

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

Plaintiff,

Civil Action No.  
2:14-cv-14-13710  
Hon. SEAN F. COX

v.

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

Defendant.

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**DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.’S  
OBJECTIONS TO THE MAGISTRATE’S ORDER GRANTING IN PART  
AND DENYING IN PART EEOC’S MOTION FOR PROTECTIVE  
ORDER**

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 *Objections To The Magistrate’s Order Granting In Part And Denying In Part EEOC’s Motion For Protective Order*, states as follows:

**PROCEDURAL HISTORY AND 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 grant the motion to dismiss in part with respect to those two claims, 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’ transition from male to female – thereby removing those issues from the case. The EEOC refused to do so – evidencing that the EEOC is still asserting those claims as part of its action. 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*).

On July 28, 2015, the Funeral Home filed *Defendant R.G. & G. R. Harris Funeral Homes, Inc.’s Response To Plaintiff’s Motion For Protective Order*.

On August 12, 2015, the parties appeared before Magistrate Judge David R. Grand for a

hearing on the *EEOC's Motion for Protective Order*.

On September 24, 2015, Magistrate Grand issued his *Order Granting In Part And Denying in Part EEOC's Motion For Protective Order* (hereinafter "*Order*").

In his *Order*, Magistrate Grand stated that "[w]hile [the Funeral Homes'] . . . requests [about the EEOC's 'transgender' and 'transitioning' claims – including requests about Stephens's genitalia, both presently and at birth] *may have been proper if Stephens's 'transgender' and 'transitioning' claims remained live*" – the EEOC's "transgender" and "transitioning" claims were not, in fact, still alive, and the Funeral Homes' inquiries were not relevant to the EEOC's "gender stereotyping" claim. *Order*, page 5. As a result, Magistrate Grand granted the EEOC's Motion for Protective Order "*insofar as R.G. seeks information regarding Stephens's sexual anatomy, her familial background and relationships, and any medical or psychological records related to the progress of her gender transition . . . [because] the requesting party has failed to show its relevance to the disposition of the gender-stereotyping claim.*"

The Magistrate's *Order* is clearly erroneous and contrary to law and should be reversed for the following reasons:

1. The Magistrate based his *Order* on the grounds that the EEOC's "transgender" and "transitioning" claims have been dismissed. They have not. Therefore, the Magistrate's *Order* is clearly erroneous and contrary to law.
2. The Magistrate precluded the Funeral Home from engaging in discovery about Stephens being transgender. However, if the Court is going to allow the EEOC to present evidence of Stephens being transgender during these proceedings, then the Magistrate's *Order* is clearly erroneous and contrary to law.

3. The Magistrate's *Order* failed to consider that – apart from the discovery being relevant to the EEOC's claims against the Funeral Home – the excluded discovery is relevant to the Funeral Homes' affirmative dress code defense – a defense equally applicable to the sexual stereotyping claim as well as the “transgender” and “transitioning” claims. Because the Magistrate failed to consider or address that the excluded discovery is relevant to the Funeral Home's affirmative defenses, the Magistrate's *Order* is clearly erroneous and contrary to law.
4. The Magistrate's *Order* failed to consider that the EEOC – in seeking a protective order – failed to meet the legal requirement that it articulate and prove a clearly defined and serious injury in order to be entitled to a protective order. Therefore, the Magistrate's *Order* is clearly erroneous and contrary to law.
5. Because the basis of the Magistrate's *Order* would, as a practical matter, have the effect of bootstrapping all gender identity claims into Title VII's “sex” discrimination provision – the very thing the Magistrate and this Court assert is not recognizable under Title VII – the Magistrate's *Order* is clearly erroneous and contrary to law.
6. Because the Magistrate granted the EEOC a wide-sweeping protective *Order* when there were more narrowly tailored options that would have protected both Stephens' and the Funeral Home's interests, the Magistrate's *Order* is clearly erroneous and contrary to law.

### **ANALYSIS AND ARGUMENT**

#### **Incorporation of Previous Filings**

The Funeral Home hereby restates and incorporates herein by this reference *Defendant*

*R.G. & G. R. Harris Funeral Homes, Inc.’s Response To Plaintiff’s Motion For Protective Order* previously filed herein.

### **The Rule**

F.R.C.P. 72(a) provides, in pertinent part:

**“Nondispositive Matters.** *When a pretrial matter not dispositive of a party’s claim or defense is referred to a magistrate judge to hear and decide, . . . A party may serve and file objections to the order within 14 days after being served with a copy. . . The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.”*

**A. The Magistrate’s Conclusion That The EEOC’s “Transgender” and “Transitioning” Claims Are No Longer Alive – Which Formed The Primary Basis For The Magistrate’s Granting Of A Protective Order – Is Erroneous Because This Court Declined To Dismiss Those Claims When The Funeral Home Requested It To Do So. Therefore, The Magistrate’s Granting Of A Protective Order On That Basis Was Clearly Erroneous And Contrary To Law.**

The EEOC asserted a total of four claims in its *Amended Complaint*. In addition to the sexual stereotyping claim and the clothing allowance claim, the EEOC also asserted (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*). Those are facts. Indeed, the Magistrate acknowledged that the gender identity, gender transitioning, and sexual stereotyping claims the EEOC asserted in its amended complaint constituted “three distinct allegations” (p. 3, *Order*).

The disingenuousness of the EEOC on this issue is apparent from its *Reply in Support of EEOC’s Motion for Protective Order* in which it, first, claims that its “transgender” and

“transition” claims are not additional claims but rather “*exemplify the sex-based considerations RGGR used to fire Stephens*” (whatever that obscure verbiage means) – but then, immediately thereafter, again refers to them as “*the transgender and transitioning theories.*”

In any case, the important takeaway is that the Funeral Home moved to dismiss all three of the EEOC’s distinct claims, including the EEOC’s “transgender” and “transitioning” claims, but this Court – although discussing and casting doubt upon the validity of the EEOC’s “transgender” and “transitioning” claims – did not formally dismiss them. The Court simply denied the Funeral Home’s *Motion to Dismiss* in its entirety. (See, p. 16 of this Court’s *Amended Opinion and Order Denying Defendant’s Motion To Dismiss* – “IT IS ORDERED that Defendant’s Motion to Dismiss is DENIED. IT IS SO ORDERED”). The result is that the disputed claims, which this court said lacked legal authority, remain in a kind of legal limbo. The EEOC refuses to dismiss these claims, and the Defendant still faces them in the legal process, without any opportunity to conduct discovery.

Therefore, despite all the ink now spilled in identifying, analyzing, discussing, and objecting to those claims, the EEOC’s “transgender” and “transitioning” claims still technically exist for the simple reason that they have not been formally dismissed. If this Court has determined otherwise, then Defendant requests an amended order expressly granting the Funeral Homes’ *Motion to Dismiss* those claims. Unless and until this is done, those claims still exist and – as the Magistrate himself stated – if those claims *are* still alive the Funeral Home is entitled to engage in discovery about them. Page 5, *Order Granting In Part And Denying In Part EEOC’s Motion For Protective Order*.

Therefore, since EEOC’s “transgender” and “transitioning” claims have not been formally dismissed, the Funeral Home is entitled to engage in discovery about them and the Magistrate’s

*Order* to the contrary is clearly erroneous and contrary to law.

**B. The Magistrate Clearly Erred In Granting The EEOC's Request For A Protective Order – Even With Respect To The Sexual Stereotyping Claim – Unless The Court Is Going To Exclude Any Evidence From The EEOC That Stephens Is Transgender.**

The Magistrate based his entry of a protective order on the theory that (1) the EEOC is only asserting a sexual stereotyping claim and (2) under a sexual stereotyping claim, the *reason* underlying an employee's non-conforming behavior is irrelevant. In other words, the *reason* Stephens wanted to express as a woman (whether or not Stephens is transgender) is irrelevant; all that is relevant is that Stephens is perceived by his employer as a man who is not conforming to stereotypes associated with men (p. 6, *Order* – “*it is irrelevant whether the alleged gender-stereotyping resulted from the fact that Stephens is actually transgender*”). Since Stephens being transgender is irrelevant – the Magistrate reasoned – the Funeral Home's discovery aimed at Stephens being transgender is also irrelevant.

But the EEOC throughout all its pleadings makes a great deal of the allegation that Stephens *is* transgender. Indeed, it's important to note that, continuing its practice of abandoning the logical principle of non-contradiction, and wanting inconsistent facts and positions to all be true, the EEOC states both that Stephens' gender identity is *not relevant* (p. 6, *Order* – “the EEOC correctly asserts that it is irrelevant whether the alleged gender-stereotyping resulted from the fact that Stephens is actually transgender”) and that Stephens' being transgender *is relevant* (pp.4-6, *Reply in Support of EEOC's Motion For Protective Order* – “Stephens's gender identity is relevant to this lawsuit. . . Stephens's gender identity is relevant to the Title VII, sex-

discrimination claim”).<sup>1</sup>

<sup>1</sup>**The EEOC consistently takes logically and factually inconsistent positions in this proceeding.** For example, the EEOC maintains both that: **(a) Stephens is a man** (p. 2, *Reply in Support of EEOC’s Motion For Protective Order*) and that **(b) Stephens is a woman** (§ 18, *First Amended Complaint and Jury Demand*), and that **(c) Stephens is both a man and a woman** (p. 3, *Reply in Support of EEOC’s Motion For Protective Order* – “Stephens is a transgender woman because her gender identity, female, is different than the sex assigned to her at birth, male”). Similarly, the EEOC maintains both that **(a) Stephens’ gender identity is a separate claim** (§ 15 *Amended Complaint*) and that **(b) Stephens’ gender identity is not a separate claim** (p. 2, *Reply in Support of EEOC’s Motion For Protective Order* – “These are not additional claims”). And the EEOC maintains both that **(a) Stephens’ gender identity is not relevant** (p. 6, *Order*) and that **(b) Stephens’ gender identity is relevant** (pp. 4-5, *Reply in Support of EEOC’s Motion For Protective Order*) to this case.

The EEOC, however, cannot have it both ways. The Magistrate based his *Order* upon the fact that Stephens has a sexual stereotyping claim; that is to say, Stephens was a man wanting to dress as a woman, and that the reason Stephens wanted to do so (that Stephens is transgender) was irrelevant (p. 6, *Order*). If, however, the EEOC – as it appears intent on doing – will be allowed to continue asserting its transgender claims in this case (which could only be allowed if Stephens’ transgender status is relevant) then the Magistrate erred. Even though a sexual stereotyping theory is alleged in this action, the EEOC’s overall approach is such that the Funeral Home should be permitted inquiry into the issues surrounding Stephens being transgender. If the EEOC will be allowed to present evidence that Stephens is transgender, thereby acknowledging that Stephens’ transgender status is relevant to the case, then the Funeral Home must be allowed to address and even contest that evidence. Because the Magistrate’s *Order* deprives the Funeral Home of such an opportunity, the Magistrate’s *Order* is clearly erroneous and contrary to law.

**C. The Magistrate Clearly Erred in Granting the EEOC’s Request For A Protective Order Because The Magistrate Failed To Address The Fact That The Funeral**

**Home's Discovery Was 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.

As noted in its *Response to the EEOC's Motion for Protective Order*, there is a long-recognized principle that 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*). An employer, in order to be able to impose such a dress code, however, 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. 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 claims the EEOC asserts (which it is not), the Funeral Home's discovery is still relevant to the Funeral Home's affirmative dress code defense. The Funeral Home should be allowed to inquire into those matters in order to show that the Funeral Home justifiably treated Stephens as a man for

purposes of its dress code. The relevance of the requested information to the Funeral Home's dress code defense – which, as noted, requires an employer to be able to objectively determine whether its employees are men or women – is obvious and was clearly articulated in *Appendix I To Defendant R.G. & G. R. Funeral Homes, Inc.'s Response To Plaintiff's Motion For Protective Order*, in which the Funeral Home discussed in detail every discovery request at issue, setting forth the request as well as the claims and defenses to which such requests were relevant.

Although the Funeral Home raised this issue in its *Response to the EEOC's Motion For Protective Order*, the Magistrate failed to even consider, let alone address, the Funeral Home's dress code defense and whether the Funeral Home's discovery requests were relevant to that defense. Due to that failure, the Magistrate's *Order* is clearly erroneous and contrary to law.

**D. The Magistrate Clearly Erred In Granting The EEOC A Protective Order Because The Magistrate Failed To Require The EEOC To Prove That, If A Protective Order Were Not Granted, The EEOC Would Suffer A Clearly Defined And Serious Injury.**

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*” (our emphasis). *Nix v. Sword*, 11 Fed.Appx. 498, 500 (6<sup>th</sup> Cir. 2001). See, also, *Serrano v. Cintas Corporation*, 699 F.3d 884, 902 (6<sup>th</sup> 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 failed to meet this burden and the Magistrate erred as a matter of law in granting a protective order without analyzing the harm the EEOC would have suffered had the discovery been allowed.

As pointed out in its *Response to the EEOC's Motion for Protective Order*, the EEOC failed to even allege, let alone articulate, *any* specific facts showing clearly defined and serious injury resulting from the discovery of which it complained. The EEOC merely made conclusory statements to the effect that the complained of discovery is “annoying, embarrassing, and oppressive.” See the Funeral Home’s *Response to the EEOC's Motion for Protective Order* for specific examples of the EEOC’s failure in this regard. And that was the sole basis for the Magistrate’s Order (p. 7, *Order* – “*Such information is of the most intimate and private nature, and it would be harassing and oppressive to require disclosure, at least at this juncture.*”).

But as pointed out in its *Response to the EEOC's Motion for Protective Order*, 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 because the EEOC itself trumpeted this case to the world in its September 25, 2014 Press Release, and 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*). If the EEOC’s public announcement of Stephens’ transgender status and transition from male to female was not embarrassing or oppressive to Stephens, then the Funeral Home’s inquiring as to the facts behind those public proclamations cannot plausibly be embarrassing or oppressive either. Therefore, it was error for the Magistrate to find that “[s]uch information is of the most intimate and private nature, and it would be harassing and oppressive to require its disclosure, . . .” when the EEOC and Stephens

themselves have publicly raised and discussed these very issues.

Because the Magistrate granted the EEOC a protective *Order* without determining that the EEOC and Stephens would suffer “clearly defined and *serious* injury” had the discovery been allowed, the Magistrate’s *Order* is clearly erroneous and contrary to law.

**E. The Magistrate’s Order Is Clearly Erroneous And Contrary To Law Because Its Basis Has The Practical Effect Of Bootstrapping All Gender Identity Claims Into Title VII’s “Sex” Discrimination Provision - The Very Thing Both The Magistrate And This Court Claim Is Not Recognizable Under Title VII.**

The Magistrate indicated in his *Order* that the only claim under consideration for a protective order was the EEOC’s sexual stereotyping claim, and that under a sexual stereotyping claim the only relevant consideration is how an employer subjectively perceives the sex of the transgender employee, not the transgendered employee’s biological sex. Therefore, the Magistrate reasoned, if (regardless of Stephens’ biological or transgender sexual identity) the Funeral Home perceived Stephens as a man, and terminated Stephens for expressing as a woman, such behavior fit neatly into the sexual stereotyping theory of *Price Waterhouse*.

But that analysis reveals the inherent error in extending *Price Waterhouse* (and subsequently *Smith*, which held transgender identity *could* be the basis of a stereotyping claim) into essentially making gender identity actionable per se, even in cases where an employer has a sex-specific dress code. By definition, a transgender employee will *always* be expressing him or herself contrary to sexual stereotypes (see the Funeral Home’s discussion of this issue at pp. 16-17 of the Funeral Home’s *Motion To Dismiss*); and if a transgender employee will *always* be expressing him or herself contrary to sexual stereotypes, then *all* transgender discrimination cases

will – by definition – *always* constitute sexual stereotyping. *Ipsa facto* – every transgender discrimination case will constitute “sex” discrimination under the *Price Waterhouse* sexual stereotyping theory, effectively bootstrapping *all* transgender discrimination cases into Title VII – the very thing the Magistrate and this Court state is not recognized.

If one questions this, one need only ask oneself: How many transgender discrimination cases will there be where a biological male who claims to be a woman but who never expresses as a woman, or where a biological female who claims to be a man but who never expresses as a man, is terminated for simply *being* invisibly transgendered? The answer, of course, will be none – because unless the transgendered employee expresses him or herself as a sex opposite of his or her biological sex, the employer would never know (or care) that the employee was allegedly transgender. Indeed, the essence of being transgendered is expressing as someone of the opposite sex.

The Sixth Circuit has already rejected this approach in *Vickers v. Fairfield Medical Center, et al.*, 453 F.3d 757 (2006), wherein the court refused to extend the sexual stereotyping theory of *Price Waterhouse* to a homosexual employee’s claim that he was illegally discriminated against due to his homosexual sexual behavior on the grounds that such sexual practices did not conform to the traditionally masculine role of men. In rejecting that argument, the Sixth Circuit stated: “*Ultimately, recognition of Vickers’ claim would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.*” *Vickers*, *supra*, at 764. The same, of course, can be equally said of transgender non-conforming behavior. To parrot the Sixth Circuit in

*Vickers* – in all likelihood, any discrimination based on being transgender would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all transgender people, by definition, fail to conform to traditional gender norms.

Therefore, due to this factual peculiarity, application of the sexual stereotyping theory in a transgender context will effectively bootstrap gender identity discrimination into Title VII in every transgender-contextualized case, contrary to law. Since the Magistrate based his *Order* on this flawed analysis, his *Order* was clearly erroneous and contrary to law.

**F. The Magistrate Clearly Erred In Granting The Protective Order Because There Are Reasonable 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 Magistrate imposed the most draconian option possible – completely forbidding nearly all the contested 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*: . . .” (our emphasis)).

In this regard, it must be noted that the Magistrate never found that the EEOC or Stephens would suffer any clearly defined or serious injury should the Funeral Home be allowed to pursue its discovery requests. The only alleged harm the Magistrate noted was that it would be “*harassing and oppressive*” to require Stephens to have to disclose the requested information – “*at least at this juncture*” – because “*such information is of the most intimate and private nature.*” As pointed out in the Funeral Home’s *Response to the EEOC Motion for Protective*

*Order*, however, such information was not so intimate or private so as to lead Stephens to try to keep such information secret. Indeed, Stephens wrote a letter to his employer and co-workers publicly announcing that he was transgendered, was transitioning from male to female, would be expressing as a woman, and even inviting the recipients of the letter to contact his therapist, going so far as to identify the therapist by name and provide her contact information! After Stephens disclosed such information himself, how could such information now suddenly be so “intimate and private” as to warrant the entry of a protective order, precluding the Funeral Home from inquiring into the very same things Stephens spoke freely and publicly about prior to filing suit? None of this was addressed or even considered by the Magistrate.

Given such facts – rather than prohibit the Funeral Home’s discovery requests – the Magistrate could and should have simply crafted an order that would have allowed the discovery, but protected it from public disclosure. That’s more protection than Stephens elected in announcing to the world the “intimate and private” information Stephens and the EEOC are now so loath to “disclose.” Given the important interest the Funeral Home has in being able to effectively defend against the EEOC’s claims, and the adverse affect the Magistrate’s *Order* will have upon the Funeral Home’s ability to do so, it was clearly erroneous and contrary to law for the Magistrate to have deprived the Funeral Home of its discovery rights when the Magistrate could have protected those rights while at the same time providing Stephens with a legitimate degree of protection.

## **CONCLUSION**

For all the foregoing reasons, the Magistrate's Order should be reversed, the protective order dissolved, the EEOC's Motion for Protective Order should be denied, and the EEOC ordered to respond to the Funeral Home's discovery, both now and in the future.

Respectfully submitted,

**JOEL J. KIRKPATRICK, P.C.**

/s/ Joel J. Kirkpatrick

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Dated: October 6, 2015

**CERTIFICATE OF SERVICE**

I certify that on October 6, 2015, a copy of the above *Defendant R.G. & G.R. Harris Funeral Homes, Inc.'s Objections To The Magistrate's Order Granting In Part And Denying In Part EEOC'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**