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-14-13710
Hon. SEAN F. COX

DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S RESPONSE TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

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Defendant **R.G. & G.R. HARRIS FUNERAL HOMES, INC.**, by and through its attorneys, **JOEL J. KIRKPATRICK** of JOEL J. KIRKPATRICK, P.C., and **JOSEPH P. INFRANCO** of ALLIANCE DEFENDING FREEDOM, for its Response to the Plaintiff's *Motion for Protective Order*, states as follows:

THE FACTS

On or about June 1, 2015 the Plaintiff Equal Opportunity Commission (hereinafter "EEOC") filed its *First Amended Complaint and Jury Demand* (hereinafter "*Complaint*" or "*Amended Complaint*") in this case. In its *Complaint* the EEOC raised four claims, namely that "Defendant Employer fired Stephens" (1) "because Stephens is transgender" (¶ 15 *Amended Complaint*), (2) "because of Stephens's transition from male to female" ((¶ 15 *Amended Complaint*), (3) "because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes" (¶ 15 *Amended Complaint*), and (4) that the Defendant violated § 703(a)(1) of Title VII "by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees" (¶ 17 *Amended Complaint*).

The Defendant R.G. and G.R. Funeral Homes, Inc. (hereinafter "Funeral Home") earlier filed a *Motion to Dismiss* in this case, asking the Court to dismiss the EEOC's claims, including but not limited to the EEOC's claims that the

Funeral Home fired Stephens (1) "because Stephens is transgender" and/or (2) "because of Stephens's transition from male to female." However, on April 23, 2015, the Court denied the Funeral Home's *Motion to Dismiss* (*see Amended Opinion & Order Denying Defendant's Motion To Dismiss*). Although the Court stated in its *Amended Opinion & Order Denying Defendant's Motion To Dismiss* that "transgender or transsexual status is currently not a protected class under Title VII" and that "[t]here is no Sixth Circuit or Supreme Court authority to support the EEOC's position that transgender status is a protected class under Title VII," the Court did not dismiss the EEOC's claims that "Defendant Employer fired Stephens because Stephens is transgender [and/or] because of Stephens's transition from male to female." So, although the Court seemed to suggest that those two claims may be legally unsupportable, the Court did not dismiss them—leaving them, at least technically, still a part of this action, and leaving the Funeral Home in the position of having to defend against them.

On or about June 18, 2015 the Funeral Home served upon the EEOC the Funeral Home's *First Set of Interrogatories, Request for Documents And Admissions To Plaintiff* (hereinafter "discovery"), a true and correct copy of which is attached to the EEOC's *Motion For Protective Order* as Exhibit A. The EEOC thereafter contacted the Funeral Home's counsel, raising objections to certain of the Funeral Home's discovery that asked about Stephens' gender identity,

Stephens' transition from male to female, and Stephens' sexual identity in practice and in law. The specific discovery the EEOC is objecting to are the Funeral Home's Interrogatories 4 through 12 and 14 through 16, Requests for Documents 1, 3, 4, and 5, and Requests for Admission 1 and 3. The EEOC claimed that this discovery was irrelevant, annoying, embarrassing, oppressive, and unduly burdensome.

In response, the Funeral Home's counsel pointed out to the EEOC that it had raised Stephens' gender identity and transition from male to female in its lawsuit – so the EEOC could hardly now complain that Stephens was being asked questions about these claims. Further, the Funeral Home offered to consider withdrawing certain of its discovery focusing on Stephens' gender identity and transition from male to female if the EEOC amended its complaint so as to delete its first two stated claims—namely, that the Funeral Home illegally fired Stephens because Stephens is transgender and/or because of Stephens's transition from male to female—thereby removing those issues from the case. The EEOC refused to do so. Indeed, even in its *Motion for Protective Order* the EEOC is still asserting that "*Plaintiff . . . alleges that Defendant . . . violated Title VII when it fired Aimee Stephens . . . because she is transgender*" (page 1 of the EEOC's *Memorandum in Support of Plaintiff EEOC's Motion for Protective Order*).

STATEMENT OF THE ISSUES

On July 14, 2015, the EEOC filed a *Motion for Protective Order* seeking an order precluding the Funeral Home from inquiring into the very issues the EEOC raises in its *Amended Complaint*, which the EEOC refuses to withdraw, and which it continues to assert—namely, Stephens' transgender status and Stephens' transition from male to female.

The issue before the Court, then, is whether the EEOC may raise Stephens' gender identity status and transition from male to female as claims against the Funeral Home and then prohibit the Funeral Home from asking Stephens about Stephens' gender identity status and transition from male to female—claiming that such inquiries are irrelevant, annoying, embarrassing, and oppressive.

CONTROLLING AUTHORITY

Lewis v. ACB Business Services, Inc., 135 F.3d 389 (6th Cir. 1998)

Mellon v. Cooper-Jarrett, Inc., 424 F.2d 499 (6th Cir. 1970)

Nix v. Sword, 11 Fed.Appx. 498 (6th Cir. 2001)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)

A. The Court May Not Enter A Protective Order Unless The EEOC Demonstrates Good Cause For Entry Of Such An Order.

F.R.C.P. Rule 26(b) provides, in pertinent part, that: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." And F.R.E. 401 provides that "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad and, although not without limits, is broader than that permitted at trial. *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998), citing *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970).

F.R.C.P. Rule 26(c) provides, in pertinent part, that: "A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . .". However, a court must have "good cause" to issue a protective order to protect a party or person from alleged annoyance, embarrassment, oppression, or undue burden or expense. F.R.C.P. 26(c). And not only does the party seeking a protective order have the burden of showing that good cause for entry of a protective order exists, *Nix v. Sword*, 11 Fed.Appx. 498,

500 (6th Cir. 2001), but, in order "[t]o show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements. *Nix*, supra, at 500, citing *Avirgan v. Hull*, 118 F.R.D. 252,254 (D.D.C. 1987).

B. The EEOC's Request For A Protective Order Should Be Denied Because, Contrary To The EEOC's Assertions, The Discovery To Which The EEOC Objects Seeks Relevant Information Or Information That Is Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

The EEOC claims it is entitled to a protective order because the discovery to which it objects is "not relevant to whether [the Funeral Home] fired Stephens for a discriminatory reason." (¶ 4 *Motion for Protective Order*). But in so stating, the EEOC misrepresents its own claims.

In its *Motion for Protective Order* the EEOC states that "The EEOC brought two claims in this case: 1) RGGR violated Title VII when it fired Aimee Stephens because she did not conform to RGGR's 'sex- or gender-based preferences, expectations, or stereotypes'" [hereinafter referred to as the "sexual stereotyping claim"]; "and 2) RGGR maintains a disparate clothing allowance" [hereinafter referred to as the "clothing allowance claim"]. (¶ 3 *Motion for Protective Order*).

Although it is certainly true that the EEOC has brought the two claims it mentions in its *Motion for Protective Order*, those are not the *only* claims asserted

in this action. The EEOC neglects to point out that it has asserted a total of four—not just two—claims. In addition to the sexual stereotyping claim and the clothing allowance claim, the EEOC has also brought two other claims, namely (1) the claim that the Funeral Home terminated Stephens "because Stephens is transgender" and (2) the claim that the Funeral Home terminated Stephens "because of Stephens's transition from male to female" (¶ 15 *Amended Complaint*). Neither of these two other claims—which the EEOC omits in its *Motion for Protective Order*—have been dismissed, and the EEOC has specifically refused to withdraw them, which can only mean the EEOC intends to pursue them. It is precisely to these two other claims—as well as the Funeral Home's dress code affirmative defense—that much of the Funeral Home's discovery, to which the EEOC is objecting, is directed. And in objecting to the Funeral Home's discovery, the EEOC does not address why such discovery is not relevant to its two other claims or the Funeral Home's dress code defense. The EEOC only argues that the Funeral Home's discovery is irrelevant to its sexual stereotyping claim.

The EEOC's claim that the Funeral Home terminated Stephens "because Stephens is transgender" places Stephens' transgender status at issue. If Stephens is not, in fact, transgender, then the Funeral Home could not have terminated Stephens *because* Stephens *is* transgender. Therefore, discovery inquiring about Stephens' transgender status are relevant to this claim.

The same is true with respect to the EEOC's second claim—which is that the Funeral Home terminated Stephens "because of Stephens's transition from male to female." If Stephens is not, in fact, transitioning from male to female, then the Funeral Home could not have terminated Stephens *because* Stephens *was* transitioning from male to female. Therefore, discovery asking about Stephens' transitioning from male to female are relevant to this claim.

In short, as long as the EEOC is claiming that the Funeral Home violated Title VII "*because* Stephens *is* transgender" (¶ 15 *Amended Complaint*) or "*because* of Stephens's *transition from male to female*" (¶ 15 *Amended Complaint*), the discovery targeted at determining whether Stephens is transgender or has transitioned from male to female is relevant.

The EEOC cites *Hispanic Aids Forum v. Bruno*, 759 N.Y.S.2d 291 (N.Y.Sup. 2003) for the proposition that a protective order should be entered in this case as it was in that case. But in *Bruno*, the court entered a protective order in favor of the Hispanic Aids Forum—an organization that provided support services to Latinos affected by HIV/AIDS—not on some general principle that inquiries as to transgender status are always irrelevant, but only because providing the information sought was prohibited by a public health law that barred Hispanic Aids Forum from revealing the identity of its clients. There is no similar circumstance here.

The EEOC also cites several cases—namely, *Jensen v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959 (8th Cir. 1993); *Wilson v. Muckala*, 303 F.3d 1207 (10th Cir. 2002)—for the proposition that an employee's private behavior may not impact the employee's sexual harassment claims. But none of those cases is on point. Each of them stands for the proposition that previous private bad acts committed by the alleged victims of sexual harassment may not be used as a defense to current sexual harassment claims (or in the case of *Muckala*, previous bad acts of an alleged sexual harasser may not be used to prove a later claim of sexual harassment). But that is not at all what is at issue here. The Funeral Home is not inquiring into previous and private bad acts of Stephens to demonstrate Stephens was not illegally discriminated against. The Funeral Home is inquiring into facts that form the very basis of the EEOC's claims against it, namely that Stephens was discriminated against over being transgender and/or for transitioning from male to female—not to mention in order to determine facts as to Stephens' sex for purposes of the Funeral Home's dress code defense. Therefore, none of the cases the EEOC cites on this point are applicable.

C. The EEOC's Request For A Protective Order Should Be Denied Because The Discovery To Which The EEOC Objects Is Relevant To The Funeral Home's Dress-Code Defense.

The Funeral Home's Fourth Affirmative Defense to the EEOC's claims is

that the Funeral Home has a right to impose sex-specific dress codes on its employees, and that that is precisely what the Funeral Home was doing here.

Employers may impose sex-specific dress codes on their employees (for a comprehensive discussion of this issue, *see* pp. 19-22 of *Defendant R.G. & G.R. Harris Funeral Homes, Inc.'s Motion To Dismiss)*. In order to be able to impose such a dress code, an employer must be able to *objectively know* whether its employees are men or women. If an employer cannot *objectively know* whether an employee is a man or a woman, and act upon that knowledge, then sex-specific dress-codes are meaningless, because then there would be no objective standard to apply such a sex-specific dress code. In order for an employer to impose its men's dress code on men, it must be able to objectively determine which of its employees are men, and which are women.

For that reason, the Funeral Home—for purposes of enforcing its dress code—must have been able, at the time of the complained of action, to have objectively determined whether Stephens was a man or a woman. And such an *objective* determination could only be made based upon objective sex-differentiating facts—such as Stephens' birth certificate, Stephens' anatomy, Stephens' history of sexual identity at work during his employment, and Stephens' sex-based legal status.

Therefore, even if the Funeral Home's discovery were irrelevant to all four

of the EEOC's claims—which it is not—the Funeral Home's discovery is still relevant to its affirmative dress code defense, so that the Funeral Home should be able to inquire into those matters, in order to show whether the Funeral Home justifiably treated Stephens as a man for purposes of its dress code.

D. The EEOC's Request For A Protective Order Should Be Denied Because Transgender Claims Under Title VII's Sex Discrimination Provisions Present Unique Factual And Legal Issues That Render The Funeral Homes' Discovery Relevant.

The Funeral Home's discovery to which the EEOC objects is also relevant due to the unique aspects of a case the EEOC continues to insist is grounded on Stephens' claims to be transgendered.

First, the EEOC states that "There is no dispute that Stephens is transgender" (page 7 of *Memorandum in Support of Plaintiff EEOC's Motion for Protective Order*). That is not true. Paragraph 10 of the EEOC's *Amended Complaint* alleges that "Stephens is a transgender woman"—by no means a term of art or universally understood descriptor. And in paragraph 11 of the Funeral Home's *Answer To Plaintiff's Amended Complaint*, the Funeral Home denies that allegation. In the same paragraph of its *Answer* the Funeral Home also denies the EEOC's allegation that Stephens is undergoing a gender transition from male to female. Because neither of those claims has been dismissed, and the EEOC has refused to withdraw them, and the Funeral Home denies them—discovery inquiring about whether

Stephens is "a transgender woman" and whether Stephens is transitioning from male to female are relevant and the Funeral Home is entitled to inquire into those disputed allegations.

Second, a sex discrimination claim in a transgender context is unique because the whole concept of being "transgender" is premised upon the notion there is no objectively determinable sex. In the transgender context, men claim to be women and women claim to be men (which is not the case, for example, in cases like *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where a woman who was not conforming to feminine sexual stereotypes was not claiming she was not a woman, nor in sexual orientation cases where homosexual men are not claiming to be women nor are homosexual women claiming to be men). This incongruence in the transgender context is readily apparent from the EEOC's allegation that "Stephens is a *transgender woman*" (emphasis added) (¶ 10 *Amended Complaint*). In other words, the EEOC is essentially stating that Stephens is both a man and a woman, depending upon which claim it is asserting.

The EEOC treats and refers to Stephens as a woman for purposes of its transgender claims (note, for example, that throughout its *Motion For Protective Order* the EEOC refers to Stephens as "she"), while for purposes of its sexual stereotyping claim the EEOC treats Stephens as a man. Indeed, it must assert these inconsistent claims in order to assert a sexual stereotyping claim, because if

Stephens is really a woman, then by wanting to dress and express as a woman Stephens is not engaging in gender *non-conforming* behavior—Stephens is engaging in gender *conforming* behavior. *See*, for example, *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)(sex stereotyping is based on a person's gender *non-conforming* behavior)(emphasis added).

The EEOC's premise—that for Title VII purposes—an employee can be both male and female at the same time, is incoherent, and is not made more coherent by contextualizing it in a sexual stereotyping claim. Indeed, the premise is belied simply by talking about being transgendered. For example, the EEOC claims that Stephens is transitioning "from male to female" (¶ 15 *Amended Complaint*). But to make such a statement requires one to acknowledge that there is such a thing as "male" and there is such a thing as "female." Otherwise the statement that one is transitioning from one to the other is literally nonsense. In short, the EEOC cannot be allowed to claim that: (1) Stephens is a man, *and* that (2) Stephens is a woman, *and* that (3) the Funeral Home may not inquire into which sex Stephens is.

In the context of a gender identity—and especially a sexual stereotyping—case, it is essential to determine whether Stephens is – for Title VII purposes—a man or a woman. *See*, for example, *Johnston v. Univ. of Pittsburgh*, 2015 WL 1497753 (W.D. Pennsylvania 2015)(A university is not illegally discriminating when it prohibits a transgender male student from using sex-segregated restrooms

and locker rooms designated for men. Title IX's prohibition on discrimination on the basis of sex only referred to the traditional binary conception of sex consistent with one's birth or biological sex. While Plaintiff might identify his gender as male, his birth sex is female. It is this fact—that Plaintiff was born a biological female—that is fatal to Plaintiff's sex discrimination claim).

Stephens cannot be both male and female, because to allow such a claim would inherently undermine the very concept of "sex" discrimination—just as if there is no such thing as "race" then, by definition, there cannot be such a thing as race discrimination. So it is for this reason, too, that the Funeral Home's discovery, inquiring as to facts relating to whether Stephens is a man or a woman—anatomically, expressively, and legally—is relevant.

E. If Only The Funeral Homes' Subjective Perception Of Stephens' Sex Or Gender Identity—Not Stephens' Actual Sex Or Gender Identity—Is Relevant, Then The EEOC's *Allegations* Of Stephens' Sex And Gender Identity Are Also Irrelevant And Ought To Be Stricken.

The EEOC spends a great deal of effort arguing that, under its sexual stereotyping claim, the discovery to which it is objecting is irrelevant, because only the Funeral Home's subjective perception of Stephens' sex—not Stephens' actual sex—is relevant.

In so arguing the EEOC cites several cases in support of its position that Stephens' actual sex, gender identity, or gender transition are irrelevant. (*EEOC v.*

WC&M Enters., Inc., 496 F.3d 393 (5th Cir. 2007); *EEOC v. BOH Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013); *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3rd Cir. 2002); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000)). But none of those cases so hold. They may stand for the proposition that it may not be *necessary* to show the factual truth, for example, of a complainant's ethnicity, as was the issue in *EEOC v. WC&M Enterprises, Inc.*, supra, but they do not stand for the proposition that such determinations, and the facts necessary to make such determinations, are therefore irrelevant. For example in *WC&M Enterprises, Inc.*, supra, the claim was a hostile work environment claim, based upon the employee's ancestry and religion. Although the court pointed out that illegal ancestry discrimination could be shown even if the employer was wrong about the specifics of such ancestry—believing the employee to be Arab rather than Indian—the fact of the employee's true ancestry and religion, being Indian and Muslim, was in the record and referred to in the court's opinion (*WC&M Enterprises*, supra, at 396)("Rafiq was born in India and is a practicing Muslim"). So the true facts were obviously considered relevant to the case—although not necessarily determinative.

Further, if the EEOC's position that Stephens' actual sex, gender identity and gender transition are irrelevant, then the EEOC's *allegations* that Stephens is transgender and transitioning from male to female are irrelevant and should be

stricken from the EEOC's *Complaint*. Indeed, this result is supported by the *City of Salem* case, where the 6th Circuit stated: "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, *irrespective of the cause of that behavior*" (emphasis added). *City of Salem*, supra, at 575. T

The EEOC cannot have it both ways—insisting, on the one hand, that Stephens' actual sex, gender identity, and gender transition are facts relevant enough to be included in its *Complaint* (and, in fact, so important that the EEOC refuses to remove those allegations from its *Complaint*), while at the same time arguing that the Funeral Home ought not be allowed to inquire about them because they are not relevant to its claims. Consequently, either the EEOC ought to delete those factual allegations from its *Complaint*, or the Funeral Home ought to be allowed to engage in discovery about those alleged facts.

F. The EEOC's Request For A Protective Order Should Be Denied Because The EEOC Has Failed To Demonstrate "Good Cause" For The Entry Of A Protective Order.

The party seeking a protective order has the burden of demonstrating that there exists good cause for the entry of such an order. But in order "[t]o show good cause for the entry of a protective order, the party seeking the order must articulate *specific* facts showing *clearly defined* and *serious injury* resulting from the discovery sought and *cannot rely on mere conclusory statements*" (emphasis added). *Nix*, supra, at 500. *See*, also, *Serrano v. Cintas Corporation*, 699 F.3d

884, 902 (6th Cir. 2012)(magistrate judge erred as a matter of law in granting a protective order without analyzing the harm the objecting party would have suffered had the discovery been allowed). The EEOC fails to meet this burden.

Indeed, the EEOC fails to even allege, let alone articulate, *any* specific facts showing clearly defined and serious injury resulting from the discovery of which it complains. The EEOC merely makes conclusory statements to the effect that the complained of discovery is "annoying, embarrassing, and oppressive." Consider the following statements, which constitute all the EEOC says on the subject: "In support of this Motion, the Commission states: . . . Many of the discovery requests . . . rise to the level of annoyance, embarrassment, and oppression" (page 2 of *Motion for Protective Order*); "The discovery detailed above is humiliating, harassing, and denigrating" (page 8 of *Motion for Protective Order*); ". . . those requests are annoying, embarrassing, and oppressive. Accordingly, good cause exists to protect the EEOC and Stephens from this discovery" (page 1 of *Memorandum in Support of Plaintiff EEOC's Motion for Protective Order*); "RGGR's discovery requests . . . only serve to annoy, embarrass, and oppress the EEOC and Stephens" (page 3 of *Memorandum in Support of Plaintiff EEOC's Motion for Protective Order*); "Even if the discovery might be deemed tangentially relevant to a claim or defense, the humiliating nature of the discovery far outweighs its relevance" (page 4 of *Memorandum in Support of Plaintiff EEOC's*

Motion for Protective Order).

In short, the EEOC has failed to even allege, let alone articulate, any specific facts showing clearly defined and serious injury resulting from the complained of discovery requests. Instead, the EEOC has articulated merely conclusory statements, which are legally insufficient to support the entry of a protective order. *See Glenmede Trust Company v. Thompson*, 56 F.3d 476, 483-484 (3rd Cir. 1995), citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3rd Cir. 1994)(Broad allegations of harm, unsubstantiated by specific examples, will not suffice to meet the "good cause" requirement to obtain a protective order—so that where the party seeking a protective order does not describe their harm other than in generalized allegations of injury to reputation and to relationships with clients, they have failed to sustain their burden of demonstrating they will sustain a specific injury sufficient to warrant the entry of a protective order).

Furthermore, the EEOC cannot plausibly contend that inquiring into Stephens' transgender status and transition from male to female would degrade, demean, annoy, embarrass, or oppress Stephens. After all, it was the EEOC itself that trumpeted this case to the world in its September 25, 2014 Press Release, in which the EEOC crowed that this, and a similar case in Florida, were the first cases in EEOC history alleging that it is a violation of Title VII's prohibitions against sex discrimination for an employer to fire an employee because the employee is

transgender, transitioning from male to female, or not conforming to gender-based expectations, preferences, or stereotypes. The EEOC also publicly proclaimed in its *Amended Complaint* that "Stephens is a transgender woman" who "informed Defendant Employer and her co-workers in a letter that she was undergoing a gender transition from male to female" (¶ 10 *Amended Complaint*). An average member of the public would know that "transgender" refers to someone who claims to be the sex other than his or her biological sex; that Stephens' biological sex was male and that "sex" refers to one's anatomy, including, and perhaps most importantly, one's genitalia; and that if Stephens was "transitioning from male to female" such would most likely involve certain physical and medical treatments, including hormone therapy and surgery to construct or de-construct Stephens' genitalia and other sex-linked physical traits. So if the EEOC's public announcement of Stephens' transgender status and transition from male to female was not embarrassing or oppressive to Stephens, then inquiring as to the facts behind those public proclamations cannot plausibly be embarrassing or oppressive either. It is unreasonable for the EEOC to claim it is.

G. If The Court Concludes That Certain Of The Funeral Home's Discovery Requests Are Unreasonably Embarrassing To Stephens, There Are Alternative Means Of Protecting Stephens Other Than Preventing The Funeral Home From Conducting Such Discovery.

F.R.C.P. Rule 26(c) provides the Court with a broad non-exclusive menu of

protective order options. The EEOC is requesting the most draconian option available—completely forbidding the discovery, both now and in the future. But protective orders are not an either-or proposition. The Court is free to craft a protective order that serves all the parties' legitimate interests. F.R.C.P. Rule 26(c)(1)("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, *including one or more of the following*: . . ." (emphasis added)).

So, for example, the Court could order the EEOC to answer the Funeral Home's discovery, but order the parties to keep such information confidential, to be used only within the confines of this proceeding; or the Court could restrict the number and identity of persons who could be present at Stephens' deposition. In other words, there is a whole menu of options that would address the EEOC's concern about embarrassing Stephens without depriving the Funeral Home of the ability to seek information it needs to adequately defend itself against the EEOC's claims.

CONCLUSION

The instant motion should be denied first because the EEOC has not shown good cause for a protective order. It has alleged only general types of harm and no specific and clearly defined injury. Even if this were not so, however, the Complainant has undercut any such alleged concerns this information is

"annoying, embarrassing, or oppressive "by communicating this information freely to third parties and, in fact, inviting them to make further inquiries, including contacting Complainant's therapist. The EEOC also claims that all information about "transitioning" from male to female is irrelevant, even while they seek to premise liability and substantial damages *precisely on this basis*. The EEOC's position is so lacking in merit that it needs no further refutation beyond simply stating it.

The EEOC has alleged four causes of action. Two of these causes seek to premise liability on the *status* of being "transgendered" and the *process* of "transitioning" from male to female. The District Court denied a motion to dismiss these claims, even as it noted there is no basis in law for either. But denying the motion to dismiss has left them in play, at least at this point of the litigation, and the EEOC has refused to withdraw them. Curiously, the EEOC's motion omits these claims and focuses its request for a protective order only on a claim of sexual stereotyping. This may be the result of careless drafting, but more likely it's a calculated strategy to divert the other claims from this Court's attention. It is, after all, difficult to maintain that one is liable for a specific violation, but that one may not inquire into the details of that very claim.

As well, it must be noted that the EEOC recently and publicly announced an expanded view, beyond any statutory language, of what constitutes "sex"

discrimination under Title VII. This case is venturing into uncharted waters. The EEOC now seeks to premise liability on two new legal theories, neither of which have any legal precedent or clear meaning—at least as a basis for liability. In so doing, the EEOC expresses concern for the feelings and sensitivities of its client—who has already publicly shared much of the sought-after information. But remarkably, it has no concern for a business that must defend against these claims; that faces substantial financial penalties and adverse public reaction; and that cannot even properly apprehend the nature of the charges. The relevance and need for the material sought in discovery could not be clearer, and need not be recited in detail here. The specific discovery requests at issue and the basis for each is attached to this motion as Appendix 1.

Additionally, the claims advanced by the EEOC are incongruent and inherently self-contradictory. But rather than face an examination of these claims, the EEOC asks this Court to protect it from having to answer any inconvenient questions raised by its claims. And it would premise liability on these claims without providing the Funeral Homes with any opportunity to uncover their meaning, or even whether an individual has, in fact, acted in the manner claimed. The EEOC would like to have and eat its cake by imposing liability without discovery, and perhaps save a few slices for future claims.

The EEOC has opened a door and made all these inquiries relevant to a defense. As noted, it remains in its power to close that door. Should the EEOC amend its Complaint to allege only a sexual stereotyping claim on the basis that Stephens is a biological man who presented inconsistently with his sex, and drop the two other claims, based on gender identity status and gender transitioning, the scope of the discovery at issue may be curtailed. But as in nearly all types of allegations of harm, a claimant's opening a door allows inquiry to what might have otherwise been off limits.

Finally, as noted above, there are several options in which the public dissemination of information can be limited until determinations are made on admissibility. Due process and essential fairness demand no less than a full opportunity to understand and defend against novel theories of liability that carry significant penalties.

For all these reasons, the EEOC's Motion for Protective Order should be denied, and the EEOC ordered to respond to the Funeral Home's discovery.

Respectfully submitted,

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Dated: July 28, 2015

CERTIFICATE OF SERVICE

I certify that on July 28, 2015, a copy of the above *Defendant R.G.&G.R. Harris Funeral Homes, Inc.'s Response To Plaintiff's Motion For Protective Order* was filed electronically via the ECF filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/*s/ Joel J. Kirkpatrick*

JOEL J. KIRKPATRICK

INDEX OF EXHIBITS

1. EEOC Press Release

2. Email Exchange July 2015

APPENDIX 1 TO DEFENDANT R.G. & G.R. FUNERAL HOMES, INC.'S RESPONSE TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

Interrogatory No. 4 – "*State whether Stephens is the natural/biological father of any offspring and, if so, state the name, sex, and date of birth of each such offspring.*" Since only a man can father children, evidence that Stephens fathered offspring is relevant to determining whether Stephens is a man or a woman, which is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. Further, whether Stephens has fathered children can hardly be deemed annoying, embarrassing, or oppressive to the extent to support entry of a protective order.

Interrogatory No. 5 – "*State whether Stephens has ever been married to a woman and, if so, identity Stephens' wife or wives and the dates of such marriage(s), and the current status of such marriage(s).*" At the time at issue here, same-sex marriage was illegal in Michigan. Therefore, if Stephens was married at or before the time of the complained of action herein, such is evidence that Stephens had to have been a man at that time, which is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. In addition, whether Stephens has ever been married and, if so, to whom and when, is evidenced by public records and, therefore, can hardly be deemed annoying, embarrassing, or oppressive to an

extent sufficient to justify entry of a protective order.

Interrogatory No. 6 – "*State whether Stephens was born a biological male.*" Whether Stephens was born a biological male is relevant to determining whether Stephens is a man or a woman, which is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. In addition, whether Stephens was born a biological male can hardly be deemed annoying, embarrassing, or oppressive—especially in light of Stephens' own claim, set forth in his letter to coworkers, that he is intending to transition from male to female.

Interrogatory No. 7 – "*State whether Stephens currently has male sexual organs, including but not limited to, a penis and testicles.*" Whether Stephens has male sexual organs is directly relevant to whether he is a man or a woman, which is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. In addition, whether Stephens has male sexual organs can hardly be deemed annoying, embarrassing, or oppressive, in light of Stephens' own public proclamations—in his letter to coworkers and in the EEOC's *Complaint*—that he is transgender and is transitioning from male to female, a process that often entails genital surgery.

Interrogatory No. 8 – "*State whether Stephens has had any surgery preformed to remove or modify any male sexual organs or has had any 'sex reassignment*

surgery.'" Whether Stephens has had any such surgery is relevant to whether he is a male or a female, which is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. Indeed, Stephens stated in Stephens' letter to coworkers that "I intend to have sex reassignment surgery." Therefore, whether Stephens has had any such surgery can hardly be deemed annoying, embarrassing, or oppressive in light of Stephens' and the EEOC's own statements that Stephens is transitioning from male to female and intends to have sex reassignment surgery.

Interrogatory No. 9 – "*Prior to August 2013, state whether Stephens informed any employee of the Defendant of any intention of altering Stephens' physical appearance and 'presenting' as a woman as expressed in the August 2013 letter? (attached hereto). If so identify the employee(s), the manner of the communication, the date of the communication, the substance of the communication, and any other information relating directly or indirectly to this Interrogatory.*" Whether Stephens did so is relevant to whether Stephens claimed to be male or female and what the Funeral Home may or may not have known with respect to Stephens' sexual identity, which is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. In addition, whether Stephens ever made such communications can hardly be deemed annoying, embarrassing, or oppressive, in

light of Stephens' own statements that Stephens made such statements on at least one occasion – namely in Stephens' letter to coworkers.

Interrogatory No. 10 – "*Prior to August 2013, state whether Stephens ever 'presented' as a woman at defendant's place of business while employed by Defendant? If Yes, identify the date(s) when Stephens did so, any witnesses to the presentation, describe any alleged reaction, adverse or otherwise from Defendant, and any other information relating directly or indirectly to this Interrogatory.*" Whether Stephens ever did so is relevant to whether Stephens claimed to be male or female and what the Funeral Home may or may not have known with respect to Stephens' sexual identity, which are relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. In addition, whether Stephens ever made such presentations can hardly be deemed annoying, embarrassing, or oppressive, in light of Stephens' own statement – in Stephens' letter to coworkers – that Stephens intended to do exactly that.

Interrogatory No. 11 – "*Prior to August 2013, state whether Stephens ever 'presented' as a woman in public? If so, describe with specificity Stephens' habits of "presenting" as a woman in public, the frequency, the date(s), the location(s), and any other information relating directly or indirectly to this Interrogatory.*" Whether Stephens ever did so is relevant to whether Stephens is transgender and, if

so, whether anyone else – in particular the Funeral Home – would have had reason to know of that, which are relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. In addition, whether Stephens ever presented as a woman in public can hardly be deemed annoying, embarrassing, or oppressive, in light of Stephens' own statements that he intended to just that – at work.

Interrogatory No. 12 – "*Prior to August 2013, state whether Stephens confided in, informed, or in any way communicated to any member(s) of his family, including but not limited to, his wife, his children, his parents, or any other relative, that Stephens was a 'transgender woman' as stated in paragraph 10 of your Amended Complaint? If so, identify each such person to whom Stephens communicated, the date(s) of such communication(s), the substance of the communication(s), and any other information relating directly or indirectly to this Interrogatory*." Whether Stephens ever did so is relevant to Stephens' claim that he is transgender and is transitioning from male to female, which are relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. Inquiring whether Stephens ever made such communications can hardly be deemed annoying, embarrassing, or oppressive, in light of Stephens' own statements – in Stephens letter to coworkers – that Stephens' wife supported Stephens' transgenderism. The fact that Stephens

publicly revealed his wife's knowledge and approval of Stephens' claimed transgenderism also waives any spousal privilege Stephens might otherwise have.

Interrogatory No. 14 – "*State whether Stephens has undergone any hormone treatment or therapy on account of or in furtherance of Stephens' claim that Stephens is a "transgender woman," whether for the purpose of creating, enhancing, or exhibiting any "female" physical traits or characteristics. If so state the nature of all such treatment(s) or therapy(ies), the date(s) any such hormone treatment(s) or therapy(ies) was performed, the location(s) where it was performed, and the name(s) of all medical doctors, medical personnel, and other persons performing or assisting with such treatment or therapy.*" Whether Stephens ever did so is relevant to whether Stephens is male or female, Stephens' claim to be transgender, and Stephens' claim to be transitioning from male to female, which are relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. Indeed, in Stephens' letter to his coworkers, Stephens stated that Stephens had been in "therapy for four years," identified Stephens' therapist by name, provided a copy of the therapist's business card, and stated the diagnosis of being "transsexual" and having "gender identity disorder." In addition, what, if any such treatments or therapies Stephens has undergone can hardly be deemed annoying, embarrassing, or oppressive, in light of Stephens' own statements – both in his letter to coworkers

and on Stephens' behalf in the EEOC's *Complaint* – that Stephens was transitioning from a man to a woman, which transition usually, if not universally, involves hormonal treatments and therapy.

Interrogatory No. 15 – "*Identify each and every doctor, psychologist, psychiatrist, health care professional, and any other person who evaluated, assessed or treated Stephens for any of Stephens' claimed conditions (including but not limited to transgenderism, gender dysphoria, or gender identity disorder) that form the basis of your Amended Complaint and the contents of the August 2013 letter (attached hereto). Identify each individual by name, address, professional title, contact information, and any other information relative to this interrogatory*." This inquiry is directly relevant to whether Stephens is transgender and whether Stephens' has undergone any transition from male to female. It is also relevant to the Funeral Home's dress code defense. Stephens raised the issue himself when, in Stephens' letter to coworkers, Stephens identified a therapist by name, stated Stephens' diagnosis as "a transsexual" and as having "a gender identity disorder," and inviting the recipients of the letter to contact Stephens' therapist if they had any questions. For this reason as well, neither the EEOC nor Stephens can claim that questions about gender-related treatments are annoying, embarrassing, or oppressive so as to support entry of a protective order.

Interrogatory No. 16 – "*In the August 2013 letter authored by Stephens (attached hereto), Stephens states "with the support of my loving wife, I have decided to become the person that my mind already is." State with specificity what "support" Stephens is referring to, whether Stephens' wife still supports this decision, and the current state of Stephens' marriage to his wife, and any other information relating to this Interrogatory.*" Stephens' wife's knowledge of Stephens alleged transgenderism and transitioning from male to female is relevant to the issue of the whether Stephens was transgender and/or transitioning from male to female. In addition, given Stephens' own pronouncement – in his letter to coworkers – that his wife supported his transgenderism, Stephens can hardly now claim that inquires concerning his own statement are annoying, embarrassing, or oppressive so as to support entry of a protective order.

Request for Documents No. 1 – "*Provide all medical, counseling, therapeutic, and other professional records relating to Stephens' diagnosis of, treatment for, and gender-transition on account of, gender identity disorder, gender dysphoria, transgenderism, or any other condition related directly or indirectly to your or Stephens' claim that Stephens is a "transgender woman" and was "undergoing a gender transition from male to female.*" This request is relevant for the same reasons Interrogatories No. 14 and 15 are relevant, or may lead to the discovery of admissible evidence. As pointed out above, Stephens provided all his coworkers

with the name and contact information of Stephens' therapist, stated how long Stephens had been in therapy, what the diagnosis was, and invited coworkers to contact the therapist with any questions they may have. For these reasons, too, the Funeral Home's discovery cannot not amount to discovery that is annoying, embarrassing, or oppressive so as to support entry of a protective order.

Request for Documents No. 3 – "*Provide Stephens' Birth Certificate(s), including any pleadings, petitions, court orders, or other public records amending or modifying any of Stephens' Birth Certificate(s).*" Stephens' sex as set forth on his birth certificate is directly relevant to whether Stephens is male or female and, therefore, is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. In addition, since birth certificates are public records, asking the EEOC to provide Stephens' birth certificate cannot be sufficiently annoying, embarrassing, or oppressive so as to support the entry of a protective order.

Request for Documents No. 4 – "*Provide all marriage licenses and certificates of marriage to which Stephens has ever been a party*." Because, at all time relevant to the EEOC's claims herein, same-sex marriage was illegal in Michigan, whether Stephens is or has been married to a woman or women is directly relevant to whether he is a man or a woman, since Stephens could not be married to a woman if he were not a man. Therefore, such is relevant to the EEOC's gender identity,

transitioning, and sexual stereotyping claims, as well as to the Funeral Home's dress code defense. In addition, inquiring as to Stephens' marital status can hardly be deemed annoying, embarrassing, or oppressive, in light of Stephens' own statements – in the letter to coworkers – that Stephens had a wife who supported his transgenderism and the fact that marriage records are public records.

Request for Documents No. 5 – "*Provide all pleadings, petitions, court orders, or other public records related directly or indirectly to any dissolution of a marriage to which Stephens has ever been a party*." This inquiry is relevant for the same reasons inquiring into Stephens marriages are relevant. Stephens could not be a party to a dissolution of marriage action unless he was legally married to a woman – something Stephens could only do if her were a man. Therefore, this request is relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as to the Funeral Home's dress code defense. And since marriage dissolution records – unless judicially sealed – are public records, requesting such records can hardly be deemed sufficiently annoying, embarrassing, or oppressive so as to support the entry of a protective order.

Request for Admissions No. 1 – "*Admit that at all times during the year 2013, including August 15, 2013, Stephens was anatomically a male – that is, that Stephens was chromosomally a male and had male genitalia*." This request is directly related to whether Stephens is a male or a female and, therefore, relevant

to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. And, again, in light of the EEOC's claims, neither the EEOC nor Stephens can justifiably contend that it is sufficiently annoying, embarrassing, or oppressive for Stephens to admit or deny whether he is anatomically male so as to support entry of a protective order.

Request for Admissions No. 3 – "*Admit that, during Stephens' employment with Defendant, Stephens never dressed or 'presented' as a woman.*" This request is relevant because it goes to whether Stephens is transgender or transitioning from male to female, as well as what the Funeral Home knew or should have known with respect to Stephens' sexual identity, which are relevant to the EEOC's gender identity, transitioning, and sexual stereotyping claims, as well as the Funeral Home's dress code defense. Further, a simple admission of whether Stephens ever dressed or presented as a woman at work can hardly be deemed annoying, embarrassing, or oppressive, sufficient to support the entry of a protective order.

INDEX OF EXHIBITS

1. EEOC Press Release

2. Email Exchange July 2015

EXHIBIT 1

U.S. Equal Employment Opportunity Commission

PRESS RELEASE
9-25-14

EEOC Sues Lakeland Eye Clinic for Sex Discrimination Against Transgender Employee

Lawsuit Is One of Two the Agency Filed Today - the First Suits in Its History - Challenging Transgender Discrimination Under 1964 Civil Rights Act

TAMPA, Fla. - Lakeland Eye Clinic, a Lakeland, Fla.-based organization of health care professionals, discriminated based on sex in violation of federal law by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit filed today. This is one of the first two lawsuits ever filed by the agency alleging sex discrimination against transgender individuals. The other case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* was filed today by the EEOC's Indianapolis District Office.

According to the EEOC's lawsuit against Lakeland Eye Clinic, the defendant's employee had performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her.

Such alleged conduct violates Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination, including that based on gender stereotyping. The EEOC filed suit against Lakeland Eye Clinic in U.S. District Court for the Middle District of Florida, Tampa Division (Case No. 8:14-cv-2421-T35 AEP) after first trying to reach a pre-litigation settlement through its conciliation process. The suit seeks both monetary and injunctive relief.

The lawsuits announced today are part of the EEOC's ongoing efforts to implement its Strategic Enforcement Plan (SEP). The Commission adopted this SEP in December of 2012. The SEP includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as a top Commission enforcement priority.

In 2012, in *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012), the Commission ruled that employment discrimination against employees because they are transgender, because of their gender identity, and/or because they have transitioned (or intend to transition) is discrimination because on sex, and thus violates Title VII. This appeal arose from federal sector enforcement, where the same laws apply, but the EEOC has appellate adjudicatory authority.

In *Macy*, the Commission relied on reasoning from well-established Supreme Court precedent, as well as on holdings from more recent lower court decisions, including *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), and *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). The Commission and these courts recognize that when an employer considers an employee's sex in taking an adverse action - for example, if an employer fires a transgender employee because the employee does not conform to the employer's expectations or stereotypes regarding how someone "born" that sex should live or look - the employer will violate Title VII. The lawsuits filed today are consistent with the Commission's position in *Macy* and binding court precedent.

"An employee should not be denied employment opportunities because he or she does not conform to the preferred or expected gender norms or roles of the employer or co-workers," said Malcolm S. Medley, director for the EEOC's Miami District Office. "Protections must be afforded to such employees."

Robert E. Weisberg, regional attorney for the Miami District Office, pointed out that in 2011, the National Center for Transgender Equality and the National Gay and Lesbian Task Force completed a study that found, in Florida, 81 percent of transgender individuals responding to the survey experienced harassment or mistreatment on the job and 56 percent experienced an adverse job action.

Weisberg said, "With workplace discrimination against transgender individuals reported at these levels, EEOC stands ready to enforce the rights of transgender employees secured by Title VII."

The EEOC also filed suit today against Detroit-based R.G. & G.R. Harris Funeral Homes, Inc. for discharging a funeral director because she informed them that, as part of her gender transition from male to female, she intended to return to work presenting consistent with her gender identity as a woman. The EEOC charged in its suit, *EEOC v. R.G. & G.R Harris Funeral Homes, Inc.*, (Civ. No. E.D. Mich. 2:14-cv-13710-SFC-DRG) filed in the U.S. District Court for the Eastern District of Michigan, that Harris violated Title VII by firing the funeral director because of her transgender status, because of her gender transition, and/or based on gender-based stereotypes.

For more information about gender identity-related terms and core concepts, see, e.g., the Office of Personnel Management's "Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace."

The EEOC is responsible for enforcing federal laws against employment discrimination. The Miami District Office's jurisdiction includes Florida, Puerto Rico and U.S. Virgin Islands. Further information can be found at www.eeoc.gov.

EXHIBIT 2

Joel Kirkpatrick

From: Joseph P. Infranco <jinfranco@alliancedefendingfreedom.org>
Sent: Monday, July 13, 2015 4:56 PM
To: 'MILES SHULTZ'; Joel Kirkpatrick
Cc: KHAN, SHAJINI; PRICE, DALE
Subject: RE: RGGR / Rule 26 and LR 7.1 Conference

Miles,

So the entire discussion is in context, we explained our position that the allegations that complainant is “transgender” and “transitioning” from male to female (I do not have the exact verbiage at my fingertips) make this issue highly relevant. Our client cannot adequately prepare for, let alone understand, the charges without discovery on the issue. As we have noted, the EEOC opened this door, and we are having some difficulty understanding how the Commission thinks this information should not be available through discovery.

Further, please recall what we have said from our first response on the issue. Should the EEOC amend its pleadings and remove these bases for liability, we will be in a position to discuss dropping or amending these requests. So long as the charges remain and our client faces potential substantial harm, our duty to zealously represent our client requires no less.

Regards,

Joe Infranco

From: MILES SHULTZ [mailto:MILES.SHULTZ@EEOC.GOV]
Sent: Monday, July 13, 2015 10:22 AM
To: Joseph P. Infranco; Kirkpatrick, Joel
Cc: KHAN, SHAJINI; PRICE, DALE
Subject: RE: RGGR / Rule 26 and LR 7.1 Conference

Joseph,

I write to summarize our call from a few moments ago. The EEOC articulated its position that discovery regarding Stephens's 1) anatomy; 2) familial relationships; and 3) the status of any gender-transition process only serves to annoy, embarrass, and oppress. RGGR stated it's position, consistent with the email chain below, that this discovery is relevant, and that RGGR is inflexible on that point.

Having failed to resolve this dispute pursuant to Rule 26(c), the EEOC sought RGGR's concurrence in filing a motion for a protective order pursuant to LR 7.1. RGGR declined to concur.

Regards,
Miles

Miles E. Shultz
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>>> Joel Kirkpatrick <joel@joelkirkpatrick.com> 7/9/2015 2:55 PM >>>

Miles,

In response to your email, our position remains unchanged. The offer we made to you still stands. Joe and I will be available on Monday due to current travel obligations to discuss further our position that we have already communicated to you.

The requests we have made are relevant for the reasons set forth in our previous email. I remind you that procedurally you have not yet responded to our request for written discovery. We also do not understand your insistence that a protective order must be filed prior to the due date of a discovery response. We see nothing in the Federal rules or the local rules that requires this. If you object to any request and decline to respond, we will have the option to pursue this matter with the court. Any "protective order" at this stage prior to the discovery response, is not yet ripe.

Please advise as to your availability on Monday if you wish to speak about this matter further.

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From: MILES SHULTZ [mailto:MILES.SHULTZ@EEOC.GOV]
Sent: Wednesday, July 8, 2015 3:50 PM
To: Infranco, Joseph P.; Joel Kirkpatrick
Cc: KHAN, SHAJINI; PRICE, DALE
Subject: RE: RGGR / Rule 26 and LR 7.1 Conference

Joel,

Thanks for the email. The Commission has specifically which requests we are objecting to: Interrogatories 4, 5, 6, 7, 8, 12, 14, and 16; Requests for Production 4 and 5; and Request for Admission 1.

Despite your assertions below, RGGR's discovery requests are not relevant to any claim or defense in this case, and only serve to annoy, embarrass, and oppress Stephens. Discovery regarding her "male sexual organs, including but not limited to, a penis and testicles;" her "offspring [and] name, sex, and date of birth;"and whether she "has ever been married to a woman" is not at all relevant to whether RGGR fired her in violation of Title VII. The EEOC alleges that RGGR fired Stephens because she previously presented as one sex, was presenting as another sex, and did not satisfy RGGR's views of how she ought to present. I fail to see how this opens the door considering to extremely invasive discovery regarding: 1) Stephens's genitalia; 2) Stephens's familial relationships; and 3) the status or progress of Stephens's gender transition.

We are generally available Thursday and Friday of this week to discuss. Please let me know when works for you and Joel.

Regards,
Miles

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>>> Joel Kirkpatrick <joel@joelkirkpatrick.com> 7/8/2015 2:08 PM >>>

Miles,

This is a response to your email dated July 3 concerning "objections" to the defendant's first request for written discovery submitted to plaintiff. The plaintiff has not responded to our first request for written discovery other than your general email stating objections based on relevance and "annoying, embarrassing and oppressive" discovery questions.

The requests you deem "annoying, embarrassing, and oppressive" are not meant to be so, but are rather necessary because of the unique nature in which the EEOC is approaching this claim. The Complaint states that our client has acted unlawfully against the complainant because Stephens is "a transgender woman" and "in the process of undergoing a gender transition from male to female". This door was opened by the EEOC, through the use of terms not found in the applicable statutory language.

There is no way our client can reasonably defend against these charges without some understanding of their meaning, and how these apply to the complainant. Contrary to what you might assert, these are not universally comprehended terms, and their use for the first time in an EEOC complaint presents unique challenges to a defense.

If you wish to amend your Complaint to omit these charges and proceed solely on a sexual stereotyping claim based upon the complainant being male - and sexual stereotyping based on that basis - we are willing to

withdraw some of these requests. But as the action is currently styled, we have no alternative but to make these demands and seek judicial intervention if you disagree.

We are interested in discussing this matter further in an attempt to resolve any dispute to avoid involving Judge Cox. We can look to find time later this week or earlier next week due to the schedule of Joe and I.

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From: MILES SHULTZ [mailto:MILES.SHULTZ@EEOC.GOV]
Sent: Tuesday, July 7, 2015 11:42 AM
To: Infranco, Joseph P.
Cc: KHAN, SHAJINI; Joel Kirkpatrick; PRICE, DALE
Subject: Re: RGGR / Rule 26 and LR 7.1 Conference

Counsel,

Any update on your availability to discuss this issue this week?

Thanks,
Miles

>>> MILES SHULTZ 7/4/2015 7:14 AM >>>
Thanks Joe.

>>> "Joseph P. Infranco" <jinfranco@alliancedefendingfreedom.org> 7/3/2015 10:42 PM >>>
I am at a conference in CA through Friday, so this coming week is difficult. Let me check the conference schedule to see when we might have time to discuss.

Regards,

Joe

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On Jul 3, 2015, at 4:23 PM, MILES SHULTZ <MILES.SHULTZ@EEOC.GOV> wrote:

Joel,

Thanks for the email (and on a holiday nonetheless). First, the discovery responses are not due until July 21. Second, the Commission objects to providing any responses to the requests listed in the email below. If RGGR cannot establish they are in fact relevant and also not oppressive under Rule 26 (or will otherwise not agree to retract them), the EEOC will seek a protective order to prohibit them. If a protective order is ultimately necessary, the EEOC must file the motion prior to the July 21st deadline. Therefore, waiting to conduct a conference until after we respond on July 21 is not possible. Additionally, given the discovery time-frame, if the parties identify an issue which needs court intervention--the earlier we get that in front of the Court the better.

Please let me know when on Wednesday we can discuss.

Thanks,
Miles

Miles E. Shultz
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Office (313) 226-6217
Cell (313) 409-6904
Fax (313) 226-6584
>>> Joel Kirkpatrick <joel@joelkirkpatrick.com> 7/3/2015 4:04 PM >>>
Counsel,

I don't believe a meeting on Monday or Tuesday is possible. Do to the holiday weekend, I am out of town (up north) until Wednesday and I'm not certain of Joe's availability.

I do not see the Commission's full responses to Defendant's discovery request attached to this email. I'm not certain if the responses were mailed. Since our practice has been to attach responses via PDF email, I assume that the response has not yet been tendered. We would like to see the complete plaintiff response before engaging in any meeting to discuss whether defendant will pursue any responses deemed insufficient and incomplete. We do not want to piecemeal any discovery related issues. Please advise as to when the Plaintiff's full response to Defendant's request for written discovery will be tendered. We then can follow up with any necessary conference to address any discovery matters.

I have access to email but I am limited to a response for the above mentioned matters.

Sent from my iPad

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On Jul 3, 2015, at 8:24 AM, "MILES SHULTZ" <MILES.SHULTZ@EEOC.GOV> wrote:

> Counsel,
> I have reviewed defendant's first set of discovery requests. The Commission objects to discovery regarding 1) Stephens's anatomy; 2) Stephens's familial relationships; and 3) the status or progress of Stephens's gender transition. *See* Interrogatories 4, 5, 6, 7, 8, 12, 14, and 16; Requests for Production 4 and 5; and Request for Admission 1. This discovery is irrelevant-and annoying, embarrassing, and oppressive pursuant to Rule 26. Accordingly, please let me know your availability on Monday or Tuesday to discuss resolving this dispute without court action pursuant to Rule 26(c)(1), or, in the alternative, whether Defendant will concur in a motion for a protective order to prohibit such discovery pursuant to Local Rule 7.1. I am generally available either day except for 2-3 pm both days.
> Regards,
> Miles
> Miles E. Shultz
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