer discriminates on the basis of sex when it fires an employee for failing to conform to the employer's notions of the employee's sex. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (sexual stereotyping claim based on, among other things, instruction to plaintiff to wear jewelry and dress more femininely); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils"). Here, there is no material dispute of fact regarding motivation. Rost has frankly and forthrightly stated his motivation for firing Stephens in no uncertain terms—that Stephens was a man and had to present as one. Ex. B at 135:24-136:3.

In *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004), the Sixth Circuit explained that an employer violates Title VII when it takes action against an employee based on "[s]ex stereotyping," that is, "based on a person's gender non-conforming behavior." This includes penalizing an employee for dress or mannerisms that, in the employer's mind, conform to the wrong sex stereotypes. *See also Myers v. Cuyahoga Cty.*,

182 Fed. Appx. 510, 519 (6th Cir. 2006) ("Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender") (citing *Smith* and *Barnes*); *Fabian v. Hospital of Central Connecticut*, No. 3:12-cv-1154, __F. Supp. 3d __, 2016 WL 1089178 at *10-13 (D. Conn. March 18, 2016) (following *inter alia*, Title VII's plain language, *Price Waterhouse* and *Smith* and discussing the development of the case law).

Thus, an employee who alleges that failure to conform to sex stereotypes concerning how a man or woman should look and behave was the "driving force" behind the employer's adverse employment actions "state[s] a claim for relief pursuant to Title VII's prohibition of sex discrimination." *Smith*, 378 F.3d at 575. In particular, an employer may not fire a transgender woman for failing to comport with the employer's gender expectations. Such an act is discrimination "because of … sex," which Title VII prohibits.

RGGR fired Stephens because she did not conform to its expectations of how someone assigned the male sex at birth should look and act:

Q [Defense Counsel] Okay. Why did you -- what was the specific reason that you terminated Stephens?
A Well, because he -- he was no longer going to represent himself as a man. He wanted to dress as a woman.

Ex. B at 135:24-136:1. Rost also admits that Stephens's termination was not motivated by any performance reasons. *Id.* at 108:25-109:9.

Stephens intended to provide the same level of services to the Respondent as she had always provided. And she still intended to dress professionally, in a manner consistent with the Respondent's dress requirements for women. Ex. Q, Stephens Dep. at 133:6-133:9. In other words, she still intended to meet all of the Respondent's legitimate business expectations. Therefore, RGGR discriminated against Stephens based on its gender stereotypes, in contravention of *Smith.* Ex. B at 55:8-55:9 ("Well, I believe that God created a man as a man and God created a woman as a woman."). As the Sixth Circuit noted in *Smith*, *Price Waterhouse* states that Title VII forbids discrimination based on the employer's notions of how a male or female should look or act. *See* 378 F.3d at 572-73.

Because the Commission can establish direct evidence of

discrimination, the Court need not proceed to the second step of the traditional *McDonnell Douglas* burden-shifting analysis for cases proceeding under a circumstantial evidence theory. Even if the Court considers RGGR's dress code a possible defense, RGGR's argument fails for two reasons: RGGR's dress code is not a legitimate, non-discriminatory reason for terminating Stephens, and even if it were non-discriminatory, the dress code is a pretext, not the real reason RGGR fired Stephens.

RGGR is likely to cite a string of cases allegedly standing for the proposition that sex-specific dress codes do not violate Title VII. *See* Dkt. 7 at Pg ID 38-40. However, as this Court already recognized, this is not the Commission's allegation in the lawsuit. *See* Dkt. 13 at Pg ID 197 ("Here, however, the EEOC's complaint does not assert any claims based upon a dress code and it does not contain any allegations as to a dress code at the Funeral Home"). The Commission is not asserting that RGGR's dress code violates Title VII—rather the violation is RGGR's insistence that Stephens dress in accord with Rost's gender stereotypes. Stephens's gender identity is female, and she was prepared to abide by

RGGR's female dress code. Ex. Q, Stephens Dep. at 133:6-9. RGGR's desire to force her to present as a male at work evidences the exact sex-based consideration that establishes RGGR terminated Stephens because of her sex.

RGGR claims that if it cannot force Stephens to dress inconsistent with her gender identity, sex specific dress codes would be "effectively invalidate[d]." Dkt. 7 at Pg ID 40-42. RGGR's argument misses the mark because Stephens fully intended to abide by the female dress code—and to continue to dress in a professional manner at work.

RGGR claims that employers will not be "able to any longer control how its employees and agents appear to the public." Dkt. 7 at Pg ID 41. This is unworthy of credence. RGGR can require its employees to dress professionally and appropriately. What RGGR cannot require is that an employee dress inconsistently with his or her gender identity. It is RGGR's insistence that it could require Stephens to present inconsistently with her gender identity—but consistently with RGGR's stereotypes for how she should dress—that establishes that RGGR terminated Stephens for violating its gender-based expectations. Such

employer action violates Title VII.

D. Defendant's Clothing-Allowance Policy Constitutes Sex-Based Discrimination.

Title VII makes it unlawful for an employer to "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). Defendant's policy of paying for the work clothing of male employees, while failing to provide a comparable benefit to female employees violates Title VII.

As clarified by the EEOC Guidelines on Discrimination Because of Sex, "fringe benefits" are encompassed by the language in § 2000e-2(a)(1). 29 C.F.R. §1604.9(a)–(b). Federal courts have also recognized various allowances, including work-clothing-related allowances, as being fringe benefits under Title VII. *See Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 443, 453–56 (D.C. Cir. 1976) (upholding lower court's finding that providing a uniform-cleaning allowance to only the male employees, but not female employees, constituted a violation under Title VII); *Long v. Ringling Brothers-Barnum & Bailey Combined Shows*, 9 F.3d 340, 343–44 (4th

Cir. 1993) (finding genuine issues of material fact in a Title VII case involving a claim of fringe benefits, which included allowances for meals, laundry and valet services, and life and health insurances).

Thus, Defendant's practice of providing fringe benefits only to men in the form of free work clothing violated Title VII.

Even now, although Defendant provides female employees with a yearly clothing allowance of $75 to $150, this is significantly less than the clothing benefits in excess of $200 provided to male employees, and is less flexible, since women can only obtain it on a pre-determined schedule and even part-time male employees can replace clothing at need as it wears out or is damaged.

Specifically, RGGR permits its male employees to receive their clothing benefits immediately upon hire and they can replace soiled or damaged clothes as needed, also at no cost. In contrast, Defendant's female employees are required to wait until the next clothing allowance checks are issued for *all* female employees before they receive their clothing allowance. As a consequence, Defendant has only lessened, but not eliminated, its discrimination against female employees. Hence, it

continues to violate Title VII and is liable for damages for discrimination on the basis of sex. Thus, summary judgment is appropriate as to the clothing-allowance claim as well.

IV. CONCLUSION

There is no factual dispute that Thomas Rost discharged Aimee Stephens because she refused to conform to his sex-based stereotypes and present as a man. Rost has forthrightly admitted this, and more than once. Moreover, his religious beliefs regarding transgender persons do not excuse him from his duty as an employer to respect Aimee Stephens's Title VII rights. No case has held that either the First Amendment or RFRA trumps or voids employee discrimination claims.

Further, Defendant has and continues to provide inferior clothing allowance benefits to female employees. This, too, is not a matter of dispute. Consequently, summary judgment in favor of the Commission is appropriate as to both of the claims at issue in this lawsuit, and the Commission respectfully requests that the Court grant its motion as to liability and the matter proceed as to the calculation of damages

Respectfully submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

s/ Miles Shultz
MILES SHULTZ (P73555)
Trial Attorney

s/ Katie Linehan
KATIE LINHAN (P77974)
Trial Attorney

Dated: April 7, 2016

s/ Dale Price
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Certificate of Service

I hereby certify that on April 7, 2016, I electronically filed the forgoing with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all record attorneys.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

dated: April 7, 2016

s/ Dale Price
DALE PRICE (P55578)
Trial Attorney

APPENDIX 7

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, ACLU's Unopposed Motion and Brief for Leave to File Amicus Curiae Brief in Support of EEOC's Summary Judgement Motion**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant.

Case No. 14-cv-13710

Hon. Sean F. Cox
Mag. David R. Grand

UNOPPOSED MOTION BY THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The American Civil Liberties Union and the American Civil Liberties Union of Michigan (collectively, the "ACLU") file this unopposed motion for leave to file an *amicus curiae* brief for the reasons that follow and those set forth in the attached brief:

1. The American Civil Liberties Union is a nonprofit, nonpartisan organization with over 500,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution. The American Civil Liberties Union of Michigan is the Michigan affiliate of the American Civil Liberties Union.

2. The ACLU is well-positioned to submit an *amicus* brief in this case. The ACLU has a long history of defending religious liberty, including defending the right of individuals to freely practice their religion or no religion. *See, e.g.*, *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683 (E.D. Mich. 2008) (holding that a Catholic man's rights were violated when he was sent to jail for asking a drug court judge to remove him from a drug rehabilitation program that coerced him into practicing the Pentecostal faith).[1] At the same time, the ACLU is committed to fighting discrimination and inequality, including discrimination against transgender people. *See, e.g.*, Complaint, *Love v. Johnson*, 2:15-cv-11834-NGE-EAS (E.D. Mich. filed May 21, 2015) (challenging the State of Michigan's policy of refusing to correct the gender on a transgender person's driver's license or state identification card unless the person requesting the correction produces an amended birth certificate showing the correct gender).[2]

3. Most relevant to this case, the ACLU filed an *amicus* brief in a pregnancy discrimination case where the employer raised religious exercise defenses to enforcement of Title VII and the Americans with Disabilities Act. These defenses were rejected. *See Herx v. Diocese of Fort Want–South Bend Inc.*,

[1] For a full history of the ACLU's free exercise work, see https://www.aclu.org/aclu-defense-religious-practice-and-expression.

[2] More information about the ACLU's LGBT rights work can be found at https://www.aclu.org/issues/lgbt-rights.

48 F. Supp. 3d 1168 (N.D. Ind. 2014), *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014).

4. The proposed brief would aid this Court by providing a historical context for this case, including the long line of cases that have rejected the use of religion to discriminate against others in employment, and by highlighting the government's compelling interest in preventing such discrimination.

5. The proposed brief would also aid this Court by demonstrating why a sex specific dress code provides no defense to Title VII liability where an employer terminates a transgender employee for dressing in accordance with her gender identity.

6. Pursuant to Local Rule 7.1(a), the ACLU has contacted the parties' counsel to seek concurrence. Both parties concur in the ACLU's request to file an *amicus curiae* brief.

7. If the motion is granted, the ACLU will file the brief attached as Exhibit A.

WHEREFORE, the ACLU respectfully requests that this Court grant this motion to allow the ACLU to file the attached *amicus curiae* brief.

Respectfully submitted,

/s/ Jay D. Kaplan
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Daniel S. Korobkin (P72842)
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Dated: April 15, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant.

Case No. 14-cv-13710

Hon. Sean F. Cox
Mag. David R. Grand

BRIEF IN SUPPORT OF ACLU'S UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Local Rule 7.1(d), the ACLU submits this brief in support of its unopposed motion for leave to file an *amicus curiae* brief. Whether to grant a motion for leave to file an *amicus* brief is in the sound discretion of the Court. *See, e.g.*, *Northland Family Planning Clinic v. Cox*, 394 F. Supp. 2d 978, 990 (E.D. Mich. 2005) (granting leave to anti-abortion organization and individuals to file *amici* briefs in a constitutional challenge to an abortion restrictions); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 438 (E.D. Mich. 2004) (allowing *amicus* brief with no discussion). The ACLU has frequently been granted leave to file *amicus curiae* briefs in this Court. *See, e.g.*, *Freedom from Religion Found. v. City of Warren*, 873 F. Supp. 2d 850 (E.D. Mich. 2012); *Doe v. Sturdivant*, No. 05-

70869, 2005 WL 2769000, at *3 (E.D. Mich. Oct. 25, 2005); *Everson v. Mich. Dep't of Corrections*, 222 F. Supp. 2d 864 (E.D. Mich. 2002); *Thomason v. Jernigan*, 770 F. Supp. 1195, 1196 (E.D. Mich. 1991).

In one case, this Court engaged in some analysis when granting leave to the Detroit Free Press to file an *amicus curiae* brief. This Court granted leave in that case in part because the *amicus* brief "offers a unique perspective and analysis of the" underlying statute at issue in the case. *Flagg v. City of Detroit*, 252 F.R.D. 346, 360 n.28 (E.D. Mich. 2008). The same is true here. As discussed in the accompanying motion, the ACLU does not repeat the identical arguments of any party but rather provides an extensive discussion of courts' refusal to countenance religious exemptions from anti-discrimination laws, as well as an explanation of why a sex specific dress code provides no defense to Title VII liability where an employer terminates a transgender employee for dressing in accordance with her gender identity.

Furthermore, this Court in *Flagg* also allowed the Free Press to file an *amicus* brief because of its interest in the case. *Id.* The ACLU likewise has a significant interest in the outcome of this case and in making sure that religious exercise protections are not used to license discrimination. The intersection of these and other civil rights and liberties uniquely position the ACLU to offer an *amicus* brief here. Indeed, the ACLU has been granted *amicus* status in other

religious exercise challenges to enforcement of Title VII. *See Herx v. Diocese of Fort Want–South Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014). Moreover, as a membership organization, the ACLU has an interest in ensuring that Title VII's protections are enforced, which will benefit our members.

Accordingly, the ACLU respectfully requests that this Court grant leave to allow the ACLU to file the attached *amicus curiae* brief.

Respectfully submitted,

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Dated: April 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant.

Case No. 14-cv-13710

Hon. Sean F. Cox
Mag. David R. Grand

ACLU'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF EEOC'S MOTION FOR SUMMARY JUDGMENT

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Cases

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Other Authorities

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union and the American Civil Liberties Union of Michigan (collectively, "ACLU") submit this *amicus* brief in support of Plaintiff's motion for summary judgment. The right to practice one's religion, or no religion, is a core component of our civil liberties and is of vital importance to the ACLU. For this reason, the ACLU regularly brings cases aimed at protecting the right to religious exercise and expression. At the same time, the ACLU is committed to fighting discrimination and inequality, including discrimination against transgender people by, for example, denying transgender employees the ability to dress consistently with their gender identity.

Amici support the motion for summary judgment filed by Plaintiff Equal Employment Opportunity Commission ("EEOC"). *Amici* submit this brief to explain why an employer may not use a sex-specific dress code as a license to subject a transgender employee to an adverse employment action, such as firing, because she intends to dress consistently with her gender identity, and to explain why Title VII is essential to furthering the government's compelling interest in preventing invidious discrimination. *Amici* take no position on the other issues presented by the parties' cross-motions for summary judgment.

INTRODUCTION

Amici agree with the EEOC that terminating a transgender employee because she intends to dress consistently with her gender identity constitutes illegal sex discrimination even if couched as the enforcement of a so-called "biological" sex-specific dress code. To hold otherwise would allow employers through the adoption and application of such a dress code to reinforce the sex-stereotypes that Title VII was intended to eradicate. To be clear, this case is not a challenge to gendered dress codes, as Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("Funeral Home") would have this Court believe. The EEOC's case is only about whether firing a transgender female employee because of her plan to start dressing as a woman constitutes sex stereotyping in violation of Title VII. It plainly does.

Amici further agree with the EEOC that neither the Free Exercise Clause nor the Religious Freedom Restoration Act ("RFRA") exempts the Funeral Home from liability under Title VII. The religious defenses raised by the Funeral Home—that it has the right to discriminate based on sex in violation of federal civil rights laws because of its owner's religious beliefs—are, unfortunately, not new. For decades, private employers have attempted to use their religious beliefs to evade compliance with anti-discrimination laws, including Title VII. For example, employers claimed that the right to religious freedom entitled them to pay men more than women, because of their religious belief that men should be the primary breadwinners;

businesses claimed that the right to religious liberty entitled them to discriminate against people of color in public accommodations, because of their religious belief that the races should be kept separate; and universities claimed a religious liberty right to prohibit interracial dating among their students, because of their religious belief against interracial relationships. In each of these cases, courts squarely rejected the notion that religious liberty provides employers, schools, and businesses open to the public with a license to discriminate. This Court should come to the same conclusion here. The exemption the Funeral Home seeks, if granted, would not only contravene clear and consistent precedent, it would threaten decades of progress achieved by important civil rights statutes and would make employees throughout the country vulnerable to discrimination.

FACTUAL AND PROCEDURAL BACKGROUND

Aimee Stephens is a transgender woman who served as a funeral director and embalmer at the Funeral Home. Mem. in Supp. of Pl.'s Mot. for Summ. J. ("Pl. Mem.") at 1. On July 31, 2013, Ms. Stephens wrote her coworkers a letter informing them about her transition from male to female, and explaining that she intended to dress in appropriate business attire as a woman. *See id.* Ex. A, Stephens Letter. The Funeral Home's owner, Thomas Rost, responded two weeks later by handing Ms. Stephens a severance agreement. Mr. Rost has said that the "specific

reason" he terminated Ms. Stephens was because she "wanted to dress as a woman." Pl. Mem. at 1–2.

The EEOC brought a sex discrimination lawsuit against the Funeral Home, alleging that its termination of Ms. Stephens violated Title VII's prohibition on sex discrimination. The Funeral Home moved to dismiss the case on the ground that gender identity is not protected by Title VII; however, this Court concluded that the EEOC had properly alleged a sex discrimination claim by asserting that Ms. Stephens was fired for failing to conform to Mr. Rost's sex- or gender-based stereotypes. Op. & Order Denying Mot. to Dismiss at 14. After its motion to dismiss was denied, the Funeral Home amended its Answer to raise defenses under the Free Exercise Clause and RFRA. Answer to Am. Compl. at 5. The parties have filed cross-motions for summary judgment.

ARGUMENT

I. The Funeral Home's dress code is not a defense to its discriminatory firing of Aimee Stephens.

The Funeral Home relies on its alleged "biological" sex-specific dress code to justify its termination of Ms. Stephens. Its argument, however, misconstrues the EEOC's argument as a challenge to its dress code, which it is not, and ignores the ample legal precedent establishing that an employer's adverse response to an employee's manner of dress may constitute illegal sex discrimination. Since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), numerous courts have recognized

that disparate treatment of an employee because her clothing fails to comport with the employer's sex-based stereotypes qualifies as illegal sex discrimination. The Sixth Circuit in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), extended *Price Waterhouse*'s reasoning to a transgender firefighter who had been suspended after she began to express a more feminine appearance at work. The court reasoned that, under *Price Waterhouse*, "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex." *Id.* at 574.

Consistent with *Price Waterhouse* and *Smith*, courts have repeatedly held that an employer's adverse response to a transgender person's intention to begin dressing consistently with his or her gender identity—such as occurred in the present case—constitutes unlawful sex stereotyping. In *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), for example, the court found that a transgender woman was subject to sex stereotyping in violation of Title VII, based on evidence that her offer to work at the Library of Congress was retracted because she was perceived as "a man in women's clothing," or would be perceived as such by Members of Congress and their staffs. *Id.* at 305. The Eleventh Circuit reached a similar conclusion in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), finding that the reason for a transgender woman's termination—because she was perceived

"as 'a man dressed as a woman and made up as a woman,'"—provided "ample direct evidence to support the district court's conclusion" that she was fired due to sex stereotyping in violation of the Fourteenth Amendment. *Id*. at 1320–21; *see also Chavez v. Credit Nation Auto Sales, LLC*, No. 14-14596, 2016 WL 158820, at *7 (11th Cir. Jan. 14, 2016) (testimony that transgender woman was told not to wear a dress to and from work evidence of sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *4 (E.D. Ark. Sept. 15, 2015) (finding that there was "ample evidence from which a reasonable juror could find that [a transgender employee] was terminated because of her sex," where employer "repeatedly forbade" her to "wear feminine clothes at work" and terminated her employment "soon after she disobeyed [her employer's] orders and began wearing makeup and feminine attire at work"); *Lie v. Sky Pub. Corp.*, No. 013117J, 2002 WL 31492397, at *5 (Mass. Super. Oct. 7, 2002) (firing of transgender woman for refusing to "wear traditionally male attire" made out case of sex stereotyping).

The Funeral Home suggests that its termination of Ms. Stephens did not violate Title VII because it fired her for failing to comply with its dress code "based on the biological sex of its employees." Mem. of Law in Supp. of Def.'s Mot. for Summ. J. ("Def. Mem.") at 8. But the Funeral Home's assertion that it may require Ms. Stephens to wear men's attire because it perceives her to be

"biologically" male is simply another way of describing its illegal sex stereotyping—its refusal to allow a person it perceives as male to dress as a female.[1] As such, this case is no different than *Smith* and the other cases cited *supra*. And while the Funeral Home claims that the EEOC is challenging its ability to maintain a sex-specific dress code, the lawfulness of sex-specific dress codes is not at issue in this case. What is at issue is the Funeral Home's discriminatory application of its dress code to Ms. Stephens. None of the cases cited by the Funeral Home involve transgender employees, nor do they permit an employer to treat transgender men and women differently from other men and women. Rather, the cases cited by the Funeral Home involve employees who did not comply with the dress code applicable to them. Here, by contrast, there is no dispute that Ms. Stephens intended to comply with the dress code consistent with her gender identity.

Nor is there any basis for the Funeral Home's argument that accepting the EEOC's position in this case would require employers "to allow an employee to dress in a female uniform one day, switch to a male uniform the next day, and return to the female uniform whenever that employee chooses." Def. Mem. at 15.

[1] While it is unnecessary for this Court to resolve this question, it bears pointing out that the Funeral Home's assertion that Ms. Stephens is "biologically" male is inaccurate—research indicates that gender identity itself has a biological component. *See* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 944 (2015) (summarizing research).

A transgender person's decision to live consistent with her gender identity is not one that is made lightly, nor is going to be reversed on a whim. *See, e.g.*, *Schroer v. Billington*, 577 F. Supp. 2d 293, 296 (D.D.C. 2008) (transgender job applicant explaining "that she did not see being transgender as a choice and that it was something she had lived with her entire life"). The Funeral Home's argument that its "business needs and the interests of the grieving people [it] serves" allows it to refuse Ms. Stephens the ability to dress as a woman is similarly devoid of merit Def. Mem. at 14. The record shows that Ms. Stephens intended to dress professionally as a woman. Moreover, "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort." *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *9 (Apr. 1, 2015) (collecting cases).

II. The Free Exercise Clause and RFRA do not provide religious exemptions from Title VII and other civil rights laws.

A central question presented in this case is whether a for-profit business can rely on the religious beliefs of its owners to discriminate against a lay employee on the basis of her sex, where other employers would face liability under Title VII or another civil rights statute for engaging in such discrimination. The answer is no. Neither the Constitution's Free Exercise Clause nor RFRA gives for-profit businesses the right to discriminate against lay employees on the basis of sex, race,

or other federally protected characteristics, even if the discrimination is motivated by the sincerely held religious beliefs of the business's owners. To the contrary, courts have consistently refused to grant employers religious exemptions from civil rights laws in circumstances such as these. This Court should apply the same principle here.

A. Enforcement of Title VII against the Funeral Home does not violate the Free Exercise Clause.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (citing *Smith*). Since *Smith*, courts—including the Sixth Circuit—have consistently held that neutral laws of general applicability do not violate the Free Exercise Clause. *See, e.g.*, *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999) ("[T]he City of Troy's ordinances governing residential and community facilities districts are neutral laws of general applicability. As a result, we find that judgment was properly entered in favor of the City with respect to the free exercise claim.").

Here, Title VII is a neutral law of general applicability, and it is well-settled that the law does not target any specific religion for discriminatory treatment. *See, e.g.*, *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992) ("Title VII neither regulates religious beliefs, nor burdens religious acts,

because of their religious motivation. On the contrary, it is clear that Title VII is a secular, neutral statute . . . ."). Even if particular religious beliefs are disproportionately burdened by Title VII, this burden is insufficient to show the statute is *intended* to discriminate against that religion, such that heightened judicial scrutiny of the statute is required. *See, e.g.*, *Bloch v. Frischholz*, 587 F.3d 771, 785 (7th Cir. 2009) ("*Smith* requires more than just evidence of an adverse impact on [religious believers] . . . . Under *Smith*, the denial of a religious exception is not intentional discrimination."); *Prater v. City of Burnside*, 289 F.3d 417, 428–29 (6th Cir. 2002) ("Discrimination may not be inferred . . . simply because a public program is incompatible with a religious organization's spiritual priorities . . . . The Church, therefore, must show more than disparate impact in order to prove discriminatory animus on the part of the City."). The Free Exercise Clause accordingly does not exempt lay employees from Title VII's protections.

Even under the more rigorous pre-*Smith* analysis, courts repeatedly found that antidiscrimination laws such as Title VII meet strict scrutiny and therefore survive Free Exercise Clause challenges.[2] These courts held that any burdens on

[2] Before *Smith*, courts analyzed religious exemption claims by determining whether: (1) the denial of an exemption substantially burdened the claimant's religious exercise; and (2) if so, whether the denial of an exemption was nevertheless justified by the need to further a compelling government interest. *See Wisconsin v. Yoder*, 406 U.S. 205, 210–11 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406–09 (1963). Because RFRA was meant "to restore the compelling interest

the free exercise of religion imposed by antidiscrimination statutes are outweighed by the compelling state interest in eradicating discrimination and promoting equality. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), for example, the Supreme Court held that the IRS's denial of tax exempt status to Bob Jones University and Goldsboro Christian Schools—on the ground that the schools engaged in racial segregation because of its religious belief against interracial relationships—did not violate the Free Exercise Clause, because "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . [which] outweighs whatever burden denial of tax benefits places on [the schools'] exercise of their religious beliefs." *Id.* at 604; *see also, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) ("refus[ing] to lend credence or support to [a restaurant owner's position] that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs"), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

In the employment context, courts consistently rejected pre-*Smith* Free Exercise Clause challenges to Title VII and other nondiscrimination statutes. For instance, in *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), the Fifth

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test as set forth" in *Sherbert* and *Yoder*, 42 U.S.C. § 2000bb(b)(1), the pre-*Smith* case law is informative with respect to the Funeral Home's RFRA defense.

Circuit held that application of Title VII to a sectarian university's employment practices did not violate the Free Exercise Clause. *Id.* at 489. Although the College argued that it should be allowed to discriminate on the basis of sex because of its religious belief that only men should teach certain courses, the court concluded that the College was not exempt from Title VII's prohibition against discrimination because of sex and that any claimed burden on religious exercise in complying with the law were justified by the government's "compelling interest in eradicating discrimination in all forms." *Id* at 488. To take another example, in *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), the Ninth Circuit held that a sectarian school's policy of providing health insurance benefits only to persons it considered to be "head of household"—i.e., single persons and married men, but not married women—violated Title VII and the Fair Labor Standards Act (FLSA). *Id.* at 1364. The school challenged the statutes on Free Exercise Clause grounds, arguing that its practice of providing health insurance benefits to single employees and married men, but not married women, was motivated by the sincere religious belief that men should be the head of the household. *Id.* at 1367. The court, however, held that the school's policy discriminated on the basis of sex and that enforcement of the anti-discrimination statutes was the least restrictive means for furthering Congress's compelling interest in eliminating discrimination. *Id.* at 1368–69 (citing *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1279 (9th Cir.

1982)); *accord Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that enforcement of the FLSA's minimum wage and equal pay provisions against a sectarian school that paid female teachers less than male teachers did not violate the school's free exercise rights, because enforcement of these provisions was the least restrictive means for furthering the government's compelling interest in preventing discrimination and ensuring fair wages).

B. Enforcement of Title VII against the Funeral Home does not violate RFRA.

Just as courts refused to grant religious exemptions from Title VII and other civil rights laws under the pre-*Smith* Free Exercise Clause, so too they have refused to grant such exemptions under RFRA. *See Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006) (rejecting sectarian school's RFRA defense to Title VII sex discrimination claim by teacher who was fired after becoming pregnant outside of marriage); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810–13 (S.D. Ind. 2002) (rejecting for-profit company's RFRA defense to Title VII religious discrimination claims); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (stating that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race").

Under RFRA, which was meant to restore the pre-*Smith* approach to religious exemption claims, employers must comply with federal laws, including

Title VII—even where the requirements of those laws impose a substantial burden on its owner's religious beliefs—so long as the government "demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Here, Title VII is the least restrictive means for furthering the government's interest in preventing invidious employment discrimination on the basis of sex. "It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is . . . an invidious practice that causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992). Such discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). To prevent these evils, Title VII and other civil rights laws ensure equal access to the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996).[3]

[3] To be sure, there are many cases where a court may dispose of RFRA claims on alternative grounds. For example, the Sixth Circuit has held that RFRA does not apply in a suit between private parties. *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010). Or, as the EEOC argues here, a court may conclude that the challenged government action does not impose a substantial burden on the RFRA claimant's religious exercise. Pl. Mem. at 18–24.

Courts have acknowledged the government's compelling interest in eradicating *all* forms of invidious discrimination proscribed by Title VII. In *EEOC v. Pacific Press Publishing Association*, for example, the Ninth Circuit rejected an employer's pre-*Smith* free exercise challenge to an EEOC retaliation case, because of the government's compelling interest in preventing employment discrimination. 676 F.2d 1272, 1280 (9th Cir. 1982), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).[4] It held that "Congress clearly targeted the elimination of *all forms* of discrimination as a 'highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." *Pac. Press*, 676 F.2d at 1280 (emphasis added) (citations omitted). Courts have similarly rejected RFRA challenges to Title VII liability, explaining that Title VII furthers the government's compelling interest in "the eradication of employment discrimination based on the criteria identified in Title VII." *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 811; *see also Redhead*, 440 F. Supp. 2d at 221–22 (stating that the government has a compelling interest in making sure that "Title VII remains enforceable as to [non-ministerial] employment relationships").

[4] The employer in *Pacific Press* was a Seventh-Day Adventist non-profit publishing house, and maintained that the charging party's participation in EEOC proceedings violated church doctrines prohibiting lawsuits by members against the church. 676 F.2d at 1280.

Although it is unnecessary to consider separately the interest in protecting equal employment opportunity based on each of the protected characteristics under Title VII, it is well established that the government has a compelling interest in eradicating discrimination based on sex. As the Supreme Court stated in *Roberts*, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." 468 U.S. at 625; *see also Bd. of Directors of Rotary Club Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (acknowledging the State's "compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services"). In the employment context, in particular, courts have consistently recognized that the government interest in preventing gender discrimination is "of the highest order." *Dole*, 899 F.2d at 1392 (internal quotation marks omitted); *accord Fremont Christian School*, 781 F.2d at 1368.

The government's interest in preventing invidious sex discrimination is no less compelling when the discrimination is directed at transgender persons. Our nation has a long and painful history of sex discrimination against transgender people. *See Smith*, 378 F.3d at 575 (holding that employer engaged in impermissible sex discrimination when it suspended transgender firefighter after

she began to exhibit a more feminine appearance at work); *cf. Glenn*, 663 F.3d at 1319–20 (holding in a case involving employment discrimination against a transgender employee that "governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny [under the Fourteenth Amendment] because they embody 'the very stereotype the law condemns'" (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994)); *Adkins v. City of New York*, No. 14-CV-7519 JSR, 2015 WL 7076956, at *4 (S.D.N.Y. Nov. 15, 2015) (holding that transgender people are a quasi-suspect class for purposes of the Fourteenth Amendment, in part because they "have suffered a history of persecution and discrimination").

Numerous studies have shown that transgender people face a serious risk of bodily harm, violence, and discrimination because of their transgender status. One systematic review of violence against transgender people in the United States up to 2009 found that between 25 and 50% of respondents had been victims of physical attacks because of their transgender status, roughly 15% had reported being victims of sexual assault, and over 80% had reported being victims of verbal abuse because of their transgender status. Rebecca Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 Aggression and Violent Behavior 170 (2009). With respect to employment discrimination in particular, one national

study found that 37% of transgender people reported experiencing some form of adverse employment action because of their transgender status. E.L. Lombardi, et al., *Gender Violence: Transgender Experiences With Violence and Discrimination*, 42 Journal of Homosexuality 89 (2001). More recently, the National Transgender Discrimination Survey ("Survey") found that nearly half of respondents had experienced some form of adverse employment action, and 26% had lost a job, because of their transgender status. Jaime Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* at 50 (2011), *available at* http://www.thetaskforce.org /static_html/downloads/reports/reports/ntds_full .pdf. The Survey found that transgender people report twice the unemployment rate of the general population, and that 44% of transgender people report being underemployed. *Id.* There can be no doubt that the government has a compelling interest in addressing such rampant discrimination.

Finally, uniform enforcement of anti-discrimination laws, such as Title VII, is the least restrictive means of achieving the government's interest in preventing the social harms of discrimination. *Hobby Lobby*, 134 S. Ct. at 2783 (recognizing that prohibitions against discrimination are "precisely tailored" to achieve the goal of equal opportunity). There is simply no way to prohibit discrimination except to prohibit discrimination, and any RFRA exemption from Title VII risks imposing concrete harms on employees subjected to invidious discrimination. *See N. Coast*

Women's Care Med. Grp., Inc. v. Superior Court, 189 P.3d 959, 967 (Cal. 2008) (holding that a state law prohibiting discrimination in public accommodations "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal" other than enforcement of the statute).

Every single instance of discrimination "causes grave harm to its victims," *Burke*, 504 U.S. at 238, and denies society the benefit of their "participation in political, economic, and cultural life," *Jaycees*, 408 U.S. at 625. Because of the individual harms associated with each instance of invidious discrimination, there is simply no "numerical cutoff below which the harm is insignificant." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282 (Alaska 1994) (per curiam) (rejecting state Free Exercise Clause challenge to municipal ordinance prohibiting housing discrimination based on marital status, on the ground that any exemption to the ordinance would directly impede the government's interest in preventing such discrimination). For the same reasons, enforcement of Title VII against some employers cannot alleviate the harms imposed by allowing other employers to engage in invidious discrimination. *See* Def. Mem. at 20–21.[5]

[5] Indeed, the Constitution requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees. As the Supreme Court cautioned in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the

The implications of allowing a RFRA exemption in this context are staggering. People hold sincere religious beliefs about a wide variety of things, including racial and religious segregation and the role of women in society. Our country's tradition of respect for religious freedom, in all its diversity, requires that we not subject an individual's assertions about his or her religious beliefs to unduly invasive scrutiny. As a result, if religious motivation exempted businesses from anti-discrimination laws, our government would be powerless to enforce those laws to protect all Americans against the harms of invidious discrimination. To name just a few examples: Business owners could refuse service to people of color, on the ground that their religious beliefs forbid racial integration. *See Piggie Park*, 256 F. Supp. at 945. Employers could refuse to hire women or pay them less than men, because their religious beliefs require women to remain at home. *See Fremont Christian School*, 781 F.2d at 1367–69; *Dole*, 899 F.2d at 1398. And

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Establishment Clause requires courts analyzing religious exemption claims under RFRA and the Religious Land Use and Institutionalized Persons Act to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720; *see also Estate of Thornton v. Caldor*, 472 U.S. 703, 709–10 (1985) (holding that the Establishment Clause prohibited a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath," because the statute took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"). Otherwise, "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987)).

educational institutions receiving federal benefits could impose religiously motivated racial segregation policies on their students. *See Bob Jones Univ.*, 461 U.S. at 604. All civil rights laws would be vulnerable to such claims where the discrimination was motivated by religion. Such challenges have no foundation in the law, and should not be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the EEOC's motion for summary judgment as to the Funeral Home's liability for Ms. Stephens's gender-motivated termination should be granted.

Respectfully submitted,

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Dated: April 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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APPENDIX 8

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,**
R.G. & G.R.'s Summary Judgment Motion Brief

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission, Plaintiff, v. R.G. & G.R. Harris Funeral Homes, Inc., Defendant.	Civil Action No. 2:14-cv-13710 Hon. Sean F. Cox

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S MOTION FOR SUMMARY JUDGMENT

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Statement of the Issues Presented

1. Whether the Court should grant summary judgment to Defendant R.G. & G.R. Funeral Homes, Inc. ("R.G.") on Plaintiff Equal Opportunity Employment Commission's (the "EEOC") Title VII claim on behalf of Charging Party Stephens, when the undisputed evidence demonstrates that R.G. dismissed Stephens because of Stephens's stated intent to violate a sex-specific dress code that imposes equal burdens on the sexes.

2. Whether the Religious Freedom Restoration Act ("RFRA") requires the Court to grant summary judgment to R.G. on the EEOC's Title VII claim on behalf of Stephens, when the undisputed evidence shows that the EEOC seeks to compel R.G. (a closely held corporation) to violate its owner's sincerely held religious beliefs.

3. Whether the Court should grant summary judgment to R.G. on the EEOC's Title VII claim (on behalf of an unidentified group of women) that challenges R.G.'s manner of providing work clothes and clothing allowances to its employees, when the EEOC lacks authority to bring a claim of discrimination that is unrelated to Stephens (a biological male when employed by R.G.) and that involves a kind of discrimination (discrimination in the terms and conditions of employment) different than that alleged by Stephens (discriminatory discharge), and when the undisputed evidence demonstrates that R.G. provides work clothes and clothing allowances that are equivalent for comparable male and female employees.

Authority for the Relief Sought

Issue No. 1

Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977)

Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc)

Issue No. 2

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, *et seq.*

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)

Issue No. 3

EEOC v. Bailey Co., 563 F.2d 439 (6th Cir. 1977)

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Introduction

Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("R.G.") and its owner Thomas Rost ("Rost") walk alongside grieving family members and friends when their loved ones pass away. Rost is a devout Christian who believes that God has called him to minister to these grieving families, and his faith informs the way he operates his business and how he presents his business to the public.

Charging Party Stephens was employed by R.G. as a funeral director embalmer. In Stephens's work as a funeral director, Stephens regularly interacted with the public, including grieving family members and friends. When Stephens, a biological male, informed Rost of an intention to begin wearing the female uniform for funeral directors, R.G. dismissed Stephens for refusing to comply with R.G.'s dress code.

Plaintiff Equal Employment Opportunity Commission (the "EEOC") claims that R.G. violated Title VII's prohibition on sex discrimination when R.G. dismissed Stephens. This Court's previous rulings have established that the EEOC is confined to arguing that R.G. engaged in unlawful sex stereotyping when it dismissed Stephens. Yet the undisputed evidence demonstrates that R.G. dismissed Stephens because Stephens stated an intent to violate a sex-specific dress code that imposes equal burdens on men and women. That decision had nothing to do with pernicious or illegitimate sex-based stereotypes. Consequently, as a matter of law, Stephens's termination does not violate Title VII.

In addition, R.G. is entitled to summary judgment because the Religious

Freedom Restoration Act ("RFRA") forbids the EEOC from applying Title VII to punish R.G. under the facts of this case. RFRA applies here because R.G. is a closely held corporation entirely controlled and majority-owned by Rost and because Rost operates R.G. consistent with his Christian faith. Rost sincerely believes that a person's sex (whether male or female) is an immutable God-given gift, and that he would be violating his faith if he were to pay for and otherwise permit his funeral directors to dress as members of the opposite sex while at work. Compelling R.G. to allow its male funeral directors to wear the uniform prescribed for females would thus substantially burden R.G.'s exercise of religion. Because the government cannot satisfy strict scrutiny here, RFRA bars Title VII's application in this case.

Finally, the Court should reject the EEOC's claim that R.G. violates Title VII by allegedly failing to provide female employees work clothes or clothing allowances equivalent to those given to males. This is because the EEOC lacks authority to raise that claim and because the work clothes and clothing allowances that R.G. provides to its employees do not discriminate between comparable male and female employees.

Standard of Review

Summary judgment must be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party carries its initial burden, the non-moving party may avoid summary judgment by "point[ing] to evidence in the record upon which a reasonable jury could find for it." *Martin v. Ohio Turnpike Comm'n*,

968 F.2d 606, 608-09 (6th Cir. 1992) (citations omitted).

Argument

I. Stephens Was Not Unlawfully Dismissed Because of Sex in Violation of Title VII.

Title VII prohibits an employer from dismissing or otherwise taking adverse action against an employee "because of" the employee's sex. 42 U.S.C. § 2000e-2(a)(1). Plaintiffs generally rely on the indirect method of proof for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that method, a plaintiff must establish the prima facie case by showing that "(1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008); *accord Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006). If the plaintiff establishes these elements, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Humenny v. Genex Corp.*, 390 F.3d 901, 906 (6th Cir. 2004). If the employer provides such a reason, the plaintiff's claim fails unless the plaintiff produces evidence that the proffered reason is a pretext for discrimination. *Id.*

In Title VII sex-discrimination litigation, "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner*

Offshore Servs., Inc., 523 U.S. 75, 80 (1998). Even though Stephens stated an intent to begin wearing the female uniform for funeral directors, Stephens was at all relevant times—from the time of Stephens's hiring through discharge—a biological male. Consequently, to establish a prima facie case for sex discrimination, Stephens must show that R.G. treated Stephens less favorably than a similarly situated female employee or that Stephens was replaced with a female employee. The EEOC cannot make this showing because R.G. was simply enforcing its legitimate dress code for funeral directors when it dismissed Stephens. Accordingly, the EEOC cannot prove intent to discriminate against Stephens based on sex.

A. Stephens Must Be Considered a Male for Purposes of Title VII.

Ruling on R.G.'s Motion to Dismiss, this Court held that "transgender status is not a protected class under Title VII." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015). This Court also "rejected the EEOC's claim that R.G. violated Title VII by firing Stephens . . . because of Stephens's transition from male to female." Order Granting in Part and Denying in Part EEOC's Motion for Protective Order at *2 (ECF No. 34). The EEOC is thus confined to arguing that R.G. discriminated against Stephens under the sex-stereotyping theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Legal analysis under that theory must begin by identifying the plaintiff's sex, which forms the basis of the alleged stereotyping. Because transgender status is not a protected class, the baseline for a sex-stereotyping claim must be a person's biological sex.

In this case, there is no dispute that during Stephens's employment at R.G., Stephens was a biological male. Indeed, this fact is conclusively established in this proceeding. In its response to R.G.'s Requests for Admissions, the EEOC *denied* that Stephens is "female *and not a male* for purposes of determining whether discrimination on the basis of 'sex' has occurred under Title VII." Pl.'s Resp. to Def.'s First Set of Discovery at Request for Admission No. 6 (Ex. 25) (emphasis added).

Thus, Stephens must be treated as a male for purposes of Stephens's Title VII claim. This conclusion has two consequences. First, any claim that Stephens was subjected to unlawful discrimination because Stephens is female must fail. Second, Stephens was subject to R.G.'s dress code for male funeral directors.

B. R.G.'s Enforcement of its Sex-Specific Dress Code Does Not Violate Title VII.

1. Sex-Specific Dress Codes That Impose Equal Burdens on Men and Women Do Not Violate Title VII.

Courts generally uphold sex-specific dress and grooming policies against Title VII challenges. *See, e.g.*, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (stating that the Ninth Circuit has "long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits"); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) ("[R]easonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and

female employees, it is not usually thought that there is unlawful discrimination 'because of sex.'"). This is particularly true when even though the challenged policy treats men and women differently, it does so without placing an unequal burden on one sex.

In *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977), for example, the Sixth Circuit held that a male employee who was discharged for failing to keep his hair short as required by his employer's sex-specific grooming policy did not state a cause of action under Title VII for discrimination based on sex. The employer's grooming policy "limited the manner in which the hair of the men could be cut and limited the manner in which the hair of women could be styled." *Id.* In holding that the male plaintiff failed to make out a prima facie case of sex discrimination, the court observed that there was "no allegation that women employees who failed to comply with the code provisions relating to hair style were not discharged"; nor was there "any allegation that the employer refused to hire men who did not comply with the code, but did hire women who were not in compliance." *Id.* In other words, the plaintiff did not state a claim for sex discrimination because he failed to allege that the employer's grooming policy imposed an unequal burden on men.

Courts in other circuits have reached the same conclusion. In 2006, an en banc panel of the Ninth Circuit confronted a similar set of facts in *Jespersen*. There, the court considered whether Harrah's Casino violated Title VII by requiring its bartenders to conform to a dress and grooming policy that required female bartenders

to wear makeup and nail polish and to tease, curl, or style their hair, while prohibiting male bartenders from wearing makeup or nail polish and requiring them to keep their hair cut above the collar. *Jespersen*, 444 F.3d at 1107. The court noted that it has "long recognized that companies may differentiate between men and women in appearance and grooming policies." *Id.* at 1110. "The material issue under our settled law is not whether the policies [for men and women] are different, but whether the policy imposed on the plaintiff creates an unequal burden for the plaintiff's gender." *Id.* (citation and quotation marks omitted). Because the female plaintiff failed to show that requiring women to wear makeup (and prohibiting men from doing so) imposed an unequal burden on women, the Ninth Circuit held that she could not establish her claim of sex discrimination. *Id.* at 1112; s*ee also Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (upholding sex-specific grooming policy); EEOC Compliance Manual § 619.4(d) (June 2006) (stating that sex-specific dress codes that "are suitable and are equally enforced and . . . are equivalent for men and women with respect to the standard or burden that they impose" do not violate Title VII).

2. R.G.'s Sex-Specific Dress Code Does Not Impose Unequal Burdens on Males and Females.

Because R.G.'s dress code for funeral directors imposes equivalent burdens on men and women, the enforcement of the dress code against Stephens was not unlawful discrimination, and R.G. is entitled to judgment as a matter of law.

R.G.'s basic dress code is outlined in the company's employee handbook. *See*

R.G. Employee Manual, EEOC002717-19 (Ex. 19). It is a sex-specific dress code that R.G. applies based on the biological sex of its employees. T. Rost Aff. ¶ 35 (Ex. 1). The dress code requires men who interact with the public to wear dark suits with nothing in the jacket pockets, white shirts, ties, dark socks, dark polished shoes, dark gloves, and only small pins. R.G. Employee Manual, EEOC002717-19 (Ex. 19). Women who interact with the public must wear "a suit or a plain conservative dress" in muted colors. *Id.* The employees of R.G. understand that this requires those male employees to wear suits and ties and those female employees to wear skirts and business jackets. *See* Peterson Dep. 30:24-31:25, 32:3-8 (Ex. 11); Kish Dep. 17:8-16, 58:5-11 (Ex. 5); Shaffer Dep. 52:12-22 (Ex. 12); Cash Dep. 23:1-4 (Ex. 8); Kowalewski Dep. 22:10-15 (Ex. 9); McKie Dep. 22:22-25 (Ex. 13); M. Rost Dep. 14:9-19 (Ex. 10).

When analyzing the EEOC's claim on behalf of Stephens, the relevant requirements of the dress code are those that apply to R.G.'s funeral directors because that is the position held by Stephens. *See Jespersen*, 444 F.3d at 1106-07 (focusing only on the dress code for the plaintiff's position). R.G. employees understand that the dress code requires funeral directors to wear company-provided suits. *See* Kish Dep. 17:8-22 (Ex. 5); Crawford Dep. 18:3-11 (Ex. 6). Although R.G. has not had an opportunity to employ a female funeral director since Rost's grandmother stopped working for R.G. around 1950, *see* Stephens Dep. 102:4-14 (Ex. 14); T. Rost Aff. ¶ 52-53 (Ex. 1), there is no dispute that R.G. would provide female funeral directors with skirt suits in the same manner that it provides pant suits to male funeral directors, and

that those female employees would be required to wear those suits while on the job. *Id.* at ¶ 54. The burden on male funeral directors that must wear a company-issued suit is identical to the burden on female funeral directors that must wear company-issued suits for women.

Moreover, R.G. does not discriminate in its enforcement of the dress code. R.G. has in fact disciplined employees for failing to comply with the dress code, *see* Kish Dep. 54:1-16, 68:22-69:8 (Ex. 5); M. Rost Dep. 37:22-39:6 (Ex. 10), and no evidence indicates that R.G. has enforced it unevenly. Indeed, it is undisputed that if a female funeral director were to say that she planned to wear a men's suit at work, that employee would be discharged just like Stephens was. T. Rost Aff. ¶ 55 (Ex. 1). In addition, neither R.G.'s dress code nor any other R.G. policy requires any employee to act in a masculine or feminine manner. Nor has R.G. ever disciplined an employee for failing to act in a stereotypically masculine or feminine way.

The undisputed evidence thus demonstrates that R.G.'s dress code imposes equivalent burdens on male and female funeral directors. Consequently, the EEOC has failed to present an issue of triable fact, and R.G. is entitled to summary judgment.

3. Neither *Price Waterhouse* nor *Smith* Invalidate R.G.'s Sex-Specific Dress Code.

The Supreme Court's decision in *Price Waterhouse* and the Sixth Circuit's holding in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), do not alter the widely accepted rule acknowledged in *Barker* and *Jespersen* that sex-specific dress and grooming codes

are lawful under Title VII when they impose equivalent burdens on men and women. In *Smith*, the Sixth Circuit held that a male firefighter's Title VII complaint, which alleged that his employer took an adverse action against him because he "express[ed] less masculine, and more feminine mannerisms and appearance," stated a claim upon which relief could be granted. 378 F.3d at 572. In *Price Waterhouse*, the Supreme Court held that the plaintiff's employer violated Title VII by denying her a promotion because she was too "macho" and "aggressive" for a woman. 490 U.S. at 235-237, 250-51, 256. In neither case did the plaintiffs refuse to comply with (or challenge) a sex-specific dress code or grooming policy that imposed equal burdens on the sexes.

The absence of such a policy is critical. An important question when resolving sex-discrimination claims is whether the employer treats employees of one sex better than employees of the other sex. *White*, 533 F.3d at 391. And "the ultimate question" is whether the employee "has proven that the defendant intentionally discriminated against him because of his [sex]." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (quotation marks and alterations omitted). An employer's comments that a female employee is too "aggressive" or "macho" (as in *Price Waterhouse*, 490 U.S. at 235, 256) or that a male employee is engaging in "non-masculine behavior" (as in *Smith*, 378 F.3d at 570) show an intent to single out and discriminate against that employee because of his or her sex. But when an employer is simply enforcing a dress code that places equal burdens on the sexes and that applies to all employees in the same position, that does not demonstrate an intent to treat women worse than men

(or vice versa). *See Jesperson*, 444 F.3d at 1111-12 ("The [sex-specific dress and grooming] policy does not single out Jespersen. It applies to all of the [employees in her position], male and female."). Indeed, unlike the employers in *Price Waterhouse* or *Smith*, R.G. never indicated that Stephens's behavior was too feminine or not masculine enough. R.G. simply maintained that Stephens, like all other employees, whether male or female, must comply with the dress code. Thus, the EEOC (on behalf of Stephens) cannot show what the plaintiff in *Price Waterhouse* could (and what the plaintiff in *Smith* alleged)—that R.G. treated Stephens differently from other employees because of Stephens's sex.

As the Ninth Circuit has noted, the plaintiff in *Price Waterhouse* established impermissible sex-based discrimination because "the very traits that [the female plaintiff] was asked to hide"—primarily her aggressiveness—"were the same traits *considered praiseworthy* in men." *Jespersen*, 444 F.3d at 1111 (emphasis added). Indeed, the Court in *Price Waterhouse* explained that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." 490 U.S. at 251 In other words, by insisting that female employees conduct themselves in a stereotypically feminine fashion, Price Waterhouse impeded those employees' ability to perform their jobs and advance their careers. That is why the sex stereotyping in *Price Waterhouse* established unlawful discrimination.

But this case is very different. It is instead like *Jesperson*, where the plaintiff tried

to use *Price Waterhouse* to invalidate a sex-specific dress and grooming policy that imposed equal burdens on the sexes. But the Ninth Circuit rejected the plaintiff's argument, concluding that "Jespersen's claim . . . materially differs from [the plaintiff's] claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender." 444 F.3d at 1113.

Similarly here, "[t]he record contains nothing to suggest [that R.G.'s dress] standards would objectively inhibit" one sex's "ability to do the job." *Id.* at 1112. R.G.'s dress code does not require Stephens to conform to a sex stereotype that would impede Stephens's ability to perform the duties of a funeral director. On the contrary, as discussed below, R.G. implemented its dress code to further its unique work as a funeral business catering to the needs of its customers. Thus, far from impeding Stephens's ability to perform the requirements of the job, R.G.'s dress code *enabled* Stephens to do the job well.

4. R.G.'s Dress Code Furthers Particular Business Needs in the Funeral Industry.

R.G.'s dress code is driven by the unique nature of the funeral industry, which requires utmost sensitivity to the needs of grieving families—including the need for an environment free from distraction. *See* T. Rost Aff. ¶ 34 (Ex. 1) ("Maintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process."); T. Rost 30(b)(6) Dep.

59:13-60:5 (Ex. 4) (explaining that R.G. instituted its dress code because grieving families and friends that come to R.G. deserve "an environment where they can begin the grieving process and the healing process," and noting that clients "don't need some type of a distraction . . . for them and their family"); Stephens Dep. 91:22-92:9 (Ex. 14) (testifying that professional attire is particularly important in the funeral industry given that "the funeral business is a somber one . . . because somebody has died, and people are . . . mourning the loss"). The dress code ensures that R.G.'s "staff is . . . dressed in a professional manner that's acceptable to the families that [R.G.] serve[s]." T. Rost Dep. 49:22-50:15 (Ex. 3); *see also* T. Rost 30(b)(6) Dep. 57:20-58:6 (Ex. 4) (testifying that the "dress code conforms to what is acceptable attire in a professional manner for the services that [R.G.] provide[s]").

The sex-specific nature of the dress code is also rooted in the business need for professionalism and the absence of distraction. The dress code forbids male funeral directors from wearing the female uniform because allowing them to do that would attract undue attention to themselves and disrupt the grieving process for the clients. T. Rost Aff. ¶ 37 (Ex. 1). Indeed, Stephens himself, while owner of a funeral business, required male employees to wear a coat and tie and required the only female employee to wear a ladies' "business-type dress," described as "[a] ladies' blue jacket." Stephens Dep. 36:1-23 (Ex. 14).

Professional dress takes on heightened significance for funeral directors like Stephens because they often deal directly with grieving family members. For example,

funeral directors regularly interact with families throughout the funeral process. Cash Dep. 27:13-28:9 (Ex. 8); Crawford Dep. 14:8-18 (Ex. 6); T. Rost Aff. ¶¶ 16-31 (Ex. 1). Funeral directors also perform sensitive duties like removing the body of the deceased from the family—a particularly distressing experience for family members. T. Rost Aff. ¶¶ 14-15 (Ex. 1). Rost believes that allowing a male funeral director to dress as a female would distract R.G.'s clients mourning the loss of their loved ones, disrupt their healing process, and harm R.G.'s clients and business. *Id.* at ¶¶ 36-40.

These uncontested facts demonstrate that R.G.'s dress code and its decision to dismiss Stephens were motivated by legitimate business needs and the interests of the grieving people that R.G. serves. Thus, neither R.G.'s dress code nor Stephens's discharge violates Title VII's prohibition on sex discrimination.

R.G. must emphasize one concluding point about the EEOC's sex-stereotyping argument: accepting that argument would make it impossible for a company to enforce sex-specific dress or grooming requirements, even if they impose equal burdens on the sexes. Not only would this contravene the well-established Title VII case law that affirms those sorts of sex-specific policies, it would also override employers' freedom to determine how their businesses will present themselves to the public and would jeopardize their success in the marketplace. As Judge Posner has observed, sex-stereotyping case law does not create "a federally protected right for male workers to wear nail polish and dresses . . . , or for female ditchdiggers to strip to the waist in hot weather." *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1067

(7th Cir. 2003) (Posner, J., concurring). If it did, Title VII would require employers with legitimate sex-specific dress and grooming policies to allow an employee to dress in a female uniform one day, switch to a male uniform the next day, and return to the female uniform whenever that employee chooses. Congress surely did not have this in mind when it added sex as a protected classification in Title VII.

II. RFRA Prohibits the EEOC from Compelling R.G. to Violate its Sincerely Held Religious Beliefs.

RFRA provides that the government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The only exception to this rule is if the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The EEOC's attempt to apply Title VII under these circumstances would substantially burden R.G.'s exercise of religion by, among other things, forcing R.G. to violate Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift and that R.G. cannot pay for or otherwise permit one of its male funeral directors to wear the female uniform at work. Because the EEOC cannot demonstrate that forcing R.G. to violate its faith in this way would satisfy strict scrutiny, RFRA prohibits the EEOC's attempt to apply Title VII here.

A. RFRA Protects R.G.'s Exercise of Religion.

RFRA applies to "a person's" exercise of religion. 42 U.S.C. §§ 2000bb-1(a), (b).

This includes closely held for-profit corporations like R.G., 94.5 percent of which is owned by Rost, its sole officer and chief executive, with the remaining 5.5 percent split between Rost's two children. *See* T. Rost 30(b)(6) Dep. 26:20-28:25, 78:2-9 (Ex. 4); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) (concluding that "persons" protected by RFRA include closely held for-profit corporations).

Moreover, R.G. exercises religion through the work that it performs. As the Supreme Court explained in *Hobby Lobby*: "[T]he exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition." *Id.* at 2770 (quotation marks and citation omitted).

Rost has been a Christian for over sixty-five years. T. Rost 30(b)(6) Dep. 30:13-22 (Ex. 4). His faith informs the way he operates his business, *id.* at 86:20-22, 87:3-24, which includes hosting funeral services of deep spiritual significance to many, *see id.* at 32:3-13; T. Rost Aff. ¶¶ 10, 20, 26, 30 (Ex. 1). R.G.'s mission statement, which is posted on its website with a Scripture verse, reflects the business's religious purposes:

> R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life.

R.G. Webpage (Ex. 15). Long-time employees and managers agree that R.G. is

operated according to Rost's religious convictions. Cash Dep. 8:25-9:25, 46:5-18 (Ex. 8) (testifying that he considers R.G. to be a Christian business); Kowalewski Dep. 29:8-10 (Ex. 9) (testifying that he considers R.G. to be a Christian business).

R.G. is a tangible expression of Rost's deeply felt religious calling to care for and minister to the grieving. *See* T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4) (testifying that he considers his business to be a ministry to grieving families); T. Rost Aff. ¶ 10 (Ex. 1). Rost describes the ministry of R.G. as one of healing and giving comfort—to help families on the "worst day of their lives" and "meet their emotional, relational and spiritual needs . . . in a religious way." T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4). In addition to the spiritual and emotional care involved in his ministry, Rost ensures that all customers have access to spiritual guidance by placing throughout his funeral homes Christian devotional booklets entitled "Our Daily Bread" and small cards with Bible verses on them called "Jesus Cards," and by making a Bible available to visitors at all his funeral homes. *Id.* at 39:23-40:17; Nemeth Dep. 27:13-28:2 (Ex. 7); Cash Dep. 47:17-24 (Ex. 8); Kowalewski Dep. 31:17-32:21, 33:5-22 (Ex. 9); M. Rost Dep. 28:20-29:19 (Ex. 10); Peterson Dep. 28:18-30:12 (Ex. 11).

Viewing all this evidence of R.G.'s religious exercise in the light of *Hobby Lobby*, this Court should conclude that RFRA's protections apply here. Indeed, just as the businesses in *Hobby Lobby* exercised religion by operating "in [a] manner that reflects [their] Christian heritage," *Hobby Lobby*, 134 S. Ct. at 2770 n.23, R.G. exercises religion by, as its mission statement says, upholding as "its highest priority" the need "to

honor God in all that we do as a company." R.G. Webpage (Ex. 15).

B. Applying Title VII in this Case Would Substantially Burden R.G.'s Exercise of Religion.

The EEOC's attempt to apply Title VII here would substantially burden Rost's exercise of religion. A substantial burden exists where the government requires a person "to engage in conduct that seriously violates [his] religious beliefs," *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (quotation marks omitted), or where it "put[s] substantial pressure on an adherent . . . to violate his beliefs," *Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). Rost sincerely believes that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex. T. Rost Aff. ¶¶ 41-42 (Ex. 1). He also sincerely believes that he would violate his faith if he were to pay for or otherwise allow one of his funeral directors to wear the uniform for members of the opposite sex while at work. T. Rost Aff. ¶¶ 43-46 (Ex. 1). Thus, compelling R.G. to allow Stephens to wear the uniform for female funeral directors at work would impose a substantial burden on R.G.'s free exercise of religion by compelling Rost to engage in conduct that "seriously violates [his] religious beliefs." *Holt*, 135 S. Ct. at 862.

Moreover, requiring R.G. to permit a male funeral director to wear the uniform for female funeral directors would interfere with R.G.'s ability to carry out Rost's religious mission to care for the grieving. *See* T. Rost 30(b)(6) Dep. 59:8-12, 69:25-70:6 (Ex. 4). This is because allowing a funeral director to wear the uniform for members

of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process. *Id.* at 54:8-17, 59:13-60:9; T. Rost Aff. ¶¶ 36-38 (Ex. 1). And by forcing R.G. to violate Rost's faith, this application of Title VII would significantly pressure Rost to leave the funeral industry and end his ministry. T. Rost Aff. ¶ 48 (Ex. 1). Thus, applying Title VII in this case would substantially burden R.G.'s and Rost's religious exercise of caring for the grieving.

C. The EEOC Cannot Demonstrate That Applying Title VII in this Case Would Satisfy Strict Scrutiny.

Having established a substantial burden on religious exercise, the burden shifts to the government to satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(b). RFRA requires that the EEOC "demonstrat[e] that application of [a substantial] burden to the person . . . is the least restrictive means of furthering" a compelling government interest. *Id.* This is an "exceptionally demanding" standard, requiring the government to "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties." *Hobby Lobby*, 134 S. Ct. at 2780. The EEOC cannot make the required showing.

To begin with, the EEOC cannot demonstrate a compelling interest here. RFRA's strict-scrutiny test "look[s] beyond broadly formulated interests justifying the general applicability of government mandates," and instead scrutinizes the specific interest in applying the law to the party before the court and "the asserted harm of granting specific exemptions to [that party]." *Gonzales v. O Centro Espirita Beneficente*

Uniao do Vegetal, 546 U.S. 418, 430-31 (2006); *see also Hobby Lobby*, 134 S. Ct. at 2779. Thus, the relevant government interest is not a generic interest in opposing discrimination, but the specific interest in forcing R.G. to allow its male funeral directors to wear the uniform for female funeral directors while on the job. Yet the EEOC has no compelling interest in mandating that.

Notably, this case does not involve discriminatory animus against any person or class of persons. R.G. dismissed Stephens because Stephens would no longer comply with the dress code. R.G. was not motivated by animus against people who dress as members of the opposite sex. Indeed, it is undisputed that R.G. would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job. T. Rost Aff. ¶¶ 50-51 (Ex. 1); T. Rost 30(b)(6) Dep. 137:11-15 (Ex. 4). Moreover, the uncontested evidence demonstrates that R.G.'s dress code and its enforcement of the dress code against Stephens are based on R.G.'s legitimate interest in ensuring that mourners have a space free of disruptions to begin the healing process after the loss of a loved one. T. Rost 30(b)(6) Dep. 139:5-23 (Ex. 4); T. Rost Aff. ¶¶ 36-39 (Ex. 1). Consequently, applying Title VII here would not further a compelling government interest.

Nor can the EEOC satisfy RFRA's least-restrictive-means requirement. A number of available alternatives would allow the government to achieve its goals without violating R.G.'s free-exercise rights. For example, the government could continue to enforce Title VII in most situations, but permit businesses in industries

that serve distressed people in emotionally difficult situations to require that its public representatives comply with the dress code at work. Alternatively, the government could prohibit employers from discharging employees simply because they dress inconsistently with their biological sex outside of work, while allowing employers to dismiss employees who refuse to wear sex-specific uniforms on the job. Because these alternatives (and others) are available, the EEOC cannot meet RFRA's least-restrictive means requirement and thus cannot satisfy strict scrutiny.

III. The EEOC Cannot Prevail on its Clothing Allowance Claim on Behalf of a Class of Female Employees.

The EEOC's complaint seeks relief on behalf of "a class of female employees" that were supposedly deprived of work clothes or clothing allowances that R.G. allegedly provides to male employees. Am. Compl. ¶¶ 17-18 (ECF No. 21). R.G. is also entitled to summary judgment on this "clothing allowance" claim.

A. The EEOC Lacks Authority to Raise its Clothing Allowance Claim.

The EEOC may include in a Title VII suit only claims that fall within an "investigation reasonably expected to grow out of the [complainant's] charge of discrimination." *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The Sixth Circuit has held that a claim falls outside that scope if (1) the claim is "unrelated to [the charging] party" and (2) it involves discrimination "of a kind other than that raised by [the charging party]." *Id.* at 448. These two considerations show that the

EEOC's clothing allowance claim does not result from an investigation reasonably expected to grow out of Stephens's charge of discrimination, which alleged unlawful "discharge[] due to [Stephens's] sex and gender identity." Charge of Discrimination, EEOC002748 (Ex. 21).

First, the EEOC's clothing allowance claim on behalf of a class of women is unrelated to Stephens. As previously discussed, Stephens was a biological male while employed at R.G. *See* T. Rost Dep. 21:1-25 (Ex. 3); Def.'s Resp. to Charge at 4-5, EEOC002744-45 (Ex. 22); Kish Dep. 67:9-68:21 (Ex. 5). And there is no dispute that Stephens received, accepted, and wore the men's clothing provided by R.G. *See* Stephens Dep. 59:14-60:1 (Ex. 14); Pl.'s Resp. to Def.'s First Set of Discovery at Request for Admission No. 2 (Ex. 25). Thus, an allegation concerning work clothes or an allowance not provided to a class of females is simply not related to Stephens.

Second, the clothing allowance claim alleges discrimination of a kind other than that raised by Stephens. In the EEOC charge, Stephens alleged a discriminatory "discharge[]." Charge of Discrimination, EEOC002748 (Ex. 21). Stephens did not mention anything about inequality in the clothing or clothing allowance provided by R.G. *Id.* A claim that asserts "discriminat[ion] . . . with respect to . . . compensation, terms, conditions, or privileges of employment" (as the clothing allowance claim does) is of a different kind than a claim that alleges discriminatory "discharge." 42 U.S.C. § 2000e-2(a)(1); *see Bailey Co.*, 563 F.2d at 451 (rejecting "the belief that all forms of unlawful employment discrimination . . . whether involving hiring, discharge,

promotion, or compensation are like or related"); *Nelson v. Gen. Elec. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001) (unpublished) (finding that "the scope of the investigation reasonably expected to grow out of [an] EEOC charge" that alleged unlawful discharge did not include failure to promote). Moreover, a claim of discrimination against a class of women (which the clothing allowance claim is) is separate and distinct from a claim of discrimination against a biological man (which is all Stephens could validly raise in an EEOC charge).

Nor could Stephens have included the clothing allowance claim in an EEOC charge because, as a biological male, Stephens was not "aggrieved" by a clothing policy that supposedly disfavors women. *See* 42 U.S.C. § 2000e-5(b) (noting that EEOC charges are filed by "person[s] claiming to be aggrieved"). While older case law called for a broad reading of what it means to be an "aggrieved" person under other federal statutes, *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), the Supreme Court has mandated a narrower reading of that language in Title VII, *see Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176-77 (2011) (rejecting *Trafficante* in the Title VII context). Therefore, just as Article III standing principles generally forbid a person from raising the "rights or interests of third parties," *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013), so does Title VII's aggrieved person standard, *see Thompson*, 562 U.S. at 177 (concluding that "the term 'aggrieved' [in Title VII] must be construed more narrowly than the outer boundaries of Article III"). Consequently, a

biological male could not raise the legal interests of a class of female employees at R.G.

B. The EEOC's Clothing Allowance Claim Lacks Merit Because R.G. Does Not Discriminate Between Comparable Male and Female Employees.

The EEOC's claim that work clothes or clothing allowances were provided to male employees but not to a class of female employees also fails on its merits. To the extent that the class of employees the EEOC references is R.G.'s funeral directors—the position that Stephens held—the EEOC has failed to show disparate treatment. Indeed, R.G. provides suits for all funeral directors. *See* T. Rost Dep. 13:4-14, 47:23-48:11 (Ex. 3); Kish Dep. 64:12-24 (Ex. 5); McKie Dep. 38:19-23 (Ex. 13); Def.'s Resp. to Pl.'s Second Set of Discovery at Interrogatory No. 14 (Ex. 28). Although R.G. has not employed a female funeral director since Rost became the owner (notably, a qualified woman has not applied for an open funeral-director position during that time, *see* T. Rost Aff ¶¶ 52-53 (Ex. 1)), it is undisputed that R.G. would provide female funeral directors with a women's suit of equal quality and value to the men's suit provided to male funeral directors. *Id.* at ¶ 54.

Nor can the EEOC establish sex discrimination with respect to the clothes and clothing allowances that R.G. provides to employees in positions other than funeral director. Male employees who interact with the public in positions other than funeral director (all of whom are part-time) receive one suit from R.G. that is replaced by R.G. when it is no longer serviceable. *See* T. Rost Aff. ¶ 57 (Ex. 1) And female employees

who interact with the public in positions other than funeral director receive an annual clothing allowance of $150 for full-time employees and $75 for part-time employees. T. Rost Dep. 15:16-16:4 (Ex. 3); Nemeth Dep. 13:5-23 (Ex. 7); Kish Dep. 20:16-25 (Ex. 5). This allowance is sufficient to purchase an outfit that conforms to R.G.'s dress code for those positions and to cover the cost of replacing those outfits when they wear out. *See* Kish Aff. ¶¶ 5-7 (Ex. 2). Accordingly, regardless of the sex of the employees in those positions, R.G. provides them with clothing or resources to purchase dress code-complying clothing. Finally, no clothes or clothing allowance is provided for employees, whether male or female, in positions that do not interact with the public. *See* Kish Dep. 56:14-58:4, 65:17-66:18 (Ex. 5). The EEOC thus cannot prevail on its clothing allowance claim because it is unable to show that R.G. discriminates between comparable male and female employees.

Conclusion

For the foregoing reasons, R.G. respectfully requests that the Court grant summary judgment in its favor.

Dated: April 7, 2016

Respectfully submitted,

/s/ James A. Campbell
James A. Campbell

APPENDIX 9

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

State and Local Bathroom Laws

- **Colorado**: Rule 81. 9 of the Colorado regulations mandates that employers permit their employees to use restrooms appropriate to their gender identity without being harassed or questioned. 3 CCR 708-1-81. 9 (revised December 15, 2014).
- **Delaware:** State of Delaware Guidelines on Equal Employment Opportunity and Affirmative Action Gender Identity, available at **http://www. delawarepersonnel. com/policies/documents/sod-eeoc-guide. pdf**, issued pursuant to the state's gender identity nondiscrimination law, provides Delaware state employees with access to restrooms that correspond with their gender identity.
- **District of Columbia:** employees in the District of Columbia have the right to use facilities consistent with their gender identity. D. C. Municipal Regulations 4-802, "Restrooms and Other Gender Specific Facilities," available at **http://www. dcregs. dc. gov/Gateway/RuleHome. aspx?RuleNumber=4-802**.
- **Iowa**: the Iowa Civil Rights Commission requires that employers allow employees access to restrooms in accordance with their gender identity rather than their assigned sex at birth. *See* **https://icrc. iowa. gov/sites/files/civil_rights/publications/2012/SOGIEmpl. pdf**.
- **New York City:** This Executive Order requires "city agencies to ensure that employees and members of the public are given access to City single-sex facilities consistent with their gender identity, without being required to show identification, medical documentation, or any other form of proof or verification of gender." *See* http://www1.nyc.gov/office-of-the-mayor/news/223-

16/mayor-de-blasio-mandates-city-facilities-provide-bathroom-access-people-consistent-gender#/0.

> The term "gender" shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.

New York City, N.Y., Code § 8-102(23). The Executive Order also requires City agencies to:

- Post the new single-sex facility policy in conspicuous locations for employees and members of the public to see within three months;
- Train managers on the policy within one year and frontline staff within two years;
- Update agency Equal Employment Opportunity (EEO) plans to incorporate training requirements within three months, and
- Report steps taken to comply with today's Executive Order to the Department of Citywide Administrative Services (DCAS) pursuant to EEO reporting requirements. *See* http://www1.nyc.gov/office-of-the-mayor/news/223-16/mayor-de-blasio-mandates-city-facilities-provide-bathroom-access-people-consistent-gender#/0

• **Vermont:** Vermont requires that employers permit employees to access bathrooms in accordance with their gender identity. *See* "Sex, Sexual Orientation, and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees," Vermont Human Rights Commission, available at: http://hrc. vermont. gov/sites/hrc/files/pdfs/other%20reports/trans%20employment%20brochure%207-13 -12. pdf.

• **Washington:** employers must permit transgender employees to use the restroom consistent with their gender identity. "Guide to Sexual Orientation and Gender Identity and the Washington State Law Against Discrimination," available at: **http://www. hum. wa. gov/Documents/Guidance/GuideSO20140703. pdf**.