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

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

Plaintiff's Response to Defendant's Objections to Order Granting in Part and Denying in Part Plaintiff's Motion for Protective Order

TABLE OF CONTENTS

QUESTION PRESENTED

Rule 72 provides that a non-dispositive order of a magistrate judge should be set aside only if it "is clearly erroneous or is contrary to law." Is the Magistrate Judge's Order factually and legally supported, and, therefore, not "clearly erroneous" or "contrary to law?"

The Commission Answers: Yes.

The Defendant Answers: No.

MOST APPROPRIATE AUTHORITY

Cases

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005

Myers v. Cuyahoga Cnty, Ohio, 182 F. App'x 510, 519 (6th Cir. 2006)

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

Rules and Regulations

Fed. R. Civ. P. 72

Plaintiff Equal Employment Opportunity Commission ("EEOC") respectfully requests that the Court overrule Defendant R.G. & G.R. Harris Funeral Homes, Inc.'s ("RGGR") *Objections to the Order Granting in Part and Denying in Part Plaintiff's Motion for Protective Order* ("*Order*") [Dkt. 36] and affirm the Magistrate Judge's September 24, 2015, protective order [Dkt. 34].

I. Standard of Review

Rule 72 provides that a non-dispositive order of a magistrate judge should be set aside only if it "is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). "The 'clearly erroneous' standard applies only to the magistrate judge's factual findings." *Coleman v. Cardinal Health 200, LLC*, No. 12-CV-11154, 2013 WL 3990676, at *1 (E.D. Mich. Aug. 2, 2013), *citing Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 291 (W.D.Mich.1995). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*; *see also Bowman v. Int'l Bus. Mach. Corp.*, 2013 U.S. Dist. LEXIS 62680, *6 (S.D. Ind. May 2, 2013) (citation omitted).

"A Magistrate Judge's legal conclusions are reviewed under the plenary 'contrary to law' standard." *Coleman*, 2013 WL 3990676, at *1 (internal citation omitted). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Bowman*, 2013 U.S. Dist. LEXIS, at *6. While the reviewing district court "must exercise independent judgment with respect to the magistrate judge's conclusions of law" (*Hawthorne, Inc.*, 162 F.R.D. at 291), "[i]f the case permits two permissible views, the magistrate judge's ruling shouldn't be overturned solely because the reviewing court would have chosen the other view." *Bowman*, 2013 U.S. Dist. Lexis, at *7.

In the context of discovery, "it is well established that the scope of discovery is within the sound discretion of the trial court." *Jackson v. E-Z-GO Div. of Textron*, Inc., No. 3:12-CV-154-TBR, 2015 WL 4464098, at *2 (W.D. Ky. July 21, 2015) (internal citation and quotation omitted). And, while "[d]iscovery can be rather broad … the breadth is not limitless." *Id.* at *3.

Here, RGGR challenges the Magistrate Judge's discovery order both factually and legally. As discussed below, and given these standards, RGGR has established neither that the *Order* is factually

"clearly erroneous" nor "contrary to law." Consequently, the EEOC requests that the Court overrule RGGR's objections. The EEOC incorporates the arguments made in its original *Motion* [Dkt. 23], *Reply* [Dkt. 28], and the motion hearing [Exhibit A, August 28, 2015, *Hr'g Tr.*], and focuses this *Response* specifically on RGGR's stated objections.

II. Argument

RGGR lodges six objections. A recurring defect throughout the objections is RGGR's attempt to re-litigate issues this Court already decided in the *Order Denying Defendant's Motion to Dismiss.* For instance, RGGR argues that the *Order* would "bootstrap" all cases regarding transgender persons as sex-discrimination claims (*See* Dkt. 36 at Pg ID 438), and rehashes its argument that the EEOC's claims are so inconsistent that they fail to state a claim for relief (Dkt. 36 at Pg ID 434). As discussed below, the District Court already rejected these arguments and should similarly overrule RGGR's objections.

RGGR also fails to address the Magistrate Judge's ruling that it is RGGR's subjective intent which is relevant[1]. *See* Dkt. 34 at Pg ID 420, (*citing Smith v. City of Salem,* 378 F.3d 566 (6th Cir. 2004) and *Myers v. Cuyahoga Cnty, Ohio*, 182 F. App'x 510, 519 (6th Cir. 2006)). As other courts have similarly found, it is the employer's subjective perception and intent which is relevant and not whether its assumptions were objectively "right" in some sense. *See EEOC v. Boh Brothers*, 731 F.3d 444, 456-57 (5th Cir. 2013) ("we focus on the alleged harasser's subjective perception of the victim," and "do not require a plaintiff to prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective truth").

Another defect in RGGR's objections is the repeated assertion that the EEOC has waived any argument regarding the inherently private and intimate nature of the prohibited discovery because at

[1] The *Order* also notes RGGR failed to provide any guidance at the hearing why the dress-code defense renders any of the prohibited discovery relevant—let alone how that would justify the discovery in light of its harassing and embarrassing nature. *See* Dkt. 34 at Pg ID 420-21 ("During oral argument, R.G.'s counsel candidly admitted that he could not articulate the relevance of most of the requested information – i.e., how it would bear, one way or another, on any fact at issue in the gender stereotyping claim.").

the initiation of this lawsuit the EEOC issued a news release stating that the Commission had filed a lawsuit on behalf of Aimee Stephens, a transgender woman. This argument misses the mark. As stated at the hearing, and consistent with the *Order*, the fact that Stephens is transgender is not embarrassing; rather it is the discovery into her genitals and familial relationships that is embarrassing. As the EEOC stated at the August 28 hearing:

> "[I]t's important to note that, that [Stephens] is transgender is not embarrassing. [Stephens] is [not] embarrassed that she [is] a transgender woman and the EEOC is [not] embarrassed she [is] a transgender woman. … What is embarrassing is forcing [Stephens] to respond to discovery regarding the most [intimate], personal and sensitive parts about [] her life: Her genitals, whether she has a penis and testicle[s], that [is] interrogatory 7; whether she [has] had sex re-assignment surgeries, interrogatory 8; any biological children, and not in a deposition as a background question, but for the sole purpose of discovering whether she is a man or not."

Ex. A at 7.

A. The Magistrate Judge's Order is consistent with the law, and RGGR has failed to meet its burden of showing otherwise.

1. The *Order* found harm in responding to discovery of the "most intimate and private nature" because it is "harassing and oppressive" and RGGR's Fourth and Sixth Objections should be overruled.

RGGR objects that "the Magistrate's order failed to consider that the EEOC … failed to meet the legal requirement that it articulate and prove clearly defined and serious harm." Dkt. 36 at Pg ID 430, objection 4. But the Magistrate Judge found, as RGGR acknowledges, that discovery of "Stephens's sexual anatomy, her familial background and relationships, and any medical or psychological records related to the progress of her gender transition [are] of the most intimate and private nature" (Dkt. 36 at Pg ID 437 (citing Dkt. 34 at Pg ID 421)). The *Order* also found that where RGGR could not offer any argument regarding the relevance of the discovery, its extremely intimate nature rises to the level of harassment and embarrassment—far outweighing any interest RGGR has in seeking it. Dkt. 34 at Pg ID 421. Thus, the challenged discovery warrants the protective order. *See* Fed. R. Civ. P. 26(b)(2)(C) (authorizing a court to enter a protective order where the

burden of the discovery outweighs its likely benefit).

RGGR also objects that the Magistrate Judge "should have simply crafted an order that would have allowed the discovery, but protected it from public disclosure." Dkt. 36 at Pg ID 441; *see also*, *Id.* at Pg ID 430, objection 6. RGGR again refuses to recognize the nature and extent of the harm the *Order* and the EEOC identified: being forced to reveal the most intimate and private aspects of one's existence to another person are inherently embarrassing, harassing, and oppressive. Filing discovery under seal does not address this harm. Making such disclosures public in litigation also presents its own harm, but RGGR refuses to acknowledge the inherently embarrassing nature of the discovery.

RGGR's argument that the *Order* failed to identify harm to justify the protective order falls short. The Court correctly determined that the EEOC had established harm sufficient for the protective order it sought. Therefore, RGGR's fourth and sixth objections must be overruled.

2. RGGR's "bootstrapping" argument rehashes an issue from the *Motion to Dismiss* that the District Court rejected and offers no support for its Fifth Objection.

The Court should deny RGGR's attempt to re-litigate its failed bootstrapping argument made in objection 5, which the Court previously rejected. *See* Dkt. 36 at Pg ID 439, objection 5 ("Ipso 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."); *see also* Dkt. 7 at Pg ID 44 ("all gender identity disorder claimants—by definition—would have a claim under the sex discrimination provision of Title VII, thereby resulting in a de facto amendment of Title VII"). However, the Court's *Order Denying Defendant's Motion to Dismiss* held that:

> "Even though transgender/transsexual status is currently not a protected class under Title VII, Title VII nevertheless 'protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.' *Myers v. Cuyahoga Cnty, Ohio*, 183 F. A'ppx 510, (6th Cir. 2006) (*Citing Smith v. City Of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005))."

Dkt. 13 at Pg ID 189. Therefore, the Court should deny RGGR's efforts to re-litigate this argument.

Moreover, RGGR's argument overreaches. RGGR argues that "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." Dkt. 36 at Pg ID 440 (emphasis in original). However, RGGR's logic would result in transgender employees—as a class—being denied access to the sex-stereotyping theory of sex-discrimination. Such logic is in direct contravention of controlling Sixth Circuit precedent cited in the Court's *Order Denying Defendant's Motion to Dismiss*. Dkt. 13 at Pg ID 189-195 ("B. A Transgender Person—Just Like Anyone Else—Can Bring a Sex Stereotyping Gender-Discrimination Claim Under Title VII"). Accordingly, this Court should overrule RGGR's fifth objection.

3. RGGR's Third Objection Lacks Merit Because RGGR's dress-code defense neither renders the discovery relevant nor outweighs the harassing and oppressive nature of the discovery.

For its third objection, RGGR turns to its dress-code defense. Dkt. 36 at Pg ID 434-36. Here RGGR cites its own *Response to the EEOC's Motion for Protective Order* and—again—to its failed *Motion to Dismiss* to support its assertion. However, far from ignoring this argument, the Magistrate rejected it outright:

> "The Court also rejects R.G.'s argument that establishing Stephens's actual gender during the time of her employment is relevant because R.G. could not have unlawfully terminated Stephens for acting like a woman if she was, in fact, a woman. This argument misconstrues the very nature of the EEOC's gender-stereotyping claim and the case law discussed above. Again, the relevant inquiry underlying this theory of liability is a subjective one – whether R.G.'s supervisors perceived Stephens as a man who was acting like a woman – rather than an objective one – whether Stephens was ever actually a woman."

Dkt. 34 at Pg ID 421.

As a threshold matter, this defense is not an affirmative defense, but rather is just a purportedly legitimate, nondiscriminatory reason for discharging Stephens. As such it is RGGR's subjective intent that is at issue, not some "objective truth"

about Stephens that was not known to RGGR at the time anyway. This defense instead turns on whether it is an honest explanation of its decision or not (i.e., whether it is merely a pretext for a sex-stereotype motivated termination) and this is assuming that the defense presents, in fact, a legitimate nondiscriminatory reason to fire Stephens. These issues need not be decided on this motion, but the point is that the defense does not require discovery regarding information about Stephens's genitalia or other private matters that were unknown to RGGR at the time of its decision to discharge Stephens.

With respect to the dress code, the legal issue is whether Title VII prohibits an employer from enforcing a sex-specific dress code based on its stereotypes as to how a particular individual should present at work, and not whether RGGR must "objectively know whether an employee is a man or a woman." Dkt. 36 at Pg ID 435. In other words, is it illegal for an employer to fire an employee who had previously presented as a male because of her stated intent to present as a female in accordance with her gender identity, which would be inconsistent with the employer's belief as to how the employee

should dress?

RGGR perceived Stephens as a male for five years because she presented as a male, consistent with the sex assigned to her at birth. *See* Ex. A at 21 ("[Counsel for RGGR]: 'Four to five years, whatever it's been. There was never an inkling this [that Stephens's gender identity differed from the sex assigned to her a birth] was going on [] or that there's any observation by my client that, that he wanted a transition []'".) It was only when she informed RGGR she intended to present consistent with her gender identity, female—in contravention of RGGR's stereotypes—that it terminated her. It is RGGR's perceptions of Stephens that are dispositive. Consequently, RGGR's dress-code defense does not warrant the discovery of genitalia or familial status, and RGGR's third objection fares no better than the rest of its objections.

4. The Magistrate Judge's Order strikes a proper legal balance regarding discovery about Stephens, which overcomes RGGR's Second Objection.

In its second objection, RGGR contends that the Court impermissibly foreclosed any discovery about Stephens being transgender while permitting the EEOC to present evidence of

Stephens being transgender. *See* Dkt. 36 at Pg ID 429, objection 2. RGGR's contention misapprehends the *Order*. In fact, the *Order* did not, as RGGR asserts, bar "any discovery" about Stephens' transgender status. The Court noted, "[a] protective order as to *all* of the discovery requests at issue would go too far…" Dkt. 34 at Pg. ID 422. Specifically, the Court denied the EEOC's request for a protective order regarding RGGR's interrogatories 9 and 10, which as the Court noted, "seek information that Stephens presented publicly or to third parties … as opposed to private facts of an intimate nature." *Id.* The Court's ruling in this respect is factually and legally sustainable and RGGR fails to show that it is not. Accordingly, RGGR's second objection should be overruled.

B. The Order accurately reasoned—and the EEOC has admitted—that the Court's Denial of Defendant's Motion to Dismiss limited the prosecution of this case to a sex-stereotyping theory so RGGR's First Objection cannot be sustained.

RGGR objects to the *Order* in part because it contends the Magistrate Judge found factually that the EEOC's transgender and transitioning claims were dismissed. Dkt. 36 at Pg ID 429. RGGR

argues that the *Order Denying Defendant's Motion to Dismiss* left the transgender and transitioning theories in "a kind of legal limbo." *Id.* at Pg ID 432. This is not the case, and the Court should overrule RGGR's first objection.

The Magistrate Judge's *Order* explained that:

> "[F]ar from permitting the EEOC's tripartite Title VII claim to go forward wholesale, Judge Cox wrote, 'If the EEOC's complaint had alleged that [R.G.] fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with [R.G.] that the EEOC's complaint would fail to state a claim under Title VII.' [13 at 7]. In other words, Judge Cox rejected the EEOC's claim that R.G. violated Title VII by firing Stephens 'because she is Transgender' and/or 'because of Stephens's transition from male to female.'"

Dkt. 34 at Pg ID 416.

Moreover, during the hearing the EEOC expressly acknowledged that "Judge Cox ruled that the first two of those [theories,] transgender and transitioning[,] are [not] cognizable in and of themselves under Title VII, but this case can proceed under the gender-based stereotype claim. The EEOC does [not] intend to withdraw those two theories from the complaint to preserve our right to appeal that to the Sixth Circuit if we so choose." Ex. A at 5-6. When the Magistrate Judge asked, "So you intend to leave it

solely for the purpose of preserving your appeal?" the EEOC admitted, "Correct." *Id.* However, as the *Order Denying Defendant's Motion to Dismiss* similarly recognizes, under controlling Sixth Circuit precedent, a transgender employee does not lose her ability to proceed under a sex-stereotyping theory simply because she is transgender. Dkt. 13 at Pg ID 189-95.

While RGGR's harassing and intrusive discovery should be prohibited even if the transgender and transitioning theories remained in the case, the *Order* accurately found:

> "Consequently, for purposes of discovery, the EEOC correctly asserts that it is irrelevant whether the alleged gender-stereotyping resulted from the fact that Stephens is *actually* transgender. What is material, however, is whether R.G. terminated Stephens because she *exhibited* characteristics or behaviors that her supervisors perceived to be inconsistent with her original male gender. *See Myers v. Cuyahoga Cnty, Ohio*, 182 F. App'x 510, 519 (6th Cir. 2006) (stating that 'Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their *perceived* sex or gender.') (emphasis added)."

Dkt. 34 at Pg ID 420. Because the prohibited discovery is irrelevant to how RGGR "actually perceived Stephens before the company terminated her" the Magistrate's Order is factually and legally supported, and not clearly erroneous. Dkt. 34 at Pg ID 420.

RGGR presupposes that the discovery it seeks is relevant to the EEOC's transgender and transitioning theories of liability and in so doing misstates the Court's ruling as it relates to those two theories. While RGGR proclaims that the Magistrate Judge himself stated that if those theories are still alive then RGGR would be entitled to discovery about them (Dkt. 36 at Pg ID 432), an examination of the record belies RGGR's interpretation: all the Magistrate stated was that "such requests may have been proper if Stephens's 'transgender' and 'transitioning' claims remained live…" Dkt. 34 at Pg ID 419. The Magistrate opined no further because there was no need as those theories no longer remain in the case. Under no construction is RGGR's first objection legally tenable.

C. The EEOC is consistent that Stephens is a transgender woman because her gender identity is different than the sex assigned to her at birth.

RGGR, as it first articulated in its *Motion to Dismiss*, persists in arguing that the EEOC's claim is inherently inconsistent. *Compare* Dkt. 36 at Pg ID 434 ("The EEOC consistently takes logically and factually inconsistent positions in this proceeding."), *with* Dkt. 7 at Pg ID 44 ("The EEOC's Claims are Incoherent…").

Despite RGGR's repeated attempts to confuse the nature of the EEOC's claim, the EEOC's position has been consistent throughout this litigation: Stephens is a transgender woman because her gender identity is different than the sex assigned to her at birth. In addition to the alleged litany of inconsistent statements, RGGR also mischaracterizes the "essence" of transgender—and evidences the sex-stereotyping violation here—when it states: "Indeed the essence of being transgendered is expressing as someone of the opposite sex." Dkt. 36 at Pg ID 439. RGGR again misses the point. The "essence" of transgender is more accurately framed as an individual's expression of authentic self or an individual's internal sense of being female or male.[2]

Similarly, RGGR mischaracterizes the import of *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), and the *Order*'s rationale. *See* Dkt. 36 at Pg ID 434 ("The Magistrate based his Order upon the fact

[2] "Gender identity is a person's internal, personal sense of being a man or a woman..." GLAAD, *Transgender FAQ*, http://www.glaad.org/transgender/transfaq (last visited October 23, 2015); *see also* American Psychological Association, *Answer to Your Questions About Transgender People, Gender Identity and Gender Expression*, http://www.apa.org/topics/lgbt/transgender.aspx (last visited October 23, 2015).

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).”). That Stephens is a transgender woman is not irrelevant to the sexual stereotyping theory, and this is not what *Smith* or the *Order* stand for. Rather, what matters is RGGR’s perception of Stephens’s “characteristics and behaviors” as inconsistent with how the RGGR felt Stephens should present. Dkt. 34 at Pg ID 420. Accordingly, RGGR’s contention that the EEOC’s claim is inherently inconsistent provides no basis for sustaining RGGR’s objections to the Magistrate’s September 24 protective order.

III. Conclusion

The *Order* identified the required harm to prohibit the discovery: the inherently embarrassing and oppressive nature of discovery regarding the most private and intimate aspects of one’s being. The EEOC news release does not render this harm moot—or somehow condone discovery of Stephens’s genitals or familial relationships. RGGR’s dress-code defense does not render the prohibited discovery relevant—as the case turns on RGGR’s

subjective intent in firing Stephens and not her anatomy or familial relationships. Lastly, nothing short of a complete bar from seeking the discovery remedies the harm of being forced to reveal the most intimate aspects of one's life.

Neither the factual nor legal challenges to the Magistrate Judge's order raised by RGGR pass muster under Rule 72(a), and RGGR has failed to establish that the Magistrate Judge's order was either clearly erroneous or contrary to law. Therefore, this Court should overrule all of RGGR's objections.

Respectfully submitted,

Dated: October 23, 2015

s/ Miles Shultz
Miles Shultz (P73555)
Trial Attorney

DETROIT FIELD OFFICE
Patrick V. McNamara
477 Michigan Avenue, Room 865
Detroit, Michigan 48226
Miles.Shultz@EEOC.GOV
Tel. No. (313) 226-6217
Fax No. (313) 226-6584

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, I electronically filed the forgoing with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all record attorneys.

Dated: October 23, 2015

s/ Miles Shultz
Miles Shultz (P73555)
Trial Attorney

DETROIT FIELD OFFICE
Patrick V. McNamara
477 Michigan Avenue, Room 865
Detroit, Michigan 48226
Miles.Shultz@EEOC.GOV
Tel. No. (313) 226-6217
Fax No. (313) 226-6584

INDEX OF EXHIBIT

Exhibit A: *August 28, 2015, Hr'g Tr.*

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, **Case No. 14-13710**

-v-

RG & GR HARRIS FUNERAL HOMES,

Defendant.
_____/

MOTION HEARING

BEFORE THE HONORABLE **DAVID R. GRAND**
United States Magistrate Judge
Federal Building
200 E. Liberty Street
Ann Arbor, Michigan
August 28, 2015

APPEARANCES:

FOR THE PLAINTIFF: **MILES SHULTZ**
KENNETH BIRD
U.S. Equal Employment Opportunity Commission
477 Michigan Avenue, Suite 865
Detroit, MI 48226

FOR THE DEFENDANT: **JOEL J. KIRKPATRICK**
Kirkpatrick Law Offices, P.C.
843 Penniman Avenue, Suite 201
Plymouth, MI 48170

Transcribed by:
Christin E. Russell
RMR, CRR, FCRR, CSR
(248) 420-2720

TABLE OF CONTENTS

Ann Arbor, Michigan
August 28, 2015
2:10 p.m.

(Transcribed from audio recording.)

(Call to Order of the Court; all parties present.)

THE CLERK: This is EEOC vs RG & GR Harris Funeral Homes, case No. 14-13710.

THE COURT: Good afternoon. If I could have appearances for the record, please.

MR. KIRKPATRICK: Joel Kirkpatrick, your Honor, on behalf of defendant Funeral Homes.

THE COURT: Thank you.

MR. SHULTZ: Miles Shultz on behalf of the EEOC, your Honor.

THE COURT: Okay. Thank you.

MR. BIRD: And Ken Bird, also for the EEOC.

THE COURT: All right. Thank you. You can all be seated.

All right. We have before us the EEOC's motion for protective order. I have read the entire motion. I have had a chance to read the decision that Judge Cox issued, and the amended complaint which followed that decision. And I'm happy to hear any additional argument that either side would like to make, starting with the movant.

MR. SHULTZ: Miles Shultz for the Commission. Would

you like me to stand here?

THE COURT: Wherever you prefer is fine with me.

MR. SHULTZ: Okay. I'll stay here.

THE COURT: Before I begin, the letter that is referenced repeatedly in the documents, that was not attached anywhere. It indicated it was attached thereto but that was in reference to the interrogatories, and then the copy of the interrogatories which were provided as an exhibit did not attach a copy of the letter. So I still have not seen the letter and would appreciate a copy, if you have it.

MR. SHULTZ: I do not have a copy of the letter with me.

MR. KIRKPATRICK: Sorry, your Honor. I guess I didn't realize it wasn't attached. I apologize for that. I can certainly file with the Court later today perhaps.

THE COURT: All right. That's fine. If somebody can put that on the docket.

MR. KIRKPATRICK: Sure.

THE COURT: That would be great. But okay, go ahead, Counsel, wherever you prefer.

MR. SHULTZ: I don't have any additional arguments that's not in the briefing, but I do have a statement if the Court would like to hear or if the Court has questions regarding the Commission's position, I'd be happy to answer any questions.

THE COURT: I don't know what you mean by "statement."

MR. SHULTZ: Well, there's nothing additional. I think the brief, the pleadings or the written materials encompass the Commission's position regarding this.

THE COURT: Well, one question I have is whether, whether the EEOC intends to move to further amend its complaint to make clear in the amended complaint that it is not, in fact, seeking a separate claim that the individual was terminated both because he is transgender or she is transgender. And it seemed to me like Judge Cox clearly indicated that that particular claim would not be viable, and that it's now the EEOC's position that it clearly is not seeking to press that claim and yet, the verbiage still appears in the complaint, would arguably suggests otherwise.

MR. SHULTZ: So there are two claims in the complaint, as you're aware. One regards the discriminatory dress code allowance. The second one you're referring to is the Commission's argument that RG & GR terminated Amy Stevens because of sex. And you're right that in the complaint, there's three theories to, to establish because of sex. The first is transgender, the second is she's transitioning from male to female, and the third is the gender stereotyping.

Judge Cox ruled that the first two of those transgender and transitioning aren't cognizable in and of themselves under Title VII, but this case can proceed under the gender-based

stereotype claim. The EEOC doesn't intend to withdraw those two theories from the complaint to preserve our right to appeal that to the Sixth Circuit if we so choose. But as we were to make clear --

THE COURT: So you intend to leave it solely for the purpose of preserving your appeal?

MR. SHULTZ: Correct. Well, and to the extent that Stevens's transgender status, that Stevens as a transgender woman violates RG & GR's gender-based expectations for how someone assigned the male sex at birth should present and behave in the workplace, but it's -- there isn't, there's an inferential step on the gender-based stereotype that under the transgender or transitioning wouldn't be there, but just because Amy Stevens is transgender doesn't mean we can't establish gender-based stereotype that RG & GR -- that she violated RG & GR's expectations by presenting consistent with her gender identity female, and inconsistent with RRGR gender-based expectations for how someone assigned to the male sex at birth should present.

THE COURT: All right. Let me hear the statement then.

MR. SHULTZ: So we move to, for this protective order, to prohibit RG & GR from seeking discovery on three general areas of charging party Amy Stevens's life: One, her genitals or anatomy; two, her familial relationships; and three, the status of her gender transition.

Besides the point regarding the two different claims and the three theories pled in the complaint because of sex, of which one survives, the gender-based stereotype which we just discussed, I think it's important to note that, that Amy Stevens is transgender is not embarrassing. Amy Stevens isn't embarrassed that she's a transgender woman and the EEOC isn't embarrassed she's a transgender woman. RG & GR's argument that we waived any argument regarding embarrassment because we filed this lawsuit alleging transgender or because we issued a press release is unavailing.

What is embarrassing is forcing Amy Stevens to respond to discovery regarding the most incident, personal and sensitive parts about, about her, her life: Her genitals, whether she has a penis and testicle, that's interrogatory 7; whether she's had sex re-assignment surgeries, interrogatory 8; any biological children, and not in a deposition as a background question, but for the sole purpose of discovering whether she is a man or not.

These challenge discovery rises to the level of annoyance, embarrassment and oppression under Rule 26. If they are marginally relevant, and the EEOC's position is they aren't irrelevant at all -- they are irrelevant to a claim -- they aren't relevant to any claims or defenses in this lawsuit.

THE COURT: I guess the only question that I have for you relates to, I guess what I would characterize as some of

the either anatomical or physiological matters that you described. And would you agree with me under the current law that the defendant is allowed to have different clothing requirements for male and female workers?

MR. SHULTZ: There's no Sixth Circuit precedent on that. There is some precedent outside the circuit.

Amy Stevens fully intended to present consistent with RG & GR's female dress code. And the issue is not -- and here, the dress code issue is not that RG & GR needs some objective standard to determine whether she is a man or woman to know which dress code to enforce upon it. In fact, that is the exact gender-based manifestation that causes Title -- that exhibits Title VII's -- for which they violated Title VII for. The issue is whether Title VII allows --

THE COURT: If, if RG & GR legitimately perceived Ms. Stevens to be male and, and therefore said, well, because we perceive you to be male, we have a right under the law to require you to wear male clothing, then why wouldn't at least some of the potential evidence that might be available through the requests that would bear on their perception, why would those not be relevant?

MR. SHULTZ: Because the issue is whether Title -- and this is the heart of the case: Whether Title VII allows an employer to enforce gender-based expectations here manifested in its dress code to enforce its male dress code. In other

words, does Title VII permit an employer to enforce an employee to dress inconsistent with that employee's gender identity, but in accord with the employer's gender-based stereotype and expectations for how someone assigned a certain sex at birth should present if their gender identity is inconsistent with their sex assigned at birth.

So in this case, that's the exact -- and there is no case law on that, in that the sex differentiate case law just simply says that you can have female and male dress codes. There is no case law stating that you have -- an employer can force a transgender employee to present consistent with the sex assigned to them at birth but not consistent with their gender, their actual gender identity.

THE COURT: Okay.

MR. SHULTZ: So -- yeah.

THE COURT: Give me one second.

MR. SHULTZ: And if I may, just a brief follow-up to that, your Honor, we did respond to discovery that's relevant and not embarrassing, oppressive and annoying, particularly the interrogatory 3, which asked what we mean -- what the complaint means that Stevens is a transgender woman.

And we stated that Stevens is a transgender woman because her gender identity, female, is different from the sex assigned to her at birth, male. So discovery regarding her genitalia or her offspring, the status of her marriages simply

goes too far.

THE COURT: And I'll have some questions for the other side on those issues. I guess the ones that I think are maybe closer calls or more relevant are the ones that have potential outward physical manifestations that could bear on, on perceptions such as vocal cord surgery or, or procedures. If somebody either did or did not have such a procedure, could that not bear on the defendant's perception, and then if so, why would that not be -- why would that not be a relevant fact that the other side ought to be able to, to have access to?

MR. SHULTZ: If I'm understanding your question correctly, I think the theory of the case differs. Defendant's perception of Amy Stevens's gender identity or the sex assigned to her at birth matters in the sense that the EEOC needs to establish that RG & GR terminated her because Amy Stevens violated its gender-based expectations providing how someone assigned to the male sex at birth should present. It doesn't hinge upon RG & GR's perception of whether Amy Stevens is a man or a woman.

THE COURT: Okay. All right. Anything further then?

MR. SHULTZ: No, your Honor.

THE COURT: All right. Thank you.

Counsel?

MR. KIRKPATRICK: Thank you, your Honor. I don't know what more I can add than what was in our brief, but I would

just say that discovery is the benchmark of defending a case.

THE COURT: Well, first let me ask you in terms of the EEOC's proffer at the beginning of this hearing when I asked about these two claims which seem to me very clearly to have been disallowed by Judge Cox, although he didn't, you know, grant in part the motion to dismiss, which, if any of the discovery that was sought in light of what counsel indicated about his willingness to not pursue those claims as claims and only have them for potential appeal grounds, which if any of the the discovery requests are you willing to say all right, well, now, we no longer need those?

MR. KIRKPATRICK: I can't. The reason I can't, your Honor, is because their amended complaint is replete with, you know, references to transgender, transgender female, male-to-female transition. We don't know what that means. We're just pursuing to defend our client. One of our claims is the dress code, and our defense is to try to find out what exactly that means. We don't concede that we understand what that means.

I mean, again, we attached their press release to say, look, this is the first time they've brought this case, this and another case in Florida at the same time. This is new ground.

I know that there's a lot of media now out there with Bruce Jenner -- Caitlyn Jenner and what's going on with that,

but no one understands what that means. We're not pursuing anything to embarrass.

THE COURT: What do you -- what would you hope to, to discover that you think you would be able to use to adequately defend your client in this case?

MR. KIRKPATRICK: It may, it may help us with expert witnesses to, to testify about things. We don't know, what does it actually mean.

THE COURT: Well, I'm saying what, if you could create the evidence based on your discovery requests, what would you hope to, what would you hope to find?

MR. KIRKPATRICK: That he's a man and he's -- Stevens is a man and men are supposed to dress a certain way in a funeral home. And we would argue that the evidence that the gender identity, which has been disallowed by the judge, doesn't come into play.

I mean, it's kind of an intolerable ambiguity to say we that can argue stereotype only and he's a man, for that purpose, apparently is how I read it. So if he's a man, and he's told that he has to ascribe to being a male stereotype, but then they pepper in all this other language about transgender and being a female and identity, we want to be able to be armed with all the information we need to defend our client. That's what we're trying to fashion and find out.

And I don't know what, exactly what we're going to get

when we reach that point because our case is constantly developing our theories of defense. That's why we're at this stage of discovery, trying to find out.

I mean, this is not a situation we're trying to embarrass the other side. If this was a contract dispute between two people, we'd never ask these kind of questions. But I've never defended a case like this before, Judge, if you present yourself with what is given to you when lawsuits are filed. And I would say if it's embarrassing, then they shouldn't bring the case. But that's a little too trite to say. So we're just trying to find out what the evidence shows and how we can fashion it to defend our client.

THE COURT: I understand, but it's also a question of relevance, and I'm trying to understand. I think, I think some of the requests are, are very clearly relevant, some few of all of the requests, namely -- if you give me one second -- like interrogatories 9 and 10, because those relate to appearance, outward appearance during the specific time in question. So I can understand why those at least have potential, potential relevance, because it relates to what employees did or did not observe. And that, to me, is potentially a central issue to the case, so I can understand that. But other ones such as what, what Stevens's birth certificate shows, what marriages Stevens has or has not been a part of, whether, whatever that shows, I don't understand how do you use that one way or

another? Tell me, if it shows, if it shows that she had no marriages, how do you use that? If it shows she had prior marriages, how do you use that? I just don't see the relevance.

MR. KIRKPATRICK: A part of that actually is -- your Honor brought up at the beginning, we didn't attach the letter -- the letter that was sent to the employer saying this is what's going to happen. There's some factual issues that were asked specifically as a result of that letter. My wife supports me and so on and so forth. I'm going to be transitioning. I can't remember. I don't want to misstate myself. That's why we attached the letter to the discovery request.

But to answer your question, your Honor, I don't know what we're going to find, and I don't know how we're going to apply it. But it seems to me logically, and what discovery has allowed us to do, is to find out what your claim is. And I know the Court is asking me specifically what we're going to do with that information. I don't know, because there's no case law. This is a new area. So how am I going to be able to determine if I can argue in a court he has certain genitalia, or there was a transition, or there was surgery done, or whatever it may be, I don't know how that's going to fit deal a defense.

We're here at a, at a stage where the agency is asking

for the death penalty. You can't see any of this stuff. We just want an opportunity to see this stuff. We're not going to post it on the Internet or whatever they think they are going to do with it. I don't know. We just want to be able to get our hands on what the broad discovery rules allow us to do, which is relevant questions about whether somebody is male or whether somebody is female.

THE COURT: But the relevance is, the definition of relevance is that it goes to essentially the truth or untruth of a material fact or material dispute. And that's why I'm asking you if the -- state whether Stevens was, you know, has male sexual organs. What -- if the answer to that is yes, I do, you know, or no, I don't, if your, if your client had no idea one way or another, I guess don't see why an answer to that question, I don't see what it bears on.

MR. KIRKPATRICK: I think you bring up a good point, your Honor. You talked about Adam's apple surgery or traditionally accepted clothing for men and women. I think we all have a social understanding as we survive in society.

Obviously we don't know what's under clothes, and that's part of identity -- or that's part of somebody's physical makeup of male or female. And we're just trying to get at does this person have surgery, did they remove, do they not have that. I don't know.

THE COURT: But that still doesn't answer -- that's

what you want, but that still doesn't answer the relevance. If I -- and this is kind of a hypothetical, and I guess you always run the risk of asking a hypothetical that's maybe off, but my, my hypothetical thinking is if I am an employer, and I believe somebody to be of a certain ethnicity, and then they come in and say, well, actually my background is something different, and I'm prejudiced. And I say I don't like that, I'm going to terminate that person, I don't know that it, that it really matters whether that person's ethnicity really was what they told me or not. If I terminated that person based on a belief that I had about their ethnicity, I don't know that I get to then go and do a blood test and say no, I was wrong, they weren't that, and so therefore, I'm not liable.

And to me, that seems kind of, at least in the respects where it's not an outward visible thing that your client could have observed and reacted to in some way, I don't see why that is relevant.

MR. KIRKPATRICK: Well, I guess -- and I understand your point, your Honor. I get it. This is not an easy situation. This is kind of a unique legal action that we're involved in here, at least from my standpoint.

I think you just ask as many questions as you can to determine if somebody has certain sexual organs, you can argue that person is a man and goes into the fact that Judge Cox said there is no gender identity. You can't claim you're something

else that you're not. And I understand there's legal theories tied in. I know we're not arguing the case today. But we're asking as much as we can to find out where do we stand, what's the circle that we are working in, what information do we have to arm ourselves to defend our client. And that's all we're doing here with the discovery. And we haven't even gotten a lot of that discovery.

So I don't -- and I know that doesn't answer your question, because I -- I'm just being truthful. I don't know if I can answer your question.

THE COURT: Well, I appreciate that. I appreciate it, but at the same time, in all discovery disputes, one of the first words out of my mouth to counsel is well, why do you need it. You're asking for, for seven years. Why do you need seven years? Well, and if there's not a real good answer, well then, usually it means that something less than that is what would be appropriate.

And but at the same, you know, I don't want to unduly restrict you or your client from adequately presenting a defense. But it does seem to me like there ought to be some proffer as to what the, what the relevance is, one way or another of the answer to some of these questions.

MR. KIRKPATRICK: I would say to you this. My proffer to you is this: We're trying to determine what sex Stevens is. And that's one of the questions we're using to determine what

gender this person is. And that's really the best thing I can tell and how that fits in down the line in the theory of defense, et cetera, that we're going to present in court, Judge Cox down the line, whether there's a motion for summary judgment or trial or whatever. This is the information we want to find out to determine what that gender is.

THE COURT: Okay.

MR. KIRKPATRICK: I don't know if that helps you, but really, that's the best I can give you.

THE COURT: Okay. Give me just one second.

(Brief pause.)

THE COURT: And tell me a little about your client's theory of its defense. That your -- Stevens sends in this letter. Does your client contend that up until that point, it was just 100 percent oblivious to any potential issue with respect to gender identity or anything?

MR. KIRKPATRICK: Correct.

THE COURT: Okay. So Stevens sends in this letter. Two weeks later, my understanding is Stevens is terminated, correct?

MR. KIRKPATRICK: Yes, approximately.

THE COURT: What is your client's -- what does your client say the reason that your client terminated Stevens?

MR. KIRKPATRICK: Essentially that you're not going -- you know, you need to follow the rules here. We have sex

specific dress codes, and you need to dress as you are, that's one issue, and the belief the destruction it would be if he failed to adhere to the rules that everyone else had to adhere to.

THE COURT: Okay. So your client, did your client act then based on any -- well, let me ask this: In between receiving the letter and the date of termination, are there any facts that you can share with the Court that bear on your client's decision?

MR. KIRKPATRICK: If I recall correctly, your Honor, Stevens went on vacation.

THE COURT: Right.

MR. KIRKPATRICK: Submitted this letter. And when he came back from vacation is when they, when they met. And I really can't share at this stage privileged communication with counsel.

THE COURT: Yeah. I'm not asking for that.

MR. KIRKPATRICK: I know you're not.

THE COURT: I'm asking factually, you know, to the extent those facts will come out. And I guess to me, frankly, that bears even, even more on the potential relevance of some of these requests, because to me, it's almost like a legal, like a pure legal issue.

MR. KIRKPATRICK: Mh-hm.

THE COURT: We got this letter. We accepted everything

that the letter said. And we disapproved of that and believed it violated our policies, and so we terminated him. And whether, whether any of the underlying matters that you're seeking discovery on, or most of the underlying matters you're seeking discovery on, however they turn out are really irrelevant because they weren't in your client's mind in terms of making, making a decision.

Now, if I'm off factually, if there are issues where your client had certain observations during any kind of interim period of time or anything like that, then maybe it's a different story. And that's why I was trying to flesh out what facts there are. It doesn't sound like there are any.

MR. KIRKPATRICK: At this stage, I can't answer that fully because I'm not completely aware of anything that might be responsive to that request. And I'm sure it's going to come out in discovery. I'm sure that counsel here is going to depose my clients and find out what happened here, what happened there.

THE COURT: It just might be then a more appropriate time to be able to formulate really relevant discovery requests.

MR. KIRKPATRICK: Look, it's not like they worked at a health club and they were showering together like guys would shower, you know, that kind of thing, have an understanding. I'm not trying to be crude. I'm just trying to say -- I forgot

how long he worked there, a couple years maybe.

MR. SHULTZ: Four and a half.

THE COURT: What's that?

MR. SHULTZ: Four and a half to five years.

MR. KIRKPATRICK: Four to five years, whatever it's been. There was never an inkling this was going on, okay, or that there's any observations by my client that, that he wanted a transition or whatever, whatever the term you want to use. So I don't, I don't really know what evidence or facts, intervening facts that I can present to you between that time period of letter to removal occurred.

THE COURT: Okay. All right. Well, anything further then?

MR. KIRKPATRICK: No, your Honor. I just, I just rest on obviously our brief and that we are interested in moving forward with discovery and finding out the Court's order is.

THE COURT: All right. Counsel, anything further?

MR. SHULTZ: No, your Honor.

THE COURT: All right. Well, where are you in discovery? How much --

MR. KIRKPATRICK: We've exchanged written discovery. We've responded to their discovery. Right?

MR. SHULTZ: Yes.

MR. KIRKPATRICK: And they responded to some of our discovery requests, obviously the ones that were actually

discussed today, depositions schedules.

Now, I think we have until the end of January to complete discovery.

MR. SHULTZ: That's correct.

MR. KIRKPATRICK: We have some time. But obviously the longer this goes out, you know, we are trying to get the answers to written discovery before we move forward to the depositions.

THE COURT: I guess I just, my question is sometimes I'll rule from the bench and, you know, that works in a case. Other times, very complicated, very contested matter, it's better to have a written ruling, but I also don't want to slow you down.

MR. KIRKPATRICK: I don't think you'd be slowing us down, Judge.

THE COURT: To have a written ruling?

MR. KIRKPATRICK: Sure.

THE COURT: All right. All right. Well, that's what we'll do then. I am out of town just for a little bit, so it might take just probably two weeks or so, I don't know. If you've got discovery through January, that should give you plenty of time.

MR. KIRKPATRICK: Sure.

THE COURT: But this is a very interesting matter and, you know, there are always two sides of everything. So I want

to make sure we consider all the different, you know, all the different matters before us. But as I said, just to kind of give you some heads up, at least as to some of the areas, 9 and 10 to me, which relate to, as I said, outward appearance during the course of employment that, that I think do bear on the perception of the employer, I guess, I don't know, counsel, I guess I want to give you one last chance to argue that you believe that 9 and 10 are really, you know, a serious dispute in this matter.

MR. SHULTZ: Those are less offensive than the other discovery. In totality, the annoyance, oppression and embarrassment of the discovery, it has nothing to do with the issue at hand in the lawsuit, which as you hinted, is almost a purely legal issue, where Amy Stevens had presented as a man for four and a half to five years, then submitted a letter indicating she was going to present consistent with her gender identity, female, and was terminated, so.

THE COURT: Right. What I'm going to do is I'm going to give you not just a broad brush ruling. I mean, we will indicate as to which, each and every one of the ones that are disputed, what the answer is. And so I kind of hear you saying you don't really necessarily disagree with, that 9 and 10 on a stand-alone are, are objectionable. Is that --

MR. SHULTZ: Correct. But in totality, same thing in a deposition, if you ask about someone's children, that's not

embarrassing. But if the intent is to determine whether you're a man or a woman, I mean, so read in totality, that's why we -- any challenge -- that's why we challenged all the discovery at once.

I would add we would like some guidance, not just pertaining to the challenge discovery, but regarding prohibiting any discovery on the areas that we identified, specifically, you know, preventing a Rule 35 examination, that sort of. So we want -- I don't want to come back to the Court for another protective order regarding these three areas of her life that are irrelevant to, to any claim or defense here.

THE COURT: Well, I guess it's a little hard for me to grant prospective relief on a particular request that I haven't seen and that hasn't been fleshed out. But obviously you all should take whatever the Court says and keep that in mind as you're negotiating your, you know, your future discovery battles. And to the extent that something seems like exactly the same as something that the Court has already ruled, I guess you should, you know, think there's a pretty good likelihood that the Court will be consistent in its rulings, and to the extent that something is, you know, materially different or different in some meaningful way, you know, I would say keep an open mind as though -- as to, you know, how to resolve that dispute before coming to court.

MR. SHULTZ: Fair enough, your Honor.

THE COURT: All right. Well, thank you, all. I appreciate both -- both of you had very well written briefs and really laid out the issues for us. And we will get you our decision as quickly as we can.

MR. KIRKPATRICK: Thank you, your Honor.

MR. SHULTZ: Thanks.

THE COURT: All right. Take care.

THE CLERK: All rise.

(Court recessed, 2:42 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from audio recorded proceedings in the above-entitled cause on the date hereinbefore set forth.

s/ Christin E. Russell

CHRISTIN E. RUSSELL, RMR, CRR, FCRR, CSR

Federal Official Court Reporter