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

Answer to Defendant's Motion for Summary Judgment

The Plaintiff Equal Employment Opportunity Commission respectfully requests that Defendant's motion for summary judgment be denied for three reasons. First, that there is no material factual dispute that the Defendant discharged Aimee Stephens based on the sex-based stereotypes of Thomas Rost. Second, the Religious Freedom Restoration Act does not protect employers from the mandates of Title VII, and thus Defendant's RFRA claim must fail as a matter of law. Third, the claim of a discriminatory clothing allowance is properly before this Court, and there is no material dispute that the benefits afforded to comparable female employees were and continue to be inferior to those afforded to

men.

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

Wherefore, the Commission respectfully asks that the Court deny Defendant's Motion for Summary Judgment and grant summary judgment for Plaintiff.

Respectfully submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

s/ Miles Shultz
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Dated: May 2, 2016

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

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

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Counter-Statement of the Issues

1. The Defendant maintains a sex-differentiated dress code for employees who interact with the public. Aimee Stephens indicated that she was willing to abide fully by the dress code for female employees, but was discharged before she had the opportunity to show up at work. Can the existence of a sex-differentiated dress code insulate Defendant from liability where Thomas Rost admits he was motivated by sexual stereotypes in making the firing decision?

   The Commission answers "No."

2. The Defendant asserts that permitting Aimee Stephens to present in female clothing compliant with its dress code would have been disturbing to its customers. Can Defendant use speculative concerns regarding customer preference to insulate itself from liability under Title VII?

   The Commission answers "No."

3. The Defendant asserts that its religious exercise would have been burdened by paying for Aimee Stephens's clothing despite never having purchased clothes for a female funeral director and despite the fact that it did not start paying for clothing for any female employees prior to October 2014. Does this speculative cost constitute a substantial burden under RFRA?

   The Commission answers "No."

4. Even if being forced to pay for Aimee Stephens's clothing had constituted a substantial burden on RGGR's religious exercise, has the Commission shown that enforcing Title VII against Defendant is the least restrictive means of achieving the compelling governmental interest of eradicating sex discrimination in the

workplace?

The Commission answers "Yes."

5. During the investigation of Aimee Stephens's charge of sex discrimination, the Defendant told the Commission that female employees were not provided a clothing allowance. Further, Defendant was given the chance to provide evidence and to conciliate the clothing-allowance issue. Is the issue of the clothing allowance properly before the Court for resolution on the merits?

   The Commission answers "Yes."

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I. THE COURT SHOULD DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON THE DRESS CODE

The Equal Employment Opportunity Commission brought this Title VII, sex-discrimination action after receiving and investigating a charge of discrimination filed by Aimee Stephens, a transgender woman who served as a funeral director/embalmer for the Defendant for nearly six years under the name of Anthony Stephens. During the course of the investigation, evidence was uncovered demonstrating that Defendant maintained a discriminatory clothing-allowance policy that favored male employees who interacted with the public over their comparable female co-workers.

After investigation, the Commission concluded that the Defendant fired Stephens based on sex, but Defendant now asserts that summary judgment should be entered in its favor.

As shown below, Defendant's arguments lack factual and legal merit, and summary judgment should not only be denied to Defendant, but granted in favor of the Commission.

A. Defendant's Dress Code

Defendant asserts that enforcement of its sex-specific dress code

is a legitimate non-discriminatory reason for the termination of Aimee Stephens. The dress code is as follows:

MEN

SUITS: BLACK GRAY, OR DARK BLUE ONLY (as selected) with conservative styling. Coats should be buttoned at all times. Fasten only the middle button on a three button coat
If vests are worn, they should match the suit Sweaters are not acceptable as a vest NOTHING should be carried in the breast pocket except glasses which are not in a case.
SHIRTS: WHITE OR WHITE ON WHITE ONLY, with regular medium length collars. (Button-down style collars are NOT acceptable). Shirts should always be clean. Collars must be neat.
TIES: As selected by company, or very similar.
SOCKS: PLAIN BLACK OR DARK BLUE SOCKS.
SHOES: BLACK OR DARK BLUE ONLY. (Sport styles, high tops or suede shoes are not acceptable). Shoes should always be well-polished.
TOPCOATS: BLACK, GRAY OR DARK BLUE CLOTH ONLY. A current style and length. A velvet collar, or gray coat with velvet collar are optional. No raincoats with or without liners except in rainy weather. Plastic coats are not permitted.
GLOVES: BLACK GRAY OR DARK BLUE ONLY.
PINS: Small service or fraternity pins may be worn.
PERSONAL GROOMING: Hair should be neatly trimmed and combed at all times. (Extreme hair styles, sideburns, or beards are NOT acceptable). Neat moustaches are allowed. Every man should always be clean shaven. Nails should always be trimmed and clean.
PART-TIME MEN: Should wear conservative, dark, business suits, avoiding light brown, light blue, light gray, or large patterns. All part time personnel should follow all details of dress as specified, as near as possible.
FUNERAL DIRECTORS ON DUTY: Are responsible for the appearance of the staff assisting them on services and are responsible for personnel on evening duty.

WOMEN

Because of the particular nature of our business, please dress conservatively. A suit or a plain conservative dress would be appropriate, or as furnished by funeral home. Avoid prints, bright colored materials and large flashy jewelry. A sleeve is necessary, a below elbow sleeve is preferred.

Ex. S, Dress Code (Doc. 51-20). The code presumes that funeral directors will be male, placing "Funeral Directors on Duty" in the subsection for male employees.

Parts of the code ("selected," "selected by company,") refer to Defendant's policy to provide clothing directly to male employees. Also, deposition testimony indicated that the dress code is interpreted generously in favor of male employees, some of whom have goatees. Ex. Y, Kowalewski Dep. (Doc. 51-15) 35:9-36:10. It is also stricter than written for females, who are expected to wear skirts. Ex. AD, Rost Dep. 51:13-16. Rost admitted that skirts are a personal preference and have nothing to do with industry standards. *Id*. Also contrary to the code as written, clothes have never been furnished to women, but are to part-time men. Ex. AD, Rost Dep. 13:4-16:22.

Indeed, the code cannot be read separately from the clothing

allowance, which has been consistently afforded to all male employees who interact with the public but not to females in any form until October 2014. Consequently, the Defendant's claim that the dress code does not impose unequal burdens is contrary to fact. *See* Doc. 54 at Pg ID 1303-1305. Thus, on that basis, this case can be distinguished from the principal precedent upon which RGGR relies, *Jesperson v. Harrah's Operating Co.*, 444. F.3d 1104 (9th Cir. 2006).

Too, Defendant's argument that there is a dress code for funeral directors which is separate from other employees, Doc. 54 at Pg ID 1304, is incorrect, and indeed is contradicted by Rost's affidavit in support of the motion for summary judgment. *See* Doc. 54-2, Rost Affidavit paras. 56-57 at Pg ID 1337. The same expectations apply for all employees who interact with the public, males and females. Ex. I, Kish Dep. (Doc. 51-10) 17:25-19:5, 57:12-58:4; and Ex. O, Rost Dep. (Doc. 51-3) at 51:1-8. Defendant also asserts that had there been any female funeral directors, they would have been afforded clothing comparable to the men. Doc 54 at Pg ID 1304-1305. However, this speculative claim is undercut by the fact RGGR contracts for clothing with Sam Michael's, and has for at least a

decade. Ex. O, Rost Dep. (Doc. 51-16) 13:22-24. It is undisputed that Sam Michael's is a *men's* clothier. Ex. AH, http://sammichaels.com/about/ (last visited May 2, 2016). At a minimum, it is clear that Defendant does not anticipate having a female funeral director and is not prepared to clothe one.

B. Religious-Belief Claim

Rost asserts that his continued employment of Aimee Stephens would dishonor God:

21 Q So, your personal faith as a follower of Jesus
22 Christ tells you that it would be improper
23 or -- to employ someone like the person you
24 knew as Anthony Stephens?
25 A Absolutely.
55: 1 Q Okay. You indicated as part of the healing
2 process, but what about your religious beliefs
3 specifically are violated by continuing to
4 employ Stephens?
5 A I believe it would violate my faith, yes,
6 absolutely.
7 Q Okay. What aspects of it?
8 A Well, I believe that God created a man as a man
9 and God created a woman as a woman. And to --
10 to not honor that, I would feel it's a
11 violation of my faith, absolutely.
12 Q So Stephens would be presenting in a way that
13 offended your religious beliefs, essentially?
14 A Yes. Yes.

Ex. B, Rost 30(b)(6) Dep. (Doc. 51-3) 54:21-55:19. In addition, he states that his religious beliefs indicate how others should act with respect to sex and gender:

> 42. I sincerely believe that the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex.
>
> * * *
>
> 44. I sincerely believe that the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman or for a biological female to deny her sex by dressing as a man.

See Doc 54-2, Rost Affidavit at Pg ID 1334.

Indeed, Defendant now goes so far to say that its dress code is a proxy for Rost's religious beliefs regarding the sexes. *See* Doc. 55 at Pg ID 1692 ("R.G.'s dress code ensures that R.G. does not violate Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift").

C. Thomas Rost's Comments are Direct Evidence that Sex Stereotyping Motivated Stephens's Termination

According to the Defendant, permitting Stephens to present as female would disrupt the business and even "harm" its clients because of the claimed effect on their healing process. Thus, Defendant claims that

it fired Stephens to enforce its sex-specific dress code. Defendant's argument is disingenuous and even if true, supports a finding that its justification for Stephens' termination constitutes evidence of discriminatory animus in violation of Title VII.

> "In discrimination cases, direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering–Plough Healthcare Prods. Sales Corp.,* 176 F.3d 921, 926 (6th Cir.1999) (citations omitted). *See Norbuta v. Loctite Corp.,* 181 F.3d 102 (6th Cir.1999) (unpublished) ("[D]irect evidence proves the existence of a fact without any inferences or presumptions."). *See also Manzer v. Diamond Shamrock Chems. Co.,* 29 F.3d 1078, 1081 (6th Cir.1994) (evidence that requires the jury to infer a fact is not direct evidence). "Once there is credible direct evidence, the burden of persuasion shifts to the defendant to show that it would have terminated the plaintiff's employment had it not been motivated by discrimination." *Jacklyn v. Schering Plough Healthcare Prods. Sales Corp.,* 176 F.3d at 926 (citations omitted).
>
> In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), the Supreme Court held: "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."
>
> *Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825, 829 (6th Cir. 2000). Such is the case here—Rost's testimony demonstrates that the real reason Stephens was fired was because Stephens did not

conform to Rost's stereotypes as to how men and women are supposed to behave and present themselves.

Rost is forthright in admitting that he objected to Stephens's decision to present as female. In addition to the statements in I.B. above, when asked by his own attorney why he fired Stephens, Rost re-affirmed that Stephens's non-conformance with his beliefs regarding the behavior of men and women prompted the decision:

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

Ex. B, Rost 30(b)(6) Dep. (Doc. 51-3) 135:24-136:1.

Rost also testified that he objected to Stephens's use of "Aimee" in the charge of discrimination, saying that this made him "uncomfortable….because he's [Stephens] a man." Ex. O, Rost Dep. (Doc. 51-16) 23:4-8.

And Rost indicated discomfort with the idea of Stephens wearing female clothing outside of work, and concern with how the public would react:

You testified earlier when you were asked by your Counsel, you said that you would not have had a problem with Stephens presenting as female outside of work. · Did I hear that correctly?
A That's true.
Q Okay. What if a customer would have seen that and complained to you about it, what would you

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have done?
A · Don't know.
Q Do you think there might have been -- you indicated earlier, I believe, that you get a lot of word-of-mouth business, people coming back, families and stuff like that?
A Oh, yes.
Q Okay. · Would you say that's the bulk of your --
A Repeat business or -- yes, or in family before we call it, yes.
Q Okay. So if -- so would you have been comfortable with word getting around that Stephens was dressing as female outside of work?
A I don't know. I probably would be uncomfortable with that. · But it never came up, so --
Q Okay. Would it have affected Stephens' employment if word had gotten around?
A Don't know.

Ex. AD, Rost Dep. 30:18-31:20.

The bottom line is that, at a minimum, a jury could reasonably conclude that sex stereotyping motivated Rost's statements and actions,

at least in part.[1] In *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004), the Sixth Circuit explained that an employer violates Title VII when it takes action against an employee based on "[s]ex stereotyping," that is, "based on a person's gender non-conforming behavior." This includes penalizing an employee for dress or mannerisms that, in the employer's mind, conform to the wrong sex stereotypes.

As the Court noted in its opinion denying Defendant's Motion to Dismiss, Title VII "protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender." Doc. 13 at Pg ID 189 (quoting *Myers v. Cuyahoga Cty.*, 182 Fed. Appx. 510, 519 (6th Cir. 2006)); *see also Fabian v. Hospital of Central Connecticut*, No. 3:12-cv-1154, __ F. Supp. 3d __, 2016 WL 1089178 at *13 (D. Conn. March 18, 2016) ("discrimination on the basis of gender stereotypes … constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination 'because of sex'").

[1] A Title VII plaintiff has a valid sex discrimination claim if she can demonstrate that sex "was a motivating factor for any employment practice, even if other factors also motivated the practice." 42 U.S.C. § 2000e–2(m).

Rost's admissions clearly support a finding that "Stephens' failure to conform to sex stereotypes was the driving force behind the Funeral Home's decision to fire Stephens." *See* Doc. 13 at Pg ID 195. In that Title VII prohibits an employer from acting on such stereotypes, summary judgment for the EEOC on the basis of sex stereotyping is appropriate on this evidence alone.

Defendant's insistence that Stephens wear men's clothing at work, despite knowledge that she now identifies as female, is sex discrimination in violation of Title VII. *See Chavez v. Credit Nation Auto Sales*, LLC, No. 14-14596, 2016 WL 158820 at *7 (transgender plaintiff told she could not wear a dress after completing transition because it would be "disruptive" was evidence of sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *4 (E.D. Ark. Sept. 15, 2015) (amongst the "ample evidence" of sex discrimination provided by transgender plaintiff were an order not to wear feminine clothes at work and the termination for being "a distraction" after wearing feminine attire at work).

Defendant's argument is also dubious on the factual record. First,

Rost never proposed that Stephens could continue to work—in men's clothing— prior to his deposition. Indeed, the possibility was raised by defense counsel as a "hypothetical":

> Q So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
> A No.

Ex. X, Rost 30(b)(6) Dep. 137:11-15.

At a minimum, given the certitude of Rost's opinions on the wrongness of transgenderism, it is open to question whether he could, in fact, tolerate such, and a jury could consider the hypothetical proposal a pretextual, after-the-fact rationale. *Cicero v. Borg-Warner, Inc.*, 280 F.3d 579, 592 (6th Cir. 2002).

D. A Sex-specific dress code does not justify Stephens's Termination

Summary judgment must be denied because there is evidence that Defendant's citation to the dress code is merely a pretext. In addition, Defendant's reliance on the dress code is misplaced because even if the dress code were the reason for Stephens' termination, requiring Stephens to comply based on her biological gender rather than her

gender identity is discrimination because of sex in violation of Title VII. Thus, the dress code does not rescue Defendant from liability.

1. The Dress Code is a Pretext.

A jury could find the dress code defense pretextual because Rost did not discuss the code when firing Stephens, merely telling her that "this is not going to work out [ ] [a]nd that your services are no longer needed here." *See* Ex. B, Rost Dep. 126:1-127:10, Pg ID 666. Moreover, as discussed above, a jury could find that RGGR's current suggestion that it did not care if Stephens presented as female when outside of work is also unworthy of credence. In short, a jury is not required to accept the assertion of the dress code as dispositive.

2. Despite Stephens's Willingness to Dress Professionally, Defendant Wanted to Impose Rost's Stereotypes Upon Her.

The Defendant asserts that it was permitted to force Stephens to present in masculine clothing under a sex-specific dress code and to fire her if she did not. Specifically, Defendant argues that "unlike the employers in *Price Waterhouse* or *Smith*, RGGR never indicated that Stephens's behavior was too feminine or not masculine enough. RGGR

simply maintained that Stephens, like all other employees, whether male or female, must comply with the dress code." Doc. 54 at Pg ID 1307.

To the contrary, RGGR's acts do demonstrate sex stereotyping, albeit of a different sort than that exhibited in *Price Waterhouse*. Here, RGGR demonstrated that it expected Stephens to conform to Rost's stereotypes for how men and women are supposed to behave and present themselves. When Stephens informed Rost that she was transitioning to female, Stephens indicated that she fully intended to dress professionally and abide by RGGR's dress requirements for women. Ex. S, Dress Code (Doc. 51-20); Ex. A, Stephens Letter (Doc. 51-2); Ex. Q, Stephens Dep. (Doc. 51-18) 133:6-133:9. In other words, she still intended to meet all of the Respondent's legitimate business expectations. Thus, this case differs from *Jesperson v. Harrah's Operating Co.,* 444 F.3d 1104 (9th Cir. 2006), where the plaintiff was engaged in a challenge to the code itself.

Defendant's analogies—to allowing an employee to switch clothing every day and to allowing female employees to work topless—display Defendant's sex stereotypes about Aimee Stephens. Doc 54 at Pg ID

1311. What Stephens proposed in her letter was neither obscene nor anything other than tasteful and conservative dress, consistent with RGGR's own, sex-specific guidelines. She was not intending to draw attention to herself—to the contrary, she was fully sensitive to the concerns of the grieving and intended to blend in. Ex. X, Rost 30(b)(6) Dep. 75:5-76:5, 108:21-24; Ex. AE Stephens Dep. 90:1-90:2, Ex. A, Stephens Letter (Doc. 51-2). Hence, the fact that she would present according to the dress code renders Defendant's parade of horribles inapplicable. Doc 54 at Pg ID 1310-1311.

Defendant's claim that transgender people render sex-specific dress codes void is unpersuasive and unsupported by precedent. Indeed, what precedent exists suggests no such thing. *See G.G. v. Gloucester Cty. School Bd.*, __F.3d__, 2016 WL 1567467 at *8 (4th Cir. Apr. 19, 2016) (upholding Department of Education regulatory policy permitting transgender student to use bathroom consistent with the student's gender identity and noting that the decision does not change validity of sex-segregated restrooms).

Additionally, any sex-specific dress code, including Defendant's, is

premised on self-identification. The Defendant's emphasis on biological sex cannot be dispositive, because taken to its logical conclusion, it would create an employer's right to determine the "proper" gender identity, including, as was tried here, the right to seek very sensitive personal information. *See* Doc. 34 and 45, denying Defendant's attempt to discover, *inter alia*, information on Stephens's genitalia. Indeed, the real parade of horribles is not the specter of topless female laborers, but rather employers using sex-specific dress codes to deny employment to transgender people entirely.

3. Imposition of the Dress Code is not a Legitimate, Nondiscriminatory Reason for Stephens's Firing.

The Supreme Court has emphasized that, to pass muster under Title VII, any employment action taken against a protected employee must be legitimate and nondiscriminatory—a reasonable basis for the particular action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973).

In the Title VII context, if an employee's individual expression is tied to a protected trait, such as race or sex, discrimination based on such expression is a violation of the law. *Cf. Price Waterhouse v. Hopkins*, 490

U.S. 228, 250-51 (1989) (plurality) (finding Title VII violation where employer demanded that employee's appearance and deportment match sex stereotype associated with her gender); *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc) ("If a grooming standard imposed on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement under [Title VII].")

Here, it is clear that Defendant's dress code embodies Rost's sex-stereotypes. *See* Doc 55 at Pg ID 1692 ("R.G.'s dress code ensures that R.G. does not violate Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift"). A rationale based in sexual stereotypes cannot be as a legitimate non-discriminatory reason for Stephens' firing, and must be rejected.

Consequently, Defendant's dress-code argument must fail.

E. Catering to customer preference based on sex is discriminatory.

Defendant spends much time stating that its dress code is part of the healing process, and asserting that Stephens would be a distraction in female clothing and even "harm" the clients. Doc 54 at Pg ID 1310.

Such language is itself evidence of stereotypes, especially since Stephens was fired without even having the opportunity to work after presenting her letter. *See Carroll v. Talman Federal Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1033 (7th Cir. 1979) ("'assumptions steeped in ... stereotypes * * * are inconsistent with the purposes of the Act'") (internal citation omitted).

Title VII law establishes that no employee should be subjected to discrimination merely because a customer demands it. *Cf. Rucker v. Higher Educational Aids Bd.*, 669 F.3d 1179, 1181 (7th Cir. 1982) ("it is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race"); *Turic v. Holland Hospitality, Inc.*, 842 F.Supp. 971, 978 n.7 (W.D. Mich. 1994) (customer or colleague preference does not provides a justification for race discrimination); 29 C.F.R. § 1604.1(ii) (stating "the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers" not permissible under Title VII).

Therefore, catering to a customer's assumed preferences or prejudices is not a defense to a claim of sex discrimination. *See*

Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) ("stereotyped customer preference [cannot] justify a sexually discriminatory practice," therefore female employee could not lawfully be denied a promotion because employer's South American clients would only work with males); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants, stating "[w]hile we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large, extent, these very prejudices the Act was meant to overcome"); *Olsen v. Marriott Intern., Inc.*, 75 F.Supp.2d 1052 (D. Ariz. 1999) (customer preference could not be invoked to prevent hiring of male massage therapist).[2]

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[2] Notably, Rost's willingness to cater to customer preference extends beyond exclusion of transgender persons:

> Q....[I]f there was an objection to having an African-American employee present during funeral, would you adhere to that?
> A If there was an objection? Well, I can't ever see it happening, so I don't know.
> Q Okay. But if there was? I mean, there are

Moreover, Defendant's claim—which rests solely on Rost's speculation alone, sight unseen and uninformed by any actual experience—that transgender persons presenting according to their identity will necessarily be distracting and harmful to grieving clients is unsubstantiated and is the very essence of stereotyping that must be rejected out of hand. Rost terminated Stephens before she interacted with clients as a woman. Thus, there is no tangible evidence to support Rost's belief that the clients would consider Stephens' transgender status to be a distraction. Additionally, Rost has not offered any example of how Stephens's female presentation would "harm" the grieving clients.

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people -- unfortunately there are people out there who have racist mindsets.

. . .

BY MR. PRICE:

Q And if they thought that was -- the presence of an African-American staffer was disrupting their grieving experience, what would you do?
A I don't know.
Q Would you remove the person?
A I don't know.
Q Would you remove the employee?
A I don't know.
Q You might?
A I might. They might temporarily, but, you know, I've never had that happen, so I don't know.

Ex. AD, Rost Dep. 27:22-28:20 .

Even if Rost believed that retaining Stephens would harm his business, his discriminatory behavior would not be justified. The potential loss of business and customers or the possibility of economic backlash has long been rejected in customer-preference cases. Therefore, such "harm" does not provide Defendant with an independent, legitimate, and nondiscriminatory reason to justify Stephens' termination. *See EEOC v. St. Anne's Hospital of Chicago, Inc.*, 664 F.2d 128, 133 (7th Cir. 1981) (Title VII does not permit an "employer to reject job applicants on the basis of sex because the prejudicial preferences of customers were a threat to the business"); *cf. Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971) ("it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome"). Accordingly, Defendant's customer preference/harm justification must fail.

II. RFRA DOES NOT AUTHORIZE STEPHENS'S FIRING

RFRA has never been interpreted to insulate an employer from

liability under Title VII, and should not be here. In its Answer to the Commission's amended complaint, Defendant raised for the first time that it was justified in firing Stephens because she offended Rost's religious beliefs. *See* Doc. 22, Answer to Amended Complaint, p. 5 (Affirmative Defenses 12-13). Defendant's religious-freedom defense lacks merit.

A. Eliminating Workplace Sex Discrimination is a Compelling Governmental Interest

Congress's mandate to eliminate workplace discrimination is a compelling governmental interest, as Defendant acknowledges:

> By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority'.... Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.

EEOC v. Fremont Christian School, 781 F.2d 1362, 1368-69 (9th Cir. 1986) (quoting *EEOC v. Pacific Press Pub. Ass'n.*, 676 F.2d 1272, 1280 (9th Cir. 1982)). This is the governmental interest against which Defendant's assertion of religious belief must be assessed. *See also* Doc 51 at Pg ID 628-630.

B. Defendant would not be substantially burdened under these facts.

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

However, Defendant, speaking through Rost, maintains that its religious exercise would be burdened by having to provide female clothing to Stephens. But RGGR has never purchased clothing for a female funeral director, indeed, never paid for the clothing of any female employee until October 2014. Ex. O, Rost Dep. (Doc. 51-16) 15:16-16:12; Ex. I, Kish Dep. (Doc. 51-10) 20:16-21:3; Ex. P, Clothing Allowance Benefits Checks (Doc. 51-17). It is undisputed that Rost fired Stephens in 2013. Further, Defendant did not identify a clothing purchase as an issue in his response to discovery requests. Ex. T, Defendant's Responses to Plaintiff's Frist Set of Discovery Requests (Doc. 51-21).

As stated previously, there is no separate funeral-director dress code—there are simply different requirements for male and female

employees. Consequently, Defendant's statement that it would have had to pay for a suit of women's clothing is speculative and unsupported. For her part, Stephens herself planned to wear her own attire and did not ask Defendant to provide clothing. Ex. A, Stephens Letter (Doc. 51-2). Consequently, Defendant would not have been burdened by a financial outlay that was not contemplated by either Stephens or Rost.

And even if there is a burden in having to provide Stephens with clothing, Defendant has not established that providing two suits of clothing constitutes a *substantial* burden. In fact, Defendant cannot even specify how much it would have cost to have such suits made. Using its own stipend calculation for full-time females, the amount would have been as little as $150—which is less than Defendant pays for men's suits. Such is not a *substantial* burden—in fact, it is a ***lesser*** burden. Further, Defendant's practice of providing suits, ties and shirts to its male funeral directors whenever they desired them negates the view that providing female clothing to Stephens would be unduly costly. Indeed, as a male funeral director, Stephens had already received clothing at Defendant's expense for six years. Thus, Defendant's provision of female rather than

male attire cannot constitute a substantial burden.

Finally, Defendant's argument that its purchase of two suits of women's clothing constituted a "substantial burden" is spurious and certainly does not justify terminating Stephens's employment. When Stephens informed Defendant about her transition, she stated that she would be willing to provide her own clothing. In that Stephens's offer relieved Defendant of the need to provide female attire, Defendant has failed to establish any basis for concluding that it was engaged in a religious exercise or that such engagement would result in a substantial burden. *See Michigan Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 747 (6th Cir. 2015) ("Whether a law imposes a substantial burden on a party is something that a court must decide, not something that a party may simply allege."); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C.Cir.2008) ("accept[ing] as true the factual allegations that [appellants'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened").

Stripped of its unsustainable clothing-burden claim, Defendant's

essential objection is that Stephens is behaving in a way which offends Rost's religious beliefs. However, the perceived immorality of other persons cannot constitute a burden on Defendant's religious exercise. Defendant was not being asked to facilitate Stephens's behavior—it was being asked to respect her Title VII rights, regardless of how offensive Rost perceived her behavior to be from a religious standpoint. This is not cognizable under RFRA. As the Fifth Circuit noted in *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015) (emphasis in original):

> Although the plaintiffs have identified several acts that offend their religious beliefs, the acts ***they*** are required to perform do not including providing access to or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise.

Such is the same here—Rost is not being asked to perform any actions which he finds religiously offensive. He is simply being asked to not terminate an employee he believes is acting contrary to his religious beliefs.

C. Defendant's "Least Restrictive Means" is the Abrogation of Title VII and the Foreswearing of the Compelling Interest in Eradicating Sex Discrimination for Countless Employees.

Defendant's RFRA argument also fails because enforcement of Aimee Stephens's Title VII right to be free of workplace sexual discrimination is the least restrictive means to achieve the government's goal of eradicating sex discrimination and it is precisely tailored to achieve this goal.

The Defendant argues that the continued employment of Stephens is not the least restrictive means to achieve the EEOC's interest in preventing discrimination and asks that the government not enforce Title VII where "distressed people" are served by persons who have to comply with dress codes. Doc 54 at Pg ID 1317. Or, in the alternative, the government could enforce Title VII only when transgender people are fired because the employer objects to them presenting according to their identity outside of work, but allowing them to fire such employees for refusing to wear employer-designated sex-specific uniforms on the job. *Id.* While the above recommendations assuredly do not restrict

employers who make a religious objection, they are not ***means*** of addressing discrimination at all. RFRA limits government action to the least restrictive *means necessary to achieve the governmental interest*. RFRA does not prevent government from achieving its goals. However, Defendant's solution—of not enforcing Title VII in these circumstances—would render null and void the Title VII rights of persons like Stephens, and leave them without remedy.

This goes far beyond anything suggested by the most recent Supreme Court review of RFRA. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that RFRA exempted the employer from paying for certain contraceptive medications and devices which could also be abortifacient. Even there, the Court held that the government still had options to ensure the employees would have access to the disputed medications. *See Burwell*, 134 S. Ct. at 2780-82 (outlining available options to ensure access). Here, Defendant's proposal leaves Stephens with no redress, and thus should be rejected.

III. DEFENDANT IS LIABLE FOR SEX DISCRIMINATION UNDER ITS CLOTHING ALLOWANCE POLICY

A. Defendant's Procedural Arguments are Without Merit.

Finally, Defendant states that it is entitled to summary judgment on the sexually discriminatory clothing-allowance claim because the issue did not properly arise out of the investigation of Stephens's sexual discrimination charge. The Defendant also alleges that it does not currently discriminate against female employees because it now pays a stipend to female employees of either $75 or $150 per year.

The Supreme Court stated in *General Telephone Co. v EEOC*, 446 U.S. 318, 331 (1980) that "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *Accord EEOC v. Kronos, Inc.*, 620 F.3d 287, 297 (3rd Cir. 2010) ("Once the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such during the course of a reasonable investigation").

Defendant argues that since the discriminatory clothing-allowance was not the subject of the Charge, the Commission cannot litigate it, citing *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977); Doc. 54 at Pg ID

1317-1320. *Bailey* is easily distinguished, and has been by the Sixth Circuit. *Bailey* involved a charge of sex discrimination upon which the Commission found no probable cause to believe discrimination had occurred. Instead, the Commission filed suit on a claim of alleged religious discrimination against a separate person entirely. *Bailey Co.*, 563 F.2d at 447-48. Hence, the Sixth Circuit held that the lawsuit could not have reasonably grown out of the investigation of the complaint. *Id.* at 448-49.

Here, there is no dispute that Stephens filed a charge of sex and gender discrimination under Title VII. During the course of the investigation, further evidence of sex discrimination was obtained in the form of undisputed evidence that Defendant had a clothing allowance which assisted male—and only male—employees to meet the requirements of Defendant's dress code. Consequently, the allowance was investigated (Ex. V, Onsite Notes) and subject to an offer of conciliation after a finding of cause to believe that RGGR had discriminated on the basis of sex with respect to both discharge and the clothing allowance. Ex. W, Letter of Determination.

The situation here is much more like that of *EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205 (6th Cir. 1979). In *Cambridge Tile*, two employees had filed charges, one for sexual harassment and the other for a racially-motivated discharge. *Cambridge Tile*, 590 F.2d at 205. During the investigations, the Commission found evidence of sex discrimination in job classifications, and subpoenaed documents relevant to the job classifications. *Id.* at 206. The Court distinguished *Bailey* by noting that the job classification issue was not "wholly unrelated," and specifically held "the possibility the employer was discriminating against women in job classifications [was] relevant to the specific charges of sex and race discrimination in firing." *Id.* As the court observed, "a company's business practices are not so compartmentalized as the defendant in this case would contend." *Id.*

Such is the case here: evidence that an employer was giving a clothing benefit only to male employees was relevant to the investigation of Stephens's sex discrimination discharge claim, and properly grew out of it. Defendant asserts that the dress code is important for its business and justifies the firing of Stephens. But Defendant also says that its

refusal until October 2014 to provide women with comparable benefits to adhere to the dress code is both irrelevant and not subject to legal remedy. This argument conforms to neither the facts nor the law, and should be rejected by the Court.

B. The Defendant Continues to Discriminate Against Female Employees Through Inferior Clothing Allowances.

The relevant law and facts have been set forth in the Commission's Motion for Summary Judgment. Doc. 51 at Pg ID 614-616, and 636-638. To summarize, Defendant's policy of paying for the work clothing of male employees, while failing to provide a comparable benefit to female employees, violates Title VII. Two significant omissions mar the Defendant's substantive arguments.

First, Defendant's brief fails to inform the Court that no benefits were provided to female employees prior to October 2014, after this litigation commenced. Ex. O, Rost Dep. (Doc. 51-16) 15:16-16:12; Ex. I, Kish Dep. (Doc. 51-10) 20:16-21:3; Ex. P, Clothing Allowance Benefits Checks (Doc. 51-17). Reading RGGR's brief, one could be excused for coming to the (erroneous) conclusion that stipends have always been

paid to females. As the evidence set forth in the Commission's Brief indicates, this is not so, and Defendant's refusal to acknowledge this does it no credit.

Second, Defendant's current stipends for females are still inferior to the benefits afforded to men. Defendant does not acknowledge the value of the suits and ties provided to men, which are approximately $235 per suit/tie and can be repaired or replaced as necessary and without cost. Ex. O, Rost Dep. (Doc 51-16) 14:20-15:6.

Women, on the other hand, are given a stipend described by Rost himself as "little" and in any event inferior to those afforded to males who have contact with the public, "runners" (those who transport bodies) included. Ex. O, Rost Dep. (Doc. 51-16) 15:3-18. The sums ($150 for full-time women and $75 for part-time women) were determined by Rost's notion of what was "fair." Ex. O, Rost Dep. (Doc. 51-16) 45:12-20. Unfortunately, such subjective notions of fairness cannot be dispositive, given the Defendant's history of affording women employees absolutely no clothing allowance.

An examination of the amounts paid for men, and the flexibility

afforded to the male clothing benefit (e.g., new suits available at necessary, picked up on company time) demonstrate the continuing discrimination against female employees. The Defendant continues to violate Title VII and is liable for damages for discrimination on the basis of sex.

IV. CONCLUSION

Thomas Rost has forthrightly and repeatedly stated that his sex and gender stereotypes motivated his decision to terminate Stephens's employment. These admissions are dispositive. Moreover, Defendant's sex-differentiated dress code cannot excuse the firing of a transgender person who was willing to professionally adhere to it according to her identity. Defendant's concerns about customer reactions have been disposed of by settled precedent regarding third party prejudices.

Furthermore, Defendant's RFRA-burden claim is undercut by the absence of evidence supporting its claim that it would have paid for Aimee Stephens's funeral-director clothing. In any event, such expense would have at most required her to pay for her own clothing, not fire her. Additionally, Defendant's "least restrictive means" requires a cessation

of Title VII enforcement and no remedy for persons like Stephens, a result not contemplated by RFRA nor any precedent.

Finally, Defendant's arguments regarding the clothing-allowance claim are without merit. The claim grew reasonably from the Commission's investigation of Stephens's sex-discrimination charge, and significant evidence supporting the unlawful differential treatment regarding this privilege of employment supports summary judgment in favor of the EEOC on this claim.

Accordingly, we urge the Court to deny Defendant's Motion in its entirety, and instead grant the Commission's renewed request for entry of summary judgment in its favor.

Respectfully submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

s/ Miles Shultz
MILES SHULTZ (P73555)
Trial Attorney

Dated: May 2, 2016

s/ Dale Price
DALE PRICE (P55578)

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Certificate of Service

I hereby certify that on May 2, 2016, I electronically filed the forgoing with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all record attorneys.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Dated: May 2, 2016

s/ Dale Price
DALE PRICE (P55578)
Trial Attorney

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Exhibit V, Onsite Investigation Notes

Exhibit W, Letter of Determination

Exhibit X, Rost 30(b)(6) Dep.

Exhibit Y, Kowalewski Dep.

Exhibit Z, Cash Dep.

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Exhibit AB, Shaffer Dep.

Exhibit AC, Crawford Dep.

Exhibit AD, Rost Dep.

Exhibit AE, Stephens Dep.

Exhibit AF, Severance Agreement

Exhibit AG, McKie Dep.

Exhibit AH, http://sammichaels.com/about/

Exhibit AI, Defendant's Position Statement

Exhibit AJ, The Experience of Healing Diagrams

Case 1, *Chavez v. Credit Nation Auto Sales*, __Fed.Appx.__, 2016 WL 158820 (11th Cir. Jan. 14, 2006)

Case 2, *Dawson v. H&H Elec., Inc.*, No. 4:14-00583, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015)

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

Case 4, *G.G. v. Gloucester Cty. School Bd.*, __F.3d__, 2016 WL 1567467 (4th Cir. Apr. 19, 2016)

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC — 471-2013-03381

Michigan Department Of Civil Rights and EEOC

State or local Agency, if any

Name (indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Aimee Stephens	Redacted	Redacted

Street Address: Redacted — City, State and ZIP Code:

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. *(if more than two, list under PARTICULARS below.)*

Name	No. Employees, Members	Phone No. (Include Area Code)
R.G. & G. R. HARRIS FUNERAL	**15 - 100**	**(734) 425-9200**

Street Address: **31551 Ford Rd., Garden City, MI 48135** — City, State and ZIP Code:

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address — City, State and ZIP Code

DETROIT DIST. OFFICE 2013 SEP -9 P 12:4 EEOC

DISCRIMINATION BASED ON *(Check appropriate box(es).)*

- [ ] RACE
- [ ] COLOR
- [X] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [ ] GENETIC INFORMATION
- [ ] OTHER *(Specify)*

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
07-31-2013	**08-15-2013**

- [ ] CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s))*:

I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.

On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition. Moreover, during my entire employment I know there are no other female Funeral Director/Embalmers.

I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Sep 09, 2013 — x Aimee Stephens
Date — Charging Party Signature

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

x Aimee Stephens

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(month, day, year)*

09 Sept 2013

EEOC002748

EXHIBIT U

Deliberative After Action Memo for File

Case: Aimee Stephens v. R.G. & G.R. Harris Funeral
Case Number: 471-2013-03381

Date: 25 March 2014
Charging Party: Aimee Stephens
RE: [redacted] (Onsite) Memo

Spoke with: Thomas Rost – President and Owner, Shannon Kish – Business Office Manager, George Crawford – Funeral Director Manager of Garden City facility, Tia Macklin – Administrative Assistant, Dolores Nemeth – Administrative Assistant, and Troy Shaffer – Funeral Director/Embalmer (CP's replacement). We met at the Garden City facility. I learned that there are three facilities: Detroit (on Harper), Garden City, and Livonia. I learned that the Detroit does very little in the way of customers but is the location of the Business Office that runs the entire company. Respondent has stated that overall business has been good but overall funerals are dropping. Respondent claims that the majority of their business is done through their Cremation Society of America partner business (After further internet research it appears the Detroit (Harper) facility is used for the Cremation Society of America portion of Respondents Business primarily.)

I began each interview by introducing myself and counseling the individual what it is the EEOC does, our jurisdiction, and our neutrality. I warned that lying in a federal investigation is illegal and could result in further legal consequences, that the role of the attorney (if applicable) was as a silent observer and that should they have any questions they would need to step outside to confer but otherwise the interviewee needed to answer each question for themselves. I also explained retaliation was illegal, and for the managers that I was recording an avadavat that I would need them to review and correct if they saw fit and sign – I was asked if a copy was okay to which I agreed they could have a copy.

I began my interviews with **Mr. Rost** who stated he was the president of which I asked if he was also the owner and he admitted he was but that he did not care for the label because it was too intimidating. He said that he had been with R for 50 years and did not elaborate. I asked Mr. Rost how business was and he said that it was doing pretty well at the moment that they had approximately 30 funerals a month and 60 creations a month – on average. I asked if there had been any recent changes in the industry and he stated that Cremation was the big one. Mr. Rost stated

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that when he began working th[illegible] business was only 5% cremations [illegible] that now its 50%. He further said that he believed it was a reflection of the culture and the disvaluing of life in general. I asked if he believed that the economy had a role to play in this as well but he said he didn't think it played a huge role, and that it really is just due to changing culture values. I then went on to ask him who his typical client was and he was rather lost for words for a moment and replied that everyone is the typical client. He went on to say that in Garden City they get more of a Blue Collar crowd that comes from the south and that in Livonia it is more of a white collar crowd. He said that basically anyone in the surrounding 3-5 mile radius was a potential customer and that he believed people really were not going to drive huge distances for this sort of business unless it was due to word of mouth or previous business. I asked if repeat clients were common and Mr. Rost said that "In Family's" or repeats were very common and happen "all the time". He further stated that it was said that every 8 years people are making funeral arrangements and therefore if the customer had a good experience before would most likely return.

I asked Mr. Rost how many employees he had and he stated that he had 3 managers and a business manager, whom are his key people. He then said he had 3 other full time females and 10 part time employees and 2 licensed embalmers who are non-management funeral directors. He stated he had roughly 20 employees. I asked if there was much turnover amongst the staff and he stated not that there is not and that in the last year or two they had only CP's position open up, no others. I asked how they would advertise employment openings. Mr. Rost stated that it was not an easy thing to do due to the fact that they are a small specialized industry, then he qualified this comment stated that the meant the key people and not their "lady attendants". He continued and stated that sometimes he kept files of resumes for the key positions/people. He stated that it was mostly local people who would seek a job there. Mr. Rost also said that he would advertise on line and in local newspapers. He lastly stated that God supplies the people when he needed them most, and said that this was case in point what happened when CP first applied for the position. He went on to say how CP had been a contract embalmer down south and came in looking for a job just when they needed someone. I asked Mr. Rost if he could tell me how his business may be unique or have critical elements that are unusual than the typical business in the industry. Mr. Rost stated that he didn't associate with others in the industry other than at some conventions he attended. Mr. Rost stated that their cremation service made them unique in that they did more cremations than many in the business and that they have a larger refrigeration unit to hold bodies prior to cremation. I then asked if he could describe a typical Funeral Director in the industry. Mr. Rost stated that the Average Funeral Director tends to not be a type "A" person. He said that this is an industry where you need to have the heart of a servant and serve people from the heart. He said they need compassion and heart and that you cannot come with the personality of a salesman/care salesman because you won't

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make it. He said it's nice to be nice but that we have to draw the line somewhere and can't give the shirt off your back. He said that they have [need] a spiritual person because the heart of what they do is a spiritual concept. He stated that they dealt with clergy and ministers and hospice. He said that even people who are not spiritual at the time of death things can change them. A person that is not like this and not empathetic and who doesn't have the heart for it needs to do something else. I asked if his idea of the typical funeral director differs from his funeral directors at all and if there were other qualities that he looks for in a funeral director. He stated that the aforementioned qualities are pretty much what he would look for [and has]. He stated that he was limited to a small selection of individuals but that overall most of the people in this industry are the sort of people he previously mentioned that are desirable. He stated that the industry had downsized due to the number of cremations and that another current trend is that family owned businesses were being sold out to larger corporations.

I asked if Mr. Rost would tell me a bit about his employees. He stated that he has his management people who run and over see the daily activities that are 24 hours a day, 7 days a week. Although he did mention they use a service at night for pick up. He said that they have 3 rotating managers that run the business and that they did not have a general manager because they did not have the income for another level of management and that each manager had their specific areas [locations] that they oversee. He further stated that can rotate between facilities if need be. He stated that the other funeral directors (non-mgmt) also rotate but that they usually their primary location was near their home. He further stated that CP would be assigned a job for the day, that a Funeral Director would come in and he would do transfers, listen to messages that came in overnight, he'd have to go out and get the death certificate and have it signed, he would meet with doctors or meet family as hospice or nursing homes. He stated that they at times would even have to park cars. He'd need to take the casket down front and that often times a licensed funeral director would need to go accompany the casket to the cemetery. He said that the secretaries were in the reception area. And that finally they had part time gopher/drivers and they typically were retired people. They also did "carryover" jobs that Funeral directors typically did but may need help with during busy times. He said there were three of these positions. He also said that he had yard people, maintenance people, and some cleaning people. I asked if he could tell me a little about the job duties of a Funeral Director/Embalmer. He stated that he pretty much already covered those with his previous answers. He stated that the Funeral Director/Embalmers are pretty much his go betweens for the family and community. They are the representatives they are educated in the industry and know the options that are available for any given scenario. I then asked how many he currently had in this job title and he explained that at the moment he had two, Troy Shaffer [man who replaced CP] and Matt, his son. I then asked if he had ever had any female funeral director/embalmers and he answered that he had

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not ever had any. He stated that there were some out there and many going to school. He further stated that he believed women were better equipped to do this job and that he believes they would have more of an affinity than males. He said that customers typically were widows and children and other females. He further stated that he typically used his Receptionists for this greeting of customers and to pickup for the funeral directors when need be. He stated that they [Receptionists] were typically very well dressed in suits with skirts.

I then asked Mr. Rost about Charging Party's employment history. Mr. Rost stated that he was here for a reasonably long time. He stated that as with all employees there are ups and downs. He stated that CP started strong but leveled off. He said Anthony [CP] worked what was considered great hours for their industry, 8am – 5pm, and was quite lucky. He further stated that there were some performance issues here and there but that they were mostly attitude problem issues. Mr. Rost stated that six months before CP left that his supervisor wanted to let him go but that he [Mr. Rost] is a laid back individual and spoke with him about his attitude. I asked what in particular was the problem CP was having. Mr. Rost said he couldn't recall exactly but that in once case CP refused to help stack chairs for Dolly who is 80 years old. He continued and said that it was obvious Anthony [CP] was having a hard time outside of work and we knew something was wrong but that they didn't know what. He further stated that had they fired him then that "we wouldn't have the problem now" would we? And laughed. He then said that CP's supervisor George Crawford would have more specifics. I asked Mr. Rost if he knew of any other problems with/during CP's employment and he replied that that really hadn't been his job but that to his knowledge it was just the attitude. He said that CP was getting the job done but that over the last year it seemed to really become a problem. Mr. Rost stated that little did they know at the time that CP had been taking chemicals [hormones].

I then asked Mr. Rost why Charging Party was discharged. He stated that he had been presented a letter by CP that said when he got back after a two week vacation he would be dressing as a female and no longer as a male. I thought seriously for the two weeks and told Anthony we are going to have to part ways. I asked if there was anything more he would like to add and he said that was it. I asked what was his concerns and reasoning as to why CP's was discharged. Mr. Rost stated that their business was all about healing and that nobody, not himself, or anyone was exempt from that. He stated that if you have something that is going affect that process in any way then you don't belong in this line of work. He further stated that all male employees are provided uniforms and thus CP wearing anything else was impossibility. I asked if he believed that CP presenting as a woman would have disrupted his business. Mr. Rost stated that there was no question in his mind that [CP] dressing as a woman would have interrupted business and business transactions. He stated that dress was paramount there. He stated that they were one of the few funeral homes that still provide clothing. I asked why he did. He stated that he wanted to control what my men are

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wearing. He stated that he wanted them looking uniform and that people can recognize that they are here and apart of the [R's/business's] culture. He stated that he did want them wearing other color suits or ties. I asked why he did not do the same for his female staff. Mr. Rost laughed embarrassingly and said "How did I know you were going to ask that?" Then he laughed and explained that 15-20 years ago they supplied the women uniforms but that there had been complaints. He said "you know, you women are a strange breed, "he shifted and said "They do wear a uniform, but having them all come to a consensus was too difficult. They'd say this color makes me look fat, and this one doesn't look good on me. Women like variety, they don't like to wear the same thing every day, or so I hear." He continued "I lost the fight. So long as they look professional that is all that matters. A little color and variety is okay. We could get matching women's suits again with a red line down the seam but I lost that fight years ago." I finally asked if there were any other reasons at all that we had not already discussed that played a part in his decision to discharge the Charging Party. He replied "there were no other reasons for his discharge". I asked Mr. Rost if there were any instances where a deviation to the dress code was allowed and he said no. I asked him if he had ever seen the Charging Party present as a female and he said he never had. I asked if Mr. Rost had ever heard third hand of CP presenting as a female, and he stated he never heard or had any third hand knowledge of CP presenting as a female nor had he heard any gossip. He further stated that people [employees of R] had no idea and that this [CP presenting as female] was something not commonly known at work. I asked, commonly? Mr. Rost corrected "At all." I asked Mr. Rost if he had discussed this matter or the investigation of this case with anyone other than the attorney present today. He stated that with the basic employees he had no communications with them about this case whatsoever. He stated that the did speak with the managers about this matter and discovered that they also had no idea about CP's having presented as a female then he said he spoke with his attorney and decided to make the cut [discharge].

I then spoke with Ms. **Shannon Kish** she stated that her job title is Business Office Manager and had been with the Respondent for 26 years. She stated that when she first started that she was a receptionist then eventually moved to the business office. She stated that she works with 7 or 8 other employees at the business office: a maintenance person, a lady who does the cleaning, sometimes a summer helper, a driver, and an administration assistant. I asked Ms. Kish what were her primary job duties. She stated that she paid the bills, collect on bills, and take care of each case. She said she oversees other employees and does sort of a Human Resources person does. I then asked her where her duties primarily took place and she stated in the Detroit office. She stated that she did not work with the clientele much but that if she does then it would be contacting people on the phone regarding bills and other needs. I asked her what interaction if any does she has with other

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employees. Ms. Kish answered that she's the person who does payroll or answers general business [employment] questions. She stated that she has spoke with all the employees at one time or another. I asked her what her role as a manager is and if she makes employment decisions such as hiring and firing. She stated that she generally does not make any employment decisions such as hiring and firing and discipline. I asked Ms. Kish how business had been lately and on average how many funerals they have monthly. She stated that the last month had been very busy. She said that the industry goes through trends and that sometimes its busy and sometimes it is not. She said usually winters are favorable and that right now business is relatively good but there is some downward trends due to cremations and their popularity. I asked Ms. Kish how their business is unique to others in the industry. She stated that they take strong pride to do the best in the industry. She stated that they are family owned which is not as common as it once had been. She stated that they took pride in counseling and educating family members regarding the process of grief. She said that it was very important that they help them the best they can help them and stated that "that's why I am proud to work for this company. We truly care." I asked Ms. Kish who their typical clients were. She stated that usually they were locals. Local church members were often referred to their facilities. She said that the Livonia location covered more communities than the Garden City location typically. She said that they worked with local groups such as the Rotary, Hospitals, Churches and word of mouth recommendations or previous in family use is their clientele basis. I asked if they get repeat family business often. She stated that they do and that it was quite common occurrence. I asked Ms. Kish how many approximate employees R has and if they had much turn over. She stated that R has about 32 employees the last she counted. She said that there is hardly any turn over and that they may see a young part-timer just getting started in the industry come and go but that R currently have a lot of employees who have been there a very long time. I asked her that should an opening become available how they would advertise. She stated that they have put Ads in the paper from what she understood. She said that the Owner, Tom, herself, or the facility managers would do this depending on the job. Each was responsible for their own facility. She said that she would advertise/hire for the business office only. The facility that has an opening, the manager would select and hire. For Funeral Director/Embalmer the Owner and the Manager of the facility would select. I asked Ms. Kish if she could tell me the job/position that respondent current employs and a short description of each one. She stated that there is License Funeral Director/Embalmer, Receptionist, Business Office Help, Derivers, maintenance workers that care for the grounds, and Cleaners. She further stated that in Garden City the woman that cleans also does the grounds maintenance; but that at the Detroit and Livonia facilities they are different people doing the outside grounds maintenance and the inside cleaning. I asked if Ms. Kish knew enough about the position to be able to describe to me a typical day in the life of a Funeral Director/Embalmer. She stated that she had worked long

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enough for R to know. She stated that the position does funerals, goes out and gets doctor signatures on death certificates, receive cremation permits, does removals, prepares remains, transport remains from hospitals, assisted living facilities, homes as well as transport remains to church and/or cemeteries. She said that in the midst of these duties that they would often encounter and meet with families of the deceased. She further stated that she believed that the position was the core job at R and that they were the individuals that met with the communities the most. She stated that they sometimes were the first impression that families would have of R's business and that it was the most important job at R. I asked her who you would look for to fill particular position. Ms. Kish stated that Tom (the owner) and the managers would usually hire the Funeral Director/Embalmers. I asked if Ms. Kish could tell me the dress code that was required for the position of Funeral Director/Embalmer. She stated that the dress code is the suit that is provided by the company, a tie that was also provided, a white shirt that is provided, polished shoes, and a fraternity pin if their chose. She stated that they had to look very impeccable because it was the first impression people are going to get [of R] when they meet with Funeral Directors/Embalmers. She stated that the only people not in suites are Maintenance and Cleaning. She said everyone meeting with the public's needs had to adhere to the dress code. I asked if this dress code differs in any way from the other job positions dress codes. She stated that she had provided me the men's dress code previously and that the woman's dress code is a dress and suit coat. Nails need to be done, they have to be well groomed, hair must be done modestly, tasteful jewelry – nothing flashy, understated colors…nothing that one could wear to a wedding. She said that we want people to know we are there but not stand out. I asked Ms. Kish if they had ever had a problem with employees not adhering to the dress code that needed to be spoke with or disciplined. She stated that the Dress Code is set out clearly in the employee handbook and that they have never had to reprimand or discipline people for any dress code problems. She stated that "you either adhere or you don't work here, it's disrespectful to dress as if you are going to a party." I asked if R had had any female Funeral Director/Embalmers in the past. Ms. Kish stated that they had in the past had female interns but that it had been quite some time ago. She stated that she could not recall having had any females apply for the position. She said that Tom or the [facility] manager would advertise in the paper for the position or hire through internships. I stated that a charge was filed by a former employee and I asked if Ms. Kish had known this individual and she replied "Yes, I know who Anthony Stephens is." I asked her what had been her experience with CP. She stated that he had been an Embalmer/Funeral Director for R and that she'd see him and his wife at holiday functions – including one that had been at her house once. She said she had seen him and said hello a handful of times. I asked if CP had been any performance problems to her knowledge. She stated that He was a very good embalmer and that she knew of no performance problems. I asked if she knew why CP was discharged. She stated that she was only

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given the general outline of what was going on. She said that she does not make the decisions. She said she was given paperwork to file regarding this [CP's discharge]. I asked why CP was discharged. Ms. Kish replied that it was because he was not going to wear our dress code any longer. I probed the issue and said "How so?" She stated that he was supposed to wear a suite and to my knowledge he did not want to wear the company provided suite, tie, and shirt. I asked if the women are provided suits or uniforms. Ms. Kish stated that the women at one time were provided uniforms 10 or 15 years ago but that the whole issue is much smoother now. She stated "we bickered because we are all different sizes and shapes" she stated but we do have to adhere to a dress code. I asked why she believes Tom had concerns with CP's request to dress in the female attire. She stated that "We have a standard when we are out in the community and that it could have been disruptive and if you have a uniform you wear it!" I asked if this was R's only concerns or if there were other issues leading to CP's discharge. Ms. Kish stated that the dress code is an important issue and that this was the only reason he was discharged. I asked Ms. Kish if she had ever seen CP present as a female. She stated she never did. I asked her if she had ever heard third hand info or gossip about CP presenting as a female. She said that she heard a lot of things due to her job but that I cannot be bent with gossip or hearsay. Then she further stated that "I did not know about CP's intentions prior to Anthony presenting a letter to Tom [the letter that outlined his intent on returning to work presenting as a female].

I then interviewed employee **Dolores Nemeth**. I asked for the attorney to step out while I interviewed ee's. I counseled the ee on who I am, what the EEOC does, our role, and retaliation. She stated that she was a Part Time Administrative Assistant and had been working for R for 12 years. Ms. Nemeth stated that she was 77 years old. She stated that this was her first position in the industry and felt comfortable doing the work and that it was a rewarding job. I asked her who her supervisor was and she stated that it is George Crawford and that he makes the schedules. I asked if business was good and she stated that it has been good. I asked Ms. Nemeth who she typically interacts with during a business day. She stated that basically just George, the supervisor, and sometimes the embalmer who seems to be on the go all the time. She stated that a lot of the time she's on her own. I asked what her primary job duties were. I asked her what her primary job duties were and she stated that she did all of the office work/paperwork and filing that needed to be done. She said that she answers phone calls, makes copies, works on files, and helps with the needed documentation and permits. She said she works with the public and sets up appointments to meet with the Director (George). She said at this facility that there are two part time Administrative Assistants. I asked if Ms. Nemeth knew what job Ms. Kish's son, Ryan, did while he was here. She stated that he was working up in the business office helping his mom when he was here. I asked Ms. Nemeth if she could tell me what the

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dress code is. She stated that the dress code was somber dress and colors. She said that she wore a jacket and sometimes print skirts. She said that she never received a uniform and that pant suits such as I was wearing that day were unacceptable and that only skirts were allowed for female staff. I asked if the dress code differed from job to job and she said no. I asked her if she could tell me what a funeral director/embalmer (non-mgmt) position did. She told me that she didn't know exactly and that she didn't watch the embalming and dressing of the remains. She said that she fixes things in the chapel and that funeral director/embalmers did see the public some. I asked her how the dress code differs for this position. She stated that funeral director/embalmers all had to wear suites, ties, and white shirts. I asked her if R had ever had a female funeral director/embalmer. She stated that not so long as she has been here and that she was not sure about before her hire. I asked Ms. Nemeth if in her experience she has seen male and female employees enjoying similar work benefits and atmosphere. She stated that she believed so and that to her there were no noticeable differences between how men and female ee's were treated. I told Ms. Nemeth that a charge of discrimination was filed by a former co-worker of which she was not surprised and I asked her if she knew CP. She said yes she did and that he had worked for R. She further stated that he [CP] had been a director/embalmer like Troy [CP's replacement]. She stated that there had been others before him. I asked if she knew him well and if they talked much. She stated they spoke but nothing out of the ordinary, only as you would with anyone else you work with. She stated that they never seen each other outside of work. I asked if she knew if CP had any work performance problems or attitude problems and she claimed that she wasn't sure and didn't want to guess. She said that it was noticeable that there were matters bothering him. I asked her how so and she stated that it was hard to describe and that it was only little things like mannerisms, hair, the fact he shaved all his facial hair off. I asked her what else but she would not venture to say any more on that matter. I asked her what happened in the end. She stated that the wasn't sure but knew that there had been a letter that he gave to certain people. I interrupted and asked who and she said she wasn't sure all who but to some people including the owner. She said it was a letter telling everyone what was going on in his life and his intentions here on out. I asked her what she thought of this letter. She stated that her reaction was of shock because she wasn't used to this sort of thing. She claims to not have known of CP's transgender status or transition until the very end. I asked if she knew if CP was discharged or quit. She stated she wasn't sure, he just never came back and when he came to retrieve his stuff simply said to her "good bye, I'm leaving" I asked how this made her feel and if she had any concerns over the matter. She stated that she didn't want to get involved and was a bit uncomfortable about this who ordeal. She said there is a limit on what you can do and you can only do so much. Ms. Nemeth was tearing up as if she may cry. She begged to know if she gave any information that was negative towards one side or another because she stated that at this stage in her life she does not

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wish to hurt anyone and only wishes to remain neutral in every possible way. She said R has been good to her and believes she would never be able to find another employer as good to her at her age, 77, and with her severe rheumatoid arthritis condition. She asked how this matter was going to all play out for everyone and said that she had not been able to sleep the previous night at all because she had been worrying about this interview. She also asked why I had chose to speak with her and if it was random. I reassured Ms. Nemeth that everything was going to be fine and that as a neutral fact finding investigator it is my job to get both sides to every claim that is filed. I told her I was not sure as to what sort of outcome may happen because I had not compiled all the information as of yet. I counseled her on retaliation.

I then interviewed employee **Tia Macklin**. She stated that she had been employed since 2000 – for 14 years. She stated that she was a Funeral Assistant and a Certified Celebrant – and she stated that she performed 99% of the certified celebrant requests – a job duty where an individual gives a nondenominational life story at a funeral as a celebration of a deceases life and achievements. She said that David Cash – Supervisor also does this. She said that it's a substantial amount of work in that you take 2 hours of notes speaking with the love ones in the decease's former home and then spend roughly 12 hours preparing the actual life story and that a service may only be perhaps 20-30 minutes. Ms. Macklin stated that she worked part time and worked on call – she stated that business had been good lately. She said that there is little consistency though and that was the nature of the business – some weeks she worked 39 hours and then the next she'd work only 3 hours. She stated she worked out of the Livonia office with Sue who does office work, Matt Rost – owners son who is the Funeral Director/Embalmer, Dave Cash the Manager of the Facility, and 6 part time help, 2 men who were runners [funeral director assistants], a cleaning lady – Joyce, and a guy who does maintenance – Leo. She stated that Dave Cash was her direct supervisor. I asked her who she typically interacting with during a work day and she said she usually worked with the public. She said she first started 14 years ago as a housekeep and rose up in the ranks once management realized she was qualified to do office work and when they needed help they asked her. I asked her about the dress code and she stated that women were required to wear skirts, long sleeves, no open toe shoes, very modest, no bright colored clothing. I asked her if pant suits were acceptable and she stated no they were not and that the only time she was able to wear a pant suit was after she had been out for double foot surgery and was wearing calf cast boots. She let Dave Cash know she'd have to wear pant suit or else show off the cast boots and he said okay. She stated that once the cast boots were off she immediately had to go back to skirts/dresses. I asked her why who said so. She said that it was implied and pretty obvious, she knew that that was how it had to be. I asked her if to her knowledge there had ever been a female Funeral Director/Embalmer. She said that she had only known of a single female intern once. I asked if in her experience did she think male and female

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employees enjoyed similar treatment, benefits, and work atmosphere. She was hesitant to speak and I reminded her about retaliation and told her that her conversation with me today would be confidential if she felt more comfortable and she said she would. She then said "I can honestly say at times no" and I asked her to elaborate. She said the 1st time she really noticed it was when they were under staffed one day and had too many things going on and there were no Funeral Director's or Drivers [Funeral Director Assistants] available but they needed someone to go out and get a death certificate signed by a doctor. I volunteered to go out and do it but Dave Cash was reluctant and really didn't want to send me and looked for someone else to go. Finally Tom made the decision to send me and get it over with because it needed to be done. I asked her why she believes this was relevant and she said that it was rather obvious that they (mgmt) did not want a woman doing this duty. Even when I got there and asked for the doctor everyone appeared to be extremely surprised to see me and someone even commented on the fact that I was a woman. I asked her if there was anything else that she considered noticeably different treatment between men and women employees. She said that dress code appeared to be so. I asked for her to elaborate. She said that the men were provided suits and ties but the females were not. She said sure we like to be fashionable but that is overrated. She said that they had asked if they could even simply get an allowance for panty hose that they are required to wear since they go through so much due to the dress code requirements, but that had been not taken seriously by mgmt. I asked if she knew why I was here today and she said that she did and that it was due to Anthony now known as Aimee having filed a charge. I asked when and how she learned of CP's transition or intentions to transition. She said that she was showed a letter by CP that he had wrote and was handing out to some of the ee's and was going to show Tom. She said that it told about his transition and that her reaction was that she was a little surprised but not terribly because she had been noticing some changes. I asked her what sort and she said that CP used to have facial hair that he shaved off and that his skin was getting softer and that she had even asked him what moisturizer he was using. I asked her what reaction of other ee's was. She said that it didn't bother her any but that initially some of the ee's talked about it but that she herself didn't speak with anyone about the subject. She didn't hear any animosity and it was more neutral gossip, not necessarily supportive. She said that shortly after having given the letter to Tom CP had a conversation with her about the things he might be facing in society, his fear for losing his job, and that his wife was standing by him and at the end of their conversation he asked where she got her shoes. I asked if she had heard whether CP was discharged or quit. She stated that she heard he'd been discharged and that her reaction was that she felt sad for him because he had a family to support. She further stated that she believe CP was discharged due to the gender transition and that she did not believe it was due to being a female necessarily – but more due to the fact that he had not been a female to begin with. I asked her if she

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knew of any CP having any performance problems or attitude problems. She stated she knew of no performance problems nor any attitude problems. She stated that he was often quiet and kept to himself and wasn't always a "sunshiny" person but he did his job and from what she witnessed he always was very good with the public. She stated that she knew of some part-timers who were not nearly as polite to the public as CP but are still employed. I asked who and she demurred that she really didn't want to say. Ms. Macklin was in tears. I counseled her about retaliation and she thanked me for my business card and rush away when I told her our interview was finished.

I then interviewed employee Troy Shaffer. I asked him his job title and he said he was an "embalmer behind the scenes". I asked how long he had been employed and he stated that he began in late August 2013. I asked who was his manager and he stated that "this [Garden City] was his main chapel and that George Crawford was his manager. He said when he goes to Livonia then Dave Cash is his manager, and when he goes to the Harper location then Dave K. was his supervisor. He said that he typically drove his own work load and did not need or get a lot of supervision. I asked then this [Garden City] primarily performed his job duties and he said yes, but that he goes all over but that he is primarily here and goes between here and Livonia. I asked if the Harper location does many funerals and he said to his knowledge they do very little services out of Harper. I told him I was unfamiliar with this industry and asked if R was a typical company in the industry. He stated that he had worked at a couple different funeral homes in Michigan and that he began in the industry in 2005. He stated that the business basis is the same but some of the job duties and what you are expected to do vary such as weeding flower beds ect. But overall the business was the same. I asked what his primary job duties were. Mr. Shaffer stated that he did Embalming, doing removals and transfers of deceased from hospitals, nursing facilities, homes. He said that he did these duties by himself but that if he has to do a removal from a private home he takes help. He said he also files death certificate and gets necessary documentation. He further stated that "I don't work much with the public; I'm basically behind the scenes. I don't run funerals the Managers run the funerals. I only work with the public when I pick up deceased and get doctors to sign death certificates. I know the person before me worked more with the public but I specifically said at my interview that I wanted to be primarily behind the scenes and they were okay with that. I asked who was okay with that, who did he interview with and he stated that Tom Rost was the only one who interviewed him. I asked him how he had learned of the job opening. Mr. Shaffer said that he worked at Verran funeral Home and had done so for many years and that his manager was close with Dave K – manager at the Harper location. Dave K asked my manager if they knew of anyone that may need a job as a full time Funeral Director/Embalmer and I interviewed. It was a word of mouth job opportunity. I asked why he left his former employer, and he said for better opportunities and admitted he was being paid

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better with R. I asked for him to tell me what the dress code is. He stated that it is basically what he was wearing that day – a suite provided by R. I asked if there were ever deviations that were allowed and he said only when he's actually embalming then he may way scrubs or such. He said some embalm in their suits but that he was not comfortable doing so. I asked if R providing suits out of the ordinary in this industry. He said he has heard of it but that it is not a common occurrence. I asked about the women's dress code. He said that he would be guessing and didn't know for certain and that he would prefer not to guess. He didn't know if a uniform was provided to women or not. He wasn't sure if women at other facilities in the industry were provided uniforms. I ended our interview and discussed retaliation and thanked Mr. Shaffer for coming in to visit me on his day off.

I then asked that although I had not initially asked to do so I was curious if I could possible interview George Crawford, CP's direct supervisor. I was allowed to do so and I met Mr. Crawford and the attorney returned to the room. I began the interview and asked Mr. Crawford his job title and he stated, "I am the Manager of the Garden City Chapel". I asked how long he had been employed with R and he said he'd been there for 7 years as a manager and had formerly owned his own funeral home and had been a funeral director for 45 years. I asked him who he typically interacts with during a business day. Mr. Crawford stated that he meets with families and is responsible for all the maintenance, running, and General Management for this [Garden City] facility. I asked besides those that he just listed if there were other primary job duties of his position. He stated that he made some employment decisions but primarily for non-mgmt personnel at his facility. I asked if he could tell me how this business was unique to others in the industry. He stated that they were not unique in any specific way but admitted that it is a well ran company. He stated that they adhere to the same standards and policies as any in the industry. I asked if returning families coming back to the business common. He stated that he did have repeat families coming back time and again that it was common. He stated most clients come by referral. I asked if he knows how many EE's there are and if there was a high turnover. He stated that he wasn't sure on the number of employees but knew that he supervised 4 or 5 people at any given time and that there was very little turnover. I asked him how R advertises job openings. He stated that he would advertise job openings in professional trade publications but that the clerical jobs were typically published in newspaper ads and that overall there was some word of mouth advertising. I asked if he could describe a typical day in the life of a funeral director/embalmer. He said that a typical day would be that he'd come in and check what had happened over night, check messages, schedule appointments. A Funeral Director/Embalmer may first meet with the families at their homes or elsewhere for a removal. He said that His own role [Funeral Director manager] was primarily meeting with families and that the subordinate Funeral Director/Embalmer does the technical duties and did not actually sit with the families and plan things

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out that that was his [Mr. Crawford's] job as a manager. He said that the position did transportation from hospital or nursing homes and that all the physical jobs that needed doing. If a residence or nursing facility had a removal or if there was a person of size then they would send two people. He said that hospitals had equipment that could aid in removals. ***He said that CP would do some job duties dealing with public like parking cars and greeting public and not just embalming in the preparation room*** *(the italic bold portion was added after Mr. Crawford and the attorney reviewed the document and wished to add further information).* I asked Mr. Crawford if he could describe to me the dress code. He stated that for men R provided 2 uniform suites and 2 ties. He stated that R gives out handbooks when someone begins working that outlines the dress code and explains that neat grooming is required. Women have a different dress code. Its conservative dress and no slacks. I asked if Mr. Crawford knows of any female funeral director/embalmers that had been employed by R. He stated that I believed he knew of some but don't recall who they were. He stated that he knew of one at his former employers on the east side some years ago. I asked Mr. Crawford's relationship with CP. He stated that Antony worked out of this [Garden City] office and that he was CP's supervisor. Mr. Crawford further stated that he had been an Embalmer and essentially he would ask CP to do different tasks here or at another location. I asked if CP had had any performance problems. Mr. Crawford stated that about 3 months prior to CP's leaving he had had attitude issues. Mr. Crawford stated he tried to resolve the matters and had difficulties. He stated CP had been lazy and that he would ask CP to do some task and that CP would back talk or resist and ask what other co-workers were doing. One case in point, Mr. Crawford explained, is that they fingerprint every body that comes in that CP once gave him flack about having to do that. Mr. Crawford said initially CP had no issues but that overtime CP became comfortable and that his attitudes changed. Mr. Crawford stated that he tried to sit down and discuss things with CP but did not discipline CP. Mr. Crawford stated that it was just that he did not have a good positive attitude. I asked if Mr. Crawford could tell me a bit about CP's discharge. Mr. Crawford stated that he had no knowledge of CP's discharge that he had been off that particular day and that when he returned to work he discovered CP had left. I asked if Mr. Crawford was privy to the letter CP sent to some ee's and asked if management had any concerns regarding this letter. Mr. Crawford stated that he had never read a letter but knew that others had received one but that he had not been one of the ones to receive it. Mr. Crawford stated that he had been blindsided with CP's explanations that were in the letter and that he had discussed the matter with Tom [the owner] about Cp's departure after he left. He further stated that dress code wasn't discussed except with reference as to why Anthony had left. He stated he did speak with Tom about other issues prior to CP having left in regards to the attitude problems but that "after discussing the issue with Tom, Tom had said he'd speak with Anthony about it and he did and it appeared to have worked well because he (CP) tried to be a better employee. There were no other concerns

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regarding CP's job performance." I asked Mr. Crawford if he ever seen CP present as female or heard of it from others. He stated he never seen Charging Party present as female but said he had seen a Halloween costume photo once a couple years ago where CP dressed as a female maid but it was taken as a joke for Halloween and no one thought anything more of it. He further stated he never heard of any talk or references towards CP's presenting as female.

EXHIBIT V

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Detroit Field Office

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Detroit, MI 48226
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Aimee Stephens
Redacted

Charge No.: 471-2013-03381
Charging Party

R.G. & G.R. Harris Funeral
31551 Ford Rd.
Garden City, MI 48135

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination on the merits of this charge.

The Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and timeliness, deferral and all other requirements for coverage have been met.

The Charging Party alleged that she was discharged due to her sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Evidence gathered during the course of the investigation reveals that there is reasonable cause to believe that the Charging Party's allegations are true.

Like and related and growing out of this investigation, the Commission found reasonable cause to believe that the Respondent discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Title VII of the Civil Rights Act of 1964, as amended, requires that if the Commission determines there is reason to believe violation(s) have occurred, it shall endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion.

Having determined that there is reasonable cause to believe that a violation has occurred, the Commission now invites the parties to join with it in a collective effort toward a just resolution of

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this matter. A Conciliation Agreement containing the types of relief necessary to remedy the violation of the statute is included for your review.

Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with the statute and Section 1601.26 of the Commission's Procedural Regulations. If the Respondent declines to enter into settlement discussions, or if the Commission's representative for any other reason, is unable to secure a settlement acceptable to the office Director, the Director shall so inform the Respondent in writing and advise it of the court enforcement alternative available to the Commission.

On Behalf of the Commission:

6/5/14
Date

for Webster Smith
District Director

EEOC000035

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can take the cremated remains to church now.
Q Okay.
A So things have changed.
Q And it's -- part of the reason you are doing cremation services is to remain -- is because the demand and just the way the funeral industry has shifted?
A Exactly.
Q You need it to stay in business really?
A Exactly.
MR. PRICE: If we could take a break here.
(Off the record at 10:37 a.m.)
MR. PRICE: Back on.
(Back on the record at 10:47 a.m.)
(Mr. Schrameck did not return to the conference room.)
BY MR. PRICE:
Q Who handles the hiring for R.G. G.R.?
A Either myself or my managers.
Q Okay. Do either you or your managers, to your understanding, ask about anybody's religion when you're hiring them?
A No.
Q Going back to this affirmative defense that we

have been talking about today. Is it the case that continuing to employ Stephens would violate the free exercise rights of Harris under the Constitution?
A Yes.
Q Okay.
A Yes. I believe so.
Q Okay. How so?
A Well, I do believe in my -- from my personal faith aspect as a follower of Jesus Christ that I have the right to minister to the families and the people that I serve in a way that is protective and safe for them, and meets their needs as they begin to heal in such a way that they're protected and safe, and having an individual that does not conform to our dress code is not appropriate.
(Mr. Schrameck entered the conference room at 10:48 a.m.)
BY MR. PRICE:
Q So, your personal faith as a follower of Jesus Christ tells you that it would be improper or -- to employ someone like the person you knew as Anthony Stephens?
A Absolutely.

Q Okay. You indicated as part of the healing process, but what about your religious beliefs specifically are violated by continuing to employ Stephens?
A I believe it would violate my faith, yes, absolutely.
Q Okay. What aspects of it?
A Well, I believe that God created a man as a man and God created a woman as a woman. And to -- to not honor that, I would feel it's a violation of my faith, absolutely.
Q So Stephens would be presenting in a way that offended your religious beliefs, essentially?
A Yes. Yes.
Q And as a result you would not have to -- it would be within your rights to terminate them according to your religious belief, terminate Stephens from your religious belief?
A Yes. Uh-huh.
Q Have you ever terminated anybody else because of the belief that they were acting contrarily to your religious faith?
A No.
Q Are there any other circumstances you can think of where you would terminate somebody for

violating your religious beliefs?
A No, offhand I can't.
Q Okay. Are your religious expectations communicated to your employees in any way?
A I would say indirectly.
Q Indirectly?
A Yes.
Q How so?
A Well, number one, they know the material is around the funeral home.
Q The material?
A Yeah, I mean, we have little devotional books for people to pick up, they have these Jesus cards, they know where I attend church. They do know, yes.
Q Okay. Would the continued employment of Stephens have interfered with your right to place the devotional booklets or Jesus cards around your facility?
A No.
Q Would it have been interfered in any way with your ability to continue to worship as you chose?
A Go back to the question. You said just because he was there or if he was there dressed as a

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in this case violate your religious freedom?
A Any other ways other than this?
Q Other than this, yeah.
A Yeah, I don't think there is any other way.
Q Okay. So that's the sole -- that's the sole basis of your claim that your rights are being violated is that we brought suit on behalf of -- to keep Stephens employed or to -- because you fired Stephens? That was badly stated. I'm sorry. Even I can recognize that.
So the sole basis of your rights being violated is the fact you're being sued for terminating Stephens' employment; that's the sole basis of your religious freedom being violated here?
A My religious freedom, yes.
Q Religious freedom. Okay. Backing up slightly, you talked about people -- your clients feeling protected and safe as part of the grieving process. In what ways would Stephens presenting as female violate that?
I mean, you already talked about you had other discussions, but with other people, you know, other families.
Can you think of other ways that it

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would be -- in what ways is it really violating people's sense of protection and safety?
A Well, I've -- don't forget that common sense tells you that the people that come to the funeral home, I have wives, I have daughters, I have sisters, I have grandchildren, I have great-grandchildren, granddaughters, I have all of these ladies that are there. They -- not only would they be seeing an individual like this and have to participate with the person, but you have also the bathroom situation where they -- are they going to share a bathroom with a man dressed up as a woman.
So, I have from older ladies to children, granddaughters that we're dealing with.
Q So, you were worried on their behalf that the presence of Stephens would be -- violate the safety of these people?
A Absolutely.
Q Was there anything about Stephens that indicated he was a danger to others, his behavior was -- did you ever have to write him up for being -- you know, for being threatening or anything like that?

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A No, but I don't think that has anything to do with him being now dressed as a woman and confronting families and being involved with that. That sounds hypothetical to me too.
Q Certainly nothing about Stephens' manner of dealing with families before you received this letter raised any concern with you, correct?
A Correct.
Q Okay. Stephens had been solicitous of their feelings. Stephens had blended in well. Stephens had, you know, been courteous and compassionate to the people, the clients who came into your facility, correct?
A I would say so, yes.
Q Do you have any reason to believe that this would have changed just because of the outward presentation in female clothing?
A Don't know.
Q Okay. You don't know of anything that would have -- you can't speculate as to whether anything would have changed?
A I don't know.
Q Okay. But certainly before that, his manner was completely appropriate and in --
A It seemed to be, yes.

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Q It conformed with what your expectations --
A Yes.
Q -- and hopes were for this what you call a ministry?
A Yes.
Q All right. Now, you're talking about granddaughters and sisters and that sort of thing, are you talking about your family members coming in --
A No, I'm talking about families --
Q Oh, extended family members coming in for funerals?
A Yes.
Q Okay.
A Uh-huh. But specifically the female part.
Q But you never got around to even -- there was no discussion of bathrooms with Stephens, correct?
A No.
Q That never came up at all?
A No.
Q So the bathroom thing is really hypothetical, I mean, because you never even got to that point?
A That's true.
Q Are there employee bathrooms as well as --

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Q Is the medical reimbursement policy still in effect?
A Yes, it is.
Q Okay. And -- okay. Now, it sets forth the dress code policy. And so forth. Are there -- apart from this document, Exhibit 6, and -- well, apart from this, are there any other documents which set forth Harris' expectations for its employees?
A No.
Q Okay. Now there is nothing -- I could be wrong and I missed it, but I did not see anything setting forth any kind of religious expression within the manual?
A No, there -- no, there isn't anything there for that.
Q Okay. Nothing setting forth your, you know, religious faith as expressed through Harris in there. Why is that the case?
A Doesn't seem like it would be part of an employee manual for what we want to accomplish here. When you're as small as we are, you can --
Q So you wouldn't want to put that in there, you want to put --

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A Well, I'd be happy to do that, but, you know, when you're as small as we are, we're talking all the time, you don't need to have everything written down.
Q Okay. Are there any unwritten policies?
A No.
Q Okay. Any unwritten expectations of employees?
A No.
Q Are there any reviews conducted, evaluations, that sort of thing?
A Not -- not in a -- in a formal setting.
Q Not like an annual review process or anything like that?
A No. No.
MR. PRICE: All right. I'm going to take a break before we finish the last section.
(Off the record at 12:10 p.m.)
MR. PRICE: Okay. We are back on.
(Back on the record at 12:17 p.m.)
BY MR. PRICE:
Q Moving on to 30(b)(6) Deposition Notice, Number 13, "The circumstances and reasons for Aimee Stephens' separation from employment -- of employment from Harris and all policies Harris

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relied upon in terminating Ms. Stephens."
Basically we'll be talking about just that whole process, determining to end the employment of Aimee Stephens.
Now, were -- you were involved in the hiring of Stephens, correct?
A I was.
Q What role did you play?
A I believe, if I remember, he -- he just came in looking for a job. I don't think he came in from an advertisement. I don't remember the circumstances. But, I believe I was the initial one that interviewed him.
Q Okay. And what job was this for?
A For a funeral director/embalmer, I guess.
Q Did you check-out the resume and references?
A Don't know.
Q Did you ever have any reason to believe that Stephens did not have the certifications or background to do the job?
A No.
Q In fact Stephens was able to perform the jobs of a funeral director and embalmer, correct?
A He was. Uh-huh.
Q All right. Now, was there somebody already

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working as a funeral director and embalmer at that time?
A Don't know.
(Mr. Schrameck exited the conference room at 12:19 p.m.)
BY MR. PRICE:
Q Okay. What location was this?
A This is at the Garden City location.
(Jeffrey Schrameck entered the conference room at 12:19 p.m.)
BY MR. PRICE:
Q All right. Do you recall whether or not Stephens replaced somebody at that location?
A I don't recall. I don't know.
Q Is it possible?
A Oh sure, it's possible.
Q Okay. During your interview with Mrs. Dickinson, I believe you said that Stephens could do the job, correct?
A Yes.
Q All right. We've already talked earlier about, you know, that Stephens showed sensitivity and compassion to the clients who came in, correct?
A Yes.
Q Okay. And that there were no -- is it safe to

say then that there were no performance-related reasons for termination of employment?
A Not at that time, but we did have some issues beforehand.
Q But they didn't motivate the decision to terminate the employment, correct?
A No. No.
Q So performance was not the basis for discharge?
A That's right.
Q Did you have any kind of suspicion that -- prior to receiving the letter from Stephens announcing this desire to present as female, did you have any suspicion or thought that anything like that could be happening?
MR. KIRKPATRICK: Objection.
THE WITNESS: No --
MR. KIRKPATRICK: Objection based on foundation. Go ahead.
THE WITNESS: No.
BY MR. PRICE:
Q Okay. How did you receive this letter?
MR. PRICE: And let's have it marked as 7, please.
(Deposition Exhibit No. 7 was marked for identification.)

THE WITNESS: (Reviewing.)
BY MR. PRICE:
Q Have you had a chance to review the letter?
A Well, I -- I know it from before.
Q Okay. You recognize it then?
A Yes.
Q Okay. Is this the letter that Stephens gave to you?
A Yes.
Q Okay. How did you come to get it?
A He handed it to me.
Q Okay. Where was this?
A I believe at the Garden City location.
Q Now, do you visit all the facilities every day?
A No.
Q No. Okay. How often do you get out to each of them?
A Oh, I'm -- couple times a week. Yeah.
Q Okay. Do you recall time of day, whatever, like that?
A I don't recall. I'm assuming he wanted -- he asked me to speak to him. I don't recall that though.
Q Okay. Do you recall -- was it in an office there?

A I believe it was just in the chapel.
Q Okay.
A What we call a chapel.
Q The living room facility?
A The living room, yes. You probably wouldn't call it that.
Q Okay. Was there anybody else present?
A No.
Q Do you recall the time of day?
A I don't.
Q Okay. So Stephens asked to meet with you or just approached you, what was the --
A I'm not quite sure.
Q Okay. Handed you the letter, though, correct?
A Uh-huh.
Q All right. You read the letter?
A I read the letter.
Q Okay. What was your reaction upon reading it?
A Well, it was kind of a shocking letter. I believe I just said to him that I would get back to him. He was going to go away on vacation in a couple weeks and I would get back to him.
Q He was going on vacation?
A Yes.

Q Stephens was going on vacation?
A Yes.
Q Okay. All right. Did Stephens say anything to you?
A I think he just -- he explained to me how he had been taking medication, I don't know how long, but he had been involved in wanting to present himself as a female.
Q Okay. Anything else?
A I don't believe so.
Q You indicated you were shocked at the letter. Did you have any other feelings about it?
A No, I don't think so.
Q Okay. You indicated that you would get back -- you were going to decide what to do?
A Yes.
Q Okay. So what did you do next?
A Contacted our corporate attorney.
Q Okay. And I don't want to know anything about details or anything like that. But who is your corporate attorney?
A David Thoms.
Q Was that the same day?
A I'm not sure.
Q All right. Do you recall roughly when -- are

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you're -- I'm going to object on this. You're asking from legal conclusions, somebody out there, I don't know if I'm going to get sued or not, I don't even understand if what he was doing would allow him to be sued, I mean, there's just a host of objections that we have placed on there.

MR. PRICE: And I agree, but I'm still allowed to ask the question in discovery.

MR. KIRKPATRICK: All right.

THE WITNESS: What was the question again?

MR. KIRKPATRICK: If you can answer the question.

BY MR. PRICE:

Q Did you have any concern that in firing Stephens you would by subjecting yourself to a sex discrimination lawsuit?

A Yes, that's always a possibility. Yes.

Q Has Harris ever been sued before by an employee for discharge?

MR. KIRKPATRICK: Objection, relevance. Go ahead and answer, if you can.

THE WITNESS: No.

BY MR. PRICE:

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Q Okay. How did you fire Stephens; how did you let Ms. Stephens know that she was being released?

A Well, I said to him, just before he was -- it was right before he was going to go on vacation and I just -- I said -- I just said "Anthony, this is not going to work out. And that your services would no longer be needed here."

Q That's at the Garden City location?

A Yes.

Q What time of day was it?

A It was later in the afternoon.

Q Where did you meet Stephens?

A In the chapel.

Q Chapel again?

A Uh-huh.

Q Did you ask for the meeting or did he ask --

A Yes.

Q All right. Did you present them with a severance agreement?

A I did.

Q Okay. Apart from saying "Not going to work out", do you recall anything else that you said?

A No.

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Q How long did this conversation take?

A Not very long. Couple minutes.

Q Couple minutes total?

A Uh-huh.

Q What did Stephens say?

A He was sorry that it wasn't going to work out. And said that he might have to contact his attorney or an attorney. And I said, "Well, you do whatever you feel you have to do." And that was the end of the conversation.

Q Did Stephens leave the facility at that point?

A He did.

Q Did you ever talk to anybody else about -- apart from your management team, did you ever talk to anybody else about Stephens and the letter that you received?

A No. Obviously everybody became aware of it in the staff pretty quickly, but no.

Q Did you let people know that you fired Stephens?

A After the -- sure. Afterwards, sure.

Q Okay. Who did you contact?

A I probably sent it out in a little notice of some kind, that's usually what we would do, just to --

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Q Is that e-mail or what?

A No, it's fax.

Q Okay. Do you still have a copy of that fax?

A No.

Q Do you recall what it said?

A I do not.

Q Would you have personally faxed it or would that have been something that you would have Shannon or --

A She would have sent it, yes.

Q Okay. Now, when your -- did you tell Stephens about any of your concerns regarding that you've talked about today, your religious freedom rights, you know, the affect on the ministry or anything like that?

A Did not talk to him about anything.

Q Just said "This is not going to work out"?

A That's exactly right.

Q And "Here's a severance agreement"?

A Yes.

Q And that's it?

A That's it.

Q Have you ever fired anyone else at Harris because of a -- what you believe to be a conflict with your religious concerns?

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A Yes.
Q And I think Mr. Price asked you about the verse, the scripture verse at the bottom?
A Yes.
Q The Matthew verse?
A Yes.
Q And asked you if that was the only thing on this mission statement or the website that describes your, you know, religious beliefs. Do you recall that?
A Yes.
Q Is that in fact the only thing on that website, mission statement?
A Well, there is up at the top the statement that our highest priority is to honor God and all that we do as a company and as individuals.
Q So that's the first statement of your mission statement?
A It's the first statement and the bottom is the last statement.
Q So would it be fair to say that this statement reflects your entire belief from your personal religious position?
A Yes.
Q Okay. I'm going to have you go with Exhibit 1,

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which is the answer to the Complaint. Turn to page 3.
Now, you were asked by Mr. Price about the affirmative defenses; do you recall that?
A Yes.
Q Just so we understand, are you an attorney?
A No.
Q Do you have any legal training, per se?
A No.
Q Do you understand, perhaps conceptually, what affirmative defenses are in the context of a Federal lawsuit?
A No.
Q Okay. So, can you speak to perhaps what may be an appropriate affirmative defense or what might not be an appropriate affirmative defense in the context of answering a lawsuit?
A No.
Q Okay. You just relied on Counsel's advice?
A Yes.
Q All right. I'm going to ask you to review Exhibit 2. Can you tell me the date of that Exhibit at the bottom, what it's dated?
A It looks like 9, September, '13.

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Q 2013?
A Yes.
Q Would it be fair to say that that date is shortly after Stephens was terminated from employment?
A Yes.
Q Was there a Federal lawsuit filed against your company at the time, Harris Funeral Homes at the time that that thing was filled out?
A No. I -- no.
Q Okay. And so, would it be fair to say that you received that document at some point; was it mailed to your location?
A Yes.
Q Okay. I think there was testimony you didn't recall and that it might have gotten to somebody else, but is it possible that you received that?
A Yes, we would have received it, yes.
Q Now, you had given some testimony pursuant to Mr. Price's questioning about why you terminated Stephens. Do you recall that?
A Yes.
Q Okay. Why did you -- what was the specific reason that you terminated Stephens?

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A Well, because he -- he was no longer going to represent himself as a man. He wanted to dress as a woman.
Q Okay. So he presented you this letter, which I think is Exhibit -- I forgot what Exhibit Number it was -- might have been the last one. Is it 7?
A Number 7, yes.
Q Yeah, Exhibit 7. So just for a little background and pursuant to the question of Mr. Price, you were presented that letter from Stephens?
A Correct.
Q Okay. And did anywhere in that letter indicate that Stephens would continue to dress under your dress code as a man in the workplace?
A No.
Q Did he ever tell you during your meeting when he handed you that letter that he would continue to dress as a man?
A No.
Q Did he indicate that he would dress as a woman?
A Yes. Yes.
Q Okay. Is it -- the reason you fired him, was it because he claimed that he was really a

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woman; is that why you fired him or was it because he claimed -- or that he would no longer dress as a man?
A That he would no longer dress as a man.
Q And why was that a problem?
A Well, because we -- we have a dress code that is very specific that men will dress as men; in appropriate manner, in a suit and tie that we provide and that women will conform to their dress code that we specify.
Q So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
A No.
Q Would you have hired and terminated somebody for being gay?
A No.
MR. PRICE: Objection, speculation.
MR. KIRKPATRICK: Okay. Okay. Speculation.
BY MR. KIRKPATRICK:
Q You had some questions about your moral beliefs and whether or not you fired somebody for being an adulterer; do you recall that?

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A Yes.
Q Would you fire someone just for being an adulterer?
A No.
Q As long as they followed the rules would they stay?
A Yes.
Q Including the dress code?
A Yes.
Q Okay. Or a woman who claimed that she had an abortion, as long as she followed the rules, would you have fired her?
A Yeah -- no, I wouldn't have fired her.
Q Okay. As long as she followed the rules, she could stay?
A Yes.
Q All right. Have you ever hired any gay people?
A Yes.
Q Or I should say, have you ever had any gay people work for you?
A Yes.
Q Have you ever fired them for that reason?
A No.
Q Okay. Now, there was questions about issues after Stephens was fired and things that you

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were thinking of when Mr. Price was questioning you and there was an issue of safety using restrooms; do you recall that?
A Yes.
Q That word "Safety", was it -- what, you believed that he was going the be physically dangerous to people?
A No. No.
Q What do you mean about you were concerned about safety about girls and women and granddaughters using the restroom with someone who was a man dressed as a woman?
A Well, just presenting in a funeral home an environment that is suitable for them to begin the healing process.
Q Okay. Would it be uncomfortable?
A Yeah, that it's a comfortable situation, yeah.
Q But, just to be clear, you didn't believe that just because Stephens had presented you this letter and told you what he told you, that somehow he was going the be a physical danger to anyone?
A No.
Q Okay. There was some questions that Mr. Price asked you about your interview you had with the

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EEOC investigator. Do you recall that?
A Yes. Yes.
Q Now, you were interviewed by this EEOC investigator prior to this lawsuit being filed against you?
A That's correct.
Q Okay. And I think there was questions about did you bring up anything about religious issues or religious objections or anything like that. Do you recall that question?
A Yes.
Q And we just made it clear that there was no lawsuit filed at the time?
A That's right.
Q And you just answered her questions, correct?
A That's right.
Q Did you -- were you under any belief that you had to present all and any defenses to -- might be from a lawsuit that wasn't filed yet?
A No.
MR. KIRKPATRICK: Okay. All right. That's it for me.
RE-EXAMINATION
BY MR. PRICE:
Q You were just asked about the investigator, you

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know, whether you were in a lawsuit or not. Is it your understanding that you only had religious freedom or protection under the Religious Freedom Restoration Act only if you're being sued?
A. I don't understand.
Q. Do you have to be sued before you have -- you're declaring your right to exercise your religious freedom or free exercise of religion?
A. No. But it wasn't up in a discussion, so it wouldn't be something that I would bring up.
Q. Okay. But it was one of your -- it's -- obviously it's one of your reasons for justifying your decisions with respect to Stephens, correct?
A. Yes.
Q. Okay. Now you're dealing with a Federal agency that's asking you your position on a charge, correct?
A. Yes.
Q. Okay. Wouldn't you feel the need to be as forthright and complete as possible in setting forth your justifications?
A. Yes, but she didn't ask me specific questions about my religious beliefs, or beliefs at the

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funeral home.
Q. Why would she have to if you don't mention that in any of your earlier responses?
A. I don't know why I would have to necessarily bring it up.
Q. So, how was the government supposed to understand that you have a religious objection or religious concerns if you don't raise them?
A. That's why they're raised now.
Q. Okay. But you didn't feel -- you felt like you didn't need to bother to bring that up during the investigation part?
A. I just thought that was just an investigation, she presented herself and said she's there just to investigate this, and make it as simple and as clean as possible.
Q. You were asked about the mission statement. Talking about, yes, at the first paragraph.
A. Uh-huh.
Q. My apology, I did miss that. Talks about honoring God in all you do as a company and individuals.
Do you believe that it would -- you would not have been honoring God if you continued to employ Aimee Stephens?

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A. Yes.
Q. You would not have been honoring God to keep that person in place?
A. Yes.
Q. And why not?
A. Because it would be, I believe, a huge disservice to the families that have called upon me, and expect certain criteria and certain services to be offered them. I think I would be doing them a huge disservice to them and to my -- to my staff, people that work for me, everybody that's involved.
Q. And to your own personal faith?
A. Absolutely.
Q. Okay. Because as you said before, God made men as men and women as women?
A. Exactly.
Q. Your -- it was mentioned before that you don't honor all of the legal holidays, obviously like Veteran's Day. Why are those six picked and no others?
A. Well, I didn't have anything to do with picking those, but they go back way before my time. I guess those were the original six considered legal holidays.

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Q. Okay.
A. And I guess just out of tradition we've never changed.
Q. Has there been any discussion of having Easter as a --
A. It has been discussed.
Q. Okay. What was the -- what was the thought? Why not?
MR. KIRKPATRICK: Objection to relevance. Go ahead and answer if you can.
THE WITNESS: It would require, you know, additional pay for one thing.
BY MR. PRICE:
Q. There's an expense to it?
A. Yeah, there's an expense to it, of course.
Q. Okay. Because I believe the holiday pay works you get -- you get an extra paid day, like paid for six days even though you're working five?
A. Exactly. Even when you're -- yeah, when you're not working so you're getting paid, yeah.
Q. Okay. You said -- you've been told -- or mentioned that you've had gay people work for you. Do you recall when most recently that was?
A. It's been awhile. It's been quite a number of

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Q. No, I violated my own rule by speaking over your answer.
Besides family complaints, what sort of things do you discipline over?
A. If things don't get done as they should, if there's a list whether verbally, written or things to get done and things don't get done, I just inquire why and why not. If they have a valid excuse, that's fine. If they don't, then we just need to address it and make sure things get done as they should.
Q. Okay. So that's basically for job performance issues?
A. Correct.
Q. That don't involve family?
A. Correct.
Q. How about for violations of the dress code? Do you discipline? Give verbal discipline for violations of the dress code?
A. I've never had to.
Q. Have you ever had an employee who wore an inappropriate jacket that said body snatcher?
A. Oh, that was Dan. Dan Kozlauskos.
Q. Could you describe that incident?
A. I believe it was when he had gone to pick

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somebody up rather than wearing his suit coat he had that on, and the hospice person or the nurse -- I don't remember if it was a hospice facility or hospital -- had contacted us and just said how inappropriate it was.
Q. What did you do to address that?
A. I told him he can't wear it anymore. So I guess I did. I just answered my own question that you asked.
Q. I just want to make the record clear.
A. Oh, that's fine. I appreciate that.
Q. But he didn't get terminated for that?
A. No, he did not.
Q. He was terminated for other reasons?
A. Yes.
Q. What was his position?
A. He was a runner or transporter.
Q. And what are the duties of a runner or transporter?
A. They get death certificates signed at doctors' offices, file death certificates as well as pick up bodies.
Q. I'd like to revisit the dress code for a second. Are women provided clothing from R.G. & G.R. Harris?

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A. No.
Q. Are women provided a clothing allowance or stipend?
A. Yes.
Q. Has that always been the case since you've worked there?
A. No.
Q. Do you know when that changed?
A. Within probably about the last few months.
Q. Last few months?
A. I think, yeah. I believe so.
Q. You're not sure?
A. No.
Q. Do you know why that changed?
A. No.
Q. Do you know how much the stipend or allowance is for?
A. I know the part-time and full-time are two different amounts. I believe it's 75 for the part-time.
Q. Okay.
A. And more for the full-time. I'm not sure the exact amount.
Q. Do you know who decided to implement the stipend?
A. No.

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Q. You weren't in any way involved in the process?
A. I was not.
Q. No one asked your input?
A. No.
Q. Has Tom Rost ever fired any employees that you supervised?
A. No. No, not that I remember.
Q. Did you consult with Tom Rost in firing the employees we've previously discussed?
A. Yes.
Q. All of them?
A. Yes.
Q. And what would the nature of those communications with Tom Rost be?
A. Voice my concern as far as why a person should be let go, and Tom would usually concur and proceed with the termination.
Q. Has Tom ever told you not to fire someone you wanted to fire?
A. He has not.
Q. Has Tom Rost ever discussed his religious beliefs with you?
A. No.
Q. Has Tom Rost ever led you in religious activities?

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A. No.
Q. Has Tom Rost ever encouraged you to participate in religious activities?
A. No.
Q. Have you ever had any sort of religious conversation with Tom Rost?
A. No.
Q. Would you consider R.G. & G.R. Harris to be a Christian business?
A. Yes.
Q. Why would you consider that?
A. All of us that go there are church-going people of different faiths, and to me a church-going person constitutes a Christian.
Q. Do you know that Tom Rost goes to church?
A. I believe he belongs to Highland Park Baptist Church.
Q. If you've never discussed religion with him, how do you know he goes to that church?
A. Because we've had families that come to us and we find out the source of the call, and they'll say I go to church with Tom Rost.
Q. R.G. & G.R. Harris provides funeral services for non-Christian families, right?
A. Yes.

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Q. And even for atheist, nonreligious families?
A. Oh, yes.
Q. So your understanding that R.G. & G.R. is a Christian business you've testified is based on the fact that a lot of the employees are church-going people?
A. Yes.
Q. Any other way you would consider R.G. & G.R. to be a Christian business?
A. Not really, no.
Q. There aren't bible studies or employee prayers?
A. There are not.
Q. Do you discuss your religious beliefs with your employees?
A. No. No.
Q. I'm going to show you what's been marked previously as Exhibit 6.
A. Okay.
MR. SHULTZ: Take a quick break and you can review it while we're breaking.
THE WITNESS: Oh, sure.
(A pause was had in the proceedings.)
BY MR. SHULTZ:
Q. Joel Kirkpatrick, R.G. & G.R. Harris's attorney, provided us with three documents responsive to

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document requests.
MR. SHULTZ: Do you want to describe what these are real fast for the record, Joel?
MR. KIRKPATRICK: Well, these are pursuant to your request for discovery, and you asked us to provide a Daily Bread that is used in the funeral home, a card there that says "What do you see" with the word Jesus on it. It's another card that's provided, and you also asked us to provide documents concerning our previous expert, Carl Jennings', material that he has provided, and so that's what we provided.
MR. SHULTZ: Let's go off the record for a second.
(Discussion held off the record.)
BY MR. SHULTZ:
Q. I'm going to show you what Mr. Kirkpatrick provided to us, which is the "What do you see, Jesus" card. We're not going to mark this as an exhibit right now because this is our only copy, and Mr. Kirkpatrick doesn't have any objections to the three exhibits we discussed.
MR. KIRKPATRICK: I have no objection.
BY MR. SHULTZ:
Q. Have you seen this card before?

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A. Yes.
Q. Why have you seen it?
A. They're available at the funeral home for anyone to take.
Q. Where at?
A. I think on the front credenza at each of the branches.
Q. Do you place those cards there?
A. Our secretaries make sure that they're filled and there's cards there for people to take.
Q. Okay. Do you direct them to place them there?
A. I don't think I've ever directed them. They just knew to do that prior to me getting there.
Q. Who would have told them to do that?
A. It could have been George Crawford.
Q. George Crawford?
A. It might have been Tom. I don't know. I'd have to speculate on that.
Q. So you're not sure if Tom Rost or George Crawford asked these to be placed at the front desks?
A. Correct. I'm not sure.
Q. Okay. Have you ever -- has Tom Rost ever encouraged you to take this card?
A. No, he hasn't.
Q. Have you ever encouraged an employee to take the

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card?
A. No, I haven't.
Q. Have you ever taken this card?
A. No, I haven't.
Q. I'm going to reference this Daily Bread pamphlet Mr. Kirkpatrick also has provided to us. We won't mark it as an exhibit since it's the only copy that we have, and I believe Mr. Kirkpatrick similarly has no objection.
MR. KIRKPATRICK: No objection.
BY MR. SHULTZ:
Q. Have you seen this Daily Bread?
A. Yes, I have.
Q. And have you seen multiple -- are there different versions of this Daily Bread?
A. I believe it comes out monthly or bimonthly.
Q. And where is this located?
A. It's on one of the tables in the funeral home in the public area.
Q. It's similar to the Jesus card, I assume, that families can take that if they need it?
A. Correct.
Q. Has anyone at R.G. & G.R. Harris ever encouraged you to take The Daily Bread?
A. No.

Q. Have you ever encouraged anybody to take The Daily Bread?
A. No, I haven't.
Q. Do you know who places The Daily Bread in the front area?
A. Tom does.
Q. How do you know that?
A. Because I've seen him carry the boxes in, take them out and set them out.
Q. Okay. You believe this happens on a monthly or bimonthly basis?
A. Yes.
Q. Let's go back to the Exhibit 6. Do you recognize this document?
A. Yes.
Q. And is this the employee manual for R.G. & G.R. Harris?
A. Yes.
Q. And that cover page says Employee Manual 1998; is that correct?
A. Yes.
Q. Has this always been the employee manual since you've worked at R.G. & G.R. Harris?
A. Yes.
Q. Did you receive a copy of this upon hire?

A. Yes.
Q. I'm going to direct you to the third page -- actually, the second page which is entitled Dress Code.
A. Okay.
Q. Does this reflect what you've testified is R.G. & G.R. Harris's dress code policy?
A. Yes.
Q. Then the third page under Personal Grooming, it says hair should be neatly trimmed and combed at all times. Extreme hair styles, sideburns or beards are not acceptable. Neat mustaches are allowed. Every man should always be clean shaven. Nails should always be trimmed and clean; is that correct?
A. Yes.
Q. Do you wear a beard?
A. Yes. Well, I wear a goatee.
Q. Is that not in violation of the personal grooming policy?
A. I believe it falls underneath moustache.
Q. So extreme hair styles, sideburns or beards are not acceptable?
A. Correct. It's not a beard to me. It doesn't go all the way up there, which would constitute a

beard. Kind of like you have is more of a beard.
Q. Okay. By beard you're referring to facial hair extending up to your hairline?
A. Correct.
Q. So your personal facial hairstyling you believe falls within the grooming policy because it's neatly trimmed?
A. Yes.
Q. But it's more than just a moustache, correct?
A. Yes.
Q. Okay. And you've never been counseled on violating the personal grooming policy?
A. I have not.
Q. Have you ever counseled anybody on violating the personal grooming policy?
A. Yes.
Q. Examples?
A. Funeral director that he had a beard and he was asked to take care of the beard.
Q. Who was the funeral director?
A. Jason Wright.
Q. He's not on your list of terminated employees, correct?
A. No.
Q. Is he still with the company?

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A. No.
Q. How did he leave?
A. I believe he was terminated from Garden City by George Crawford.
Q. Okay. Was he one of your employees that you supervised him when you counseled him on the personal grooming policy?
A. No.
Q. Why?
A. Tom had asked me to talk to him.
Q. Even though he wasn't one of your employees?
A. Correct.
Q. Why?
A. I don't remember. I don't know if George was not available or if George was on vacation. I don't recall.
Q. Jason was his name?
A. Jason Wright.
Q. Mr. Wright, was he hired with his beard?
A. I don't remember. Sorry.
Q. So you don't know if he was hired with it or if he grew it while he was employed with R.G. & G.R. Harris?
A. From what I recall, I think he had facial hair, but he got back from vacation and had

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considerably more and was asked to trim it or make it look neat.
Q. Okay. Do you know why he was terminated?
A. I don't.
Q. And he was George Crawford's employee?
A. Correct.
Q. George Crawford supervised him?
A. Yeah. It was either George or Ken Brodie. I can't remember under what manager he was let go. One of the two.
Q. Ken Brodie, he was the previous --
A. Before George.
Q. Any other times that you've disciplined someone for violating the grooming policy?
A. No.
Q. At the Garden City location, Troy Shaffer is your funeral director?
A. Yes.
Q. And you're his direct supervisor?
A. Yes.
Q. Do you and Mr. Shaffer have a division of work regarding upstairs and downstairs work?
A. Between him and I or just --
Q. Between you and him.
A. Yeah, I guess. Yes.

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Q. Could you define the distinction between upstairs and downstairs work, as you understand it?
A. Usually upstairs work is more with the family and more with the public. Downstairs work is more in the prep room dressing bodies, more of a by-yourself type of work.
Q. How did that division of work come about?
A. When I was hired, I was hired as a manager, which I don't get downstairs too often. And Troy was hired as a funeral director. He doesn't get upstairs too often. So I don't if that answers your question or not.
Q. Did Mr. Shaffer ever ask to do more downstairs work than upstairs work?
A. Yes. He expressed an interest in that.
Q. When did he express that interest?
A. It was soon after he was hired.
Q. And you weren't involved in hiring him, correct?
A. Correct. I was not.
Q. Were you at the Garden City location when he was hired?
A. I was not.
Q. So George Crawford hired him?
A. Correct.
Q. And you've been able to assent to his desire to

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do more downstairs work than upstairs work?
A. Yes.
Q. What would you consider downstairs as?
A. Embalming, dressing a casket, the bodies, applying cosmetics.
Q. So cosmetizing, dressing, casketing, embalming. Any other downstairs work?
A. That's about it.
Q. Roughly, how long does the embalming process take?
A. Usually about an hour and a half on average.
Q. And it depends on the condition of the decedent?
A. Correct.
Q. What does it depend upon?
A. If a person had an autopsy done, it adds considerable time. If a person was an organ donor, it adds considerable time as well.
Q. If they had both, how long would that take?
A. Four to five hours.
Q. Casketing?
A. Time frame for casketing?
O. Correct.
A. Roughly, about an hour.
Q. Time frame for dressing?
A. About a half an hour.

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Q. Do these time frames for dressing and casketing vary like it does for embalming?
A. Yes, they do.
Q. But the variation isn't as great?
A. Correct.
Q. What would be the range of possibilities for casketing time frame?
A. It could be anywhere from a half an hour to maybe an hour and 15 minutes.
Q. And the range of time it would take for dressing?
A. Could be as little as 15 minutes or as much as maybe 45.
Q. How about the time frame for cosmetizing, range?
A. That's roughly about the same. It's usually about 15 to 20 minutes.
Q. Okay. What would you consider to be upstairs work?
A. Meeting with families; directing funerals. Conducting services would be the same as directing funerals; clerical work as far as death certificates typed; death notice in the paper; what we call ordering where we order a casket and a vault for each case that we handle.
Q. What is your current division of upstairs work versus downstairs work that you do?

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A. Probably 95 percent upstairs.
Q. And five percent downstairs?
A. Correct.
Q. Do you still embalm bodies?
A. I have, yes.
Q. And how often do you embalm?
A. Maybe two to three times a year.
Q. Okay. Do you have an understanding for how often Troy Shaffer would be involved in embalming?
A. Yes.
Q. How often?
A. You mean per -- I guess I don't understand the question.
Q. How often does Troy Shaffer embalm bodies?
A. That's his main job there, so probably a hundred percent of the time when he's there.
Q. Okay. Did you work with an Anthony Stephens?
A. Yes.
Q. And describe how you worked with Anthony Stephens.
A. He was a funeral director at the Garden City office when I was a manager at the Harper office, and we worked together every once in a while in funerals or just me having to be at Garden City or vice versa.

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Q. Was he hired after you had started?
A. Yes.
Q. Were you involved in the hiring process for Stephens?
A. No.
Q. So you didn't interview Stephens?
A. I did not.
Q. Do you know who was involved in the hiring process for Stephens?
A. Tom. I know Tom. I don't know if anybody else was.
Q. Okay. And prior to being the Garden City manager, you were the manager in the Detroit location?
A. Correct.
Q. Which is the headquarters?
A. Yes. You could say that.
Q. Was Stephens initially hired as an apprentice?
A. Yes.
Q. And did Stephens work in the Detroit location?
A. No.
Q. Where did Stephens initially work as an apprentice?
A. The Livonia office.
Q. So at no time during Stephens' employment at R.G.

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& G.R. Harris did you supervise Stephens?
A. Not directly, no.
Q. What do you mean by not directly?
A. When we'd work together, you know, there would be that, I guess, supervisor versus -- kind of the hierarchy. I'd be his supervisor. If we happened to be working together I would direct him what to do, but on a daily basis I didn't direct him.
Q. So that's similar to you verbally disciplining Jason regarding the beard?
A. Correct.
Q. He wasn't your direct employee, your direct supervisory responsibility, but you are a manager for R.G. & G.R. Harris and he is under manager?
A. Correct.
Q. So the same thing with Stephens; you didn't directly supervise Stephens, but if you were working together then you would be the boss?
A. I was his boss, right.
Q. Okay. How often would you work with Stephens?
A. It varied. It really did. It could be once a week. It could be not at all that week. Could be every day depending on how busy we were --
Q. What was your --

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calculated for what the women are going to be paid for their clothing?
A. I do not.
Q. Okay. Do you know how much they are paid?
A. It may have been mentioned to me. I do not recall.
Q. You don't pass out the checks or anything like that to the women, do you?
A. No, I don't.
Q. All right. And you weren't party to the decision for or consulted as part of the decision to say, you know, how much should we pay the women for this?
A. No.
Q. All right. At some point -- well, let's back up a little bit. You see that you are the primary point person for dealing with the families and friends of the deceased?
A. Yes.
Q. All right. What do you do with respect to that? What are your interactions? What do you do with respect to interacting with the families and helping them through this process?
A. Well, when death occurs and the family comes to the funeral home to make funeral arrangements, I

or one of the other managers would meet with them, but if it's our Livonia chapel more than likely it would be me unless it was my day off.
I meet with the family, talk about the details relating to filling out a death certificate. I talk about what their wishes are for the type of service they'd like us to perform, all details relating to a funeral; ministers, whether a minister or a celebrant was going to be used; where the funeral would be held, at the funeral home or at a church; discuss visitation times, funeral times; whether they would like to have a notice placed in the newspaper, and if so helping assisting them in doing that; music; all things relating to a funeral.
Q. And you are also responsible for directing the funeral? That's one of your primary responsibilities?
A. Yes. Uh-huh.
Q. When you direct a funeral, what do you do? What are you doing in this?
A. Well, I make sure that the room is set up properly for a funeral. If it's at the funeral home that the chairs are all set up; that there's

a podium for the minister to use. I meet the minister when he comes in. I talk to the family, show them where to be seated, coordinate any music wishes that they would like to have for the service, play music in the background.
We record our funerals, video record them, so I set up the video. And then after the funeral is over I'll go in and give families or give the attendees instructions on what's going to happen next, whether we're going to be leaving and going to a cemetery or if we're going to be invited to a funeral luncheon, things like that.
Q. Fair enough. And do the funeral director embalmers ever do these sort of things, these kind of interactions with the families, you know, the shepherding through the process?
A. Which part of the process?
Q. Meeting with the families to ascertain their wishes and desires. Anything like that?
A. Mostly not.
Q. Okay.
A. Occasionally one of the -- someone other than a manager has met with the family. Mostly not.
Q. Okay. And who else -- who can you recall having done this?

A. Well, for instance, Derek Hamer, who is working with me there at our Livonia chapel, he has met with two or three families.
Q. On his own or --
A. Yes, because myself or one of the other managers wasn't available.
Q. Okay.
A. Before that, before him Matthew Rost had made some funeral arrangements as well.
Q. What about directing the funeral, you know, getting it set up, the podium, that sort of thing. Are you primarily the one that does that?
A. Myself or one of the other managers, yes.
Q. Okay. Has a nonmanager ever done that part of it?
A. Yes.
Q. Okay. Whom?
A. Again, Derek, who works with me at Livonia.
Q. And how often has he done that?
A. Three or four or five times. I don't recall exactly how many. And before him, of course, Matthew.
Q. Right. And currently Matthew Rost is a manager at the Detroit location; is that correct?
A. Yes.

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up, no.
Q. Now, do you recall if after this incident with Mr. Hamer that he got a new suit or got it repaired? Do you recall one or the other?
A. He got it repaired.
Q. And for your counseling, was it again a matter of getting a suit repaired?
A. Yes.
Q. How often do you think you've had to do this?
A. Probably twice.
Q. During his entire --
A. Yeah.
Q. -- year and a half or so of employment?
A. Right.
Q. Now, isn't it true that R.G. & G.R. Harris does funerals for people of all kinds of religions or even no particular religion?
A. Yes.
Q. All right. What kind of nonChristian funerals do you recall directing or participating in? I'm talking about religious funerals, not people of no observance.
A. We've had an occasion -- are you talking about like a Jewish service?
Q. Jewish or Hindu or any other religion?

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A. Hindu, Muslim, all -- yeah.
Q. You've done all those?
A. Yes.
Q. Jewish, Hindu and Muslim, and these are at the Livonia facility or do you go out to --
A. Both. Mostly at the Livonia facility, yes.
Q. Now, do you do anything to prepare for a Jewish funeral? Is there something -- do the men have to wear yarmulkes or anything like that?
A. Yes.
Q. Yes?
A. Yes.
Q. Are those kept on site or is that something the family provides?
A. The family or church would provide those, the synagogue.
Q. Would give you those things?
A. Yes. We don't have any on site.
Q. Now, is there anything kept on -- are there any kind of religious objects that are brought out that R.G. & G.R. keeps in storage for certain kinds of funerals? Like a crucifix for a Catholic funeral?
A. Obviously, yes. Crucifix, candles, kneeler for Catholic services.

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Q. And that's kept a Livonia?
A. Yes.
Q. Anything else like that kept at Livonia for different types of funerals?
A. No, not that I can think of.
Q. Now, when the synagogue has -- there's a funeral there for someone who is Jewish, the men are given yarmulkes. Is there anything else the synagogue provides for this that you can think of?
A. If the deceased is to be dressed in a certain gown, they would provide that, but I can't think of anything else. And I must tell you that we have done a couple of Jewish funerals over the entire time I've been there.
Q. Fair enough.
A. They generally go to their own directors.
Q. Yeah. There tends to be the network. There's been other testimony about it, that yes, it tends to be kind of that way. So all right. And you also indicated you do these funerals for people who are of no particular religion as well?
A. Yes.
Q. And that's when you would come in to -- usually

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that's when your celebrant role would kick in?
A. Correct.
Q. All right. Do you know of any other celebrants -- licensed celebrants at R.G. & G.R.?
A. Yes.
Q. Who are they?
A. Summer Plosky.
Q. At your Livonia location?
A. Yes.
Q. Anybody else?
A. Tia Macklin was. She's deceased now.
Q. Anybody else?
A. No.
Q. Have you ever had any discussions about religion with Mr. Rost?
A. Discussions about religion. No.
Q. Okay. Has he ever kind of expressed to you in some way that he regards R.G. & G.R. as a Christian business?
A. Sure. If you read our mission statement, it's pretty obvious that we're a Christian funeral home.
Q. Now, when you talk about the mission statement, is that something on the website?
A. I believe it's in our employee handbook. At

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least, I thought it was in some copies of it.
Q. I'm going to show you what was marked as Exhibit 6 during Mr. Rost's deposition. If you could take as much time as you need to review that, please.
Do you recognize this document?
A. I do.
Q. Okay. Is this the employee manual still covering employees at --
A. It is.
Q. All right. I have reviewed it. I do not see any kind of mission statement in that.
Is that safe to say there's not a mission statement in there?
A. It is.
Q. All right. I'm going to show you what was marked as Exhibit 5 during the same deposition. Do you recognize this document?
A. I do.
Q. Okay. Is this the mission statement you were talking about?
A. It is. I apologize.
Q. No problem at all. Now, do you know who drafted this mission statement?
A. I do not know who drafted it.

Q. Okay. Now, there are -- so you don't know who -- you don't even know if it was drafted by somebody at R.G. & G.R., correct?
A. I do not have -- no, that's correct.
Q. All right. Okay. And there are two statements. There is about at the first paragraph "Our mission is to honor God in all that we do as a company and as individuals." And also there's a biblical verse at the bottom from the gospel according to Matthew.
Okay. Is that the religious part of the -- is that the basis by which you say it's kind of a Christian business?
A. Yes.
Q. Anything else?
A. Well, I happen to know that Tom Rost is a Christian. I know that he's been affiliated with the church over the years.
Q. Do you have people, to your knowledge, who work at R.G. & G.R. who are not of any particular religious affiliation?
A. Not that I'm aware of.
Q. Okay. It's certainly something -- you don't ask about someone's religious affiliation or something like that before you hire them?

A. Absolutely not.
Q. Okay. Now, what is your religious observance?
A. I'm a Christian.
Q. What church do you go to?
A. I attend Ward Presbyterian Church.
Q. Where is that located?
A. In Northville.
Q. Now, with respect to -- is there any way that religion is exercised at R.G. & G.R.? Are there religious activities there?
A. No.
Q. Okay. No bible studies?
A. No.
Q. Nothing like that. No meetings for prayer or anything like that?
A. No.
Q. Okay. Do you -- is there anything that Mr. Rost hands -- provides for the public to take, like devotional books or anything like that that you can recall?
A. He provides The Daily Bread booklet that's sitting on our tables at each one of our locations for people to take if they wish. Oh, I'm sorry, and our Jesus card.
Q. That's okay. Yep, and the Jesus card.

A. That's what you see.
Q. We've already talked with Mr. Kirkpatrick about this.
MR. KIRKPATRICK: No objection.
BY MR. PRICE:
Q. Yeah, to show you this. We're not going to have it as an exhibit. This is our Daily Bread here from January, February -- December, January, February. That's the current one that's out there?
A. I believe so, yes.
Q. And Mr. Rost supplies those?
A. Yes.
Q. All right. And the next item is the Jesus card. It's been called What Do You See and there's the shadow?
A. Yep.
Q. Is that again provided by Mr. Rost?
A. I don't know. It's been there forever. It's been there since I've been there. I don't know.
Q. Are these available like at the credenza up front where people come in?
A. Yes.
Q. It's something they can take or not take as the mood strikes them?

EXHIBIT Z

That kind of thing.
Q And only skirts, no pant suits?
A Skirts are preferred, the preferred method of dress, yes.
Q Okay. And is that it for the female dress code?
A That's pretty much, yeah. Yeah.
Q Okay. And the male dress code?
A The men wear a suit and pants. There's a matching tie, so that it's very uniformed. A white dress shirt. I believe there is a requirement about shoes that they're not boots or they're more dress shoes. There's certain lapel pins that they can wear, and what they can keep in their pocket. So that it's not overly bulging, and that's about it.
Q Okay. And the dress code is by gender and not by position type, correct?
A I wouldn't exactly say that, because I believe that the funeral directors wear the same matching suits, opposed to like a non-funeral director.
Q So what would a non-funeral director wear?
A A dark jacket, a shirt and a tie, dark pants.
Q It's my understanding that R.G. G.R. provides

suits to its male employees?
A That -- that is correct.
Q To both funeral directors and non-funeral directors?
A That's correct, yeah.
Q Okay.
A Yeah.
Q You look a little hesitant.
A Well, sometimes if they're -- like sometimes if it's a part-time person, very part-time what I just described, suit or the jacket and pants are acceptable.
Q Okay. I believe Mr. Rost testified that full-time male employees get two suits provided by the company, plus two ties, and part-time employees get one suit, but there are -- are you testifying that there are certain part-time employees that may not get a suit at all?
A Well, there are part-time male employees that are not funeral directors and are not runners that generally just dress in what I'm saying.
Q Okay.
A You know. That they're not funeral directors or runners for us.
Q What is a runner?

A A runner would be someone who goes and obtains a doctor's signature on a death certificate. Sometimes they'll make a removal from where the death has occurred. But generally they are all wearing the matching suit.
Q Okay. And do you know where R.G. G.R. obtains the suits that it provides for its male employees?
A Yes. I think it's called Sam's -- I don't recall the exact name. But it's --
Q Okay.
A It's called Sam's, I believe.
Q And are you responsible for paying invoices from that -- from Sam's?
A That is correct. They're usually set up on a charge that is sent to us.
Q And you maintain those records for those invoices?
A I do.
Q Okay. Do you have any knowledge of how much R.G. G.R. pays for a suit from Sam's?
A For each suit individually? I want to say it might be like 200. Depends on the tailoring. So sometimes they'll vary a little bit.
Q But the charge records would have that

information on it?
A Correct.
Q Okay. Do you know how often R.G. G.R. provides suits to its male employees?
A They're pretty much as if -- wear and tear.
Q As needed?
A Uh-huh.
Q So upon hire, full-time employees are given two suits, part-time employees one, and then they're replaced as needed?
A That's fair to say, yeah.
Q So we have two suits and two ties or one suit and one tie. Any other clothing that's provided by R.G. G.R.?
A No.
Q And it's my understanding that R.G. G.R. now has a dress allowance for its female employees; is that correct?
A Clothing allowance.
Q Clothing allowance. Could you describe what the clothing allowance is?
A $150 for a full-time person and $75 for the part-time.
Q And this is per year?
A That's correct.

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Q Do you know when the clothing allowance was implemented?
A 2014.
Q 2014. Do you know why the clothing allowance was implemented?
A At one time, they tried to do the womens (sic) -- to all have the same suit. And I've been there so long, I can tell you it was a fiasco. We have younger females. We have older females. We have tall and skinny, short and full-figured. No one could agree on anything. So, it -- and that's just simply the truth. And we were then given the option to wear, you know, the skirt that you were -- you know, whatever you were comfortable in, the colors had to comply; and so they re-brought that in to give us some help to get jackets or blouses or skirts or --
Q Do you remember when those -- that discussion regarding the -- whether R.G. G.R. would provide clothing to its female employees, when that was?
A It was several times over the course of the time that I was there.
Q Okay. So from 1986, '89?

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A '88.
Q 1988 through the present it happened several times?
A That we've tried to, you know, get everybody on the same page.
Q Okay.
A Never works.
Q But the clothing allowance didn't begin until 2014?
A That's correct.
Q And were you involved in the decision-making to begin providing a clothing allowance?
A No.
Q That was --
A Tom's.
Q Mr. Rost's decision?
A Uh-huh. Uh-huh.
Q Did he consult with you at all regarding that decision?
A He told me what the amounts were, because obviously I would make the payments to the girls.
Q Did you help him at all in determining how much?
A No.

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Q So you don't have any understanding of the process to determine how much the allowance would have been?
A No.
Q Okay. So you can't explain Rost's calculation for the 150 or $75?
A No.
Q I'm going to hand you what's been marked as Exhibit 8. Are you familiar with that document?
A I am.
Q Why are you familiar with that document?
A Because I believe I typed this.
Q Okay. And so this is in response to an EEOC discovery request and it appears to be a list of employees by name, gender, job title, and either the clothing allowance provided or the clothing provided per employee; is that correct?
A That's correct.
Q Okay. And so, for instance, the first person on that list is Marla Jones; is that correct?
A Marie Jones.
Q Marie Jones. And there's $300 there?
A Right.

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Q Is that the total clothing allowance that Marie Jones has received?
A That is correct.
Q Do you know if Marie Jones is full-time or part-time employee?
A Full-time.
Q So that appears to be two years of the clothing allowance?
A That is correct.
Q Okay. So, is that chart -- does that chart just go back two years or is that the entirety of the clothing allowance provided by R.G. G.R.?
A I believe there was a time frame of employees that you asked for, and that's the employees that are on the list. I don't remember what year you had me go back to.
Q Well, if the clothing allowance started in 2014, then that would just be two years of clothing allowance, right?
A For Marie Jones?
Q For everyone, if R.G. G.R. only started providing a clothing allowance to its female employees in 2014, there would only be two years of clothing allowance for anyone, right?

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vacations, who's covering that -- just a basic communication.
Q Okay. And do these -- you said that the Karl Jennings' presentation happened at a manager meeting off site?
A Uh-huh.
Q Are these meetings typically off site or are they --
A Off site.
Q Do you remember if there was ever a discussion of Stephens' termination at any of these manager meetings?
A No, never.
Q And I'm pretty sure I asked this, but I want to make sure that I ask this. You had no role in R.G. G.R.'s decision to terminate Stephens, correct?
A None.
Q Mr. Rost never told you he was firing Stephens based on any moral or religious reasons?
A Never.
Q Did he tell you he was firing Stephens because Stephens wasn't going to abide by the male dress code?
A That is correct.

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Q Has any other employee been disciplined or terminated for dress code violations?
A Yes.
Q Do you remember when?
A It was an employee who's no longer with us, he wore a jacket into a nursing home for removal, and the nursing home called because they didn't care for the content of the jacket and he was talked to and told not to wear the jacket anymore, and he didn't.
Q It wasn't a suit jacket --
A It was a regular jacket.
Q Regular jacket that had some writing on it?
A Yes.
Q Do you remember what the writing was?
A It said "body snatcher."
Q So Mr. Rost counseled him verbally?
A The manager, David Kowalewski, talked to him. The other managers talked to him and said no more jacket.
Q Okay. And then he stopped wearing it?
A And never wore it again.
Q So he wasn't -- the reason he no longer works for R.G. G.R. isn't because he was terminated for wearing the jacket?

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A No, he was not terminated for that.
Q Okay. Any other dress code violations that you can remember?
A No. If somebody is not wearing the appropriate clothing, it's brought up to them and they are to wear what we are supposed to wear.
Q Okay. What is your perception or understanding of the religious environment at R.G. G.R.?
A I'm sorry, one more time.
Q What is your perception or understanding of the religious environment at R.G. G.R.? I can be more specific.
A Please.
Q Are there employee Bible studies?
A No.
Q Prayer groups?
A No.
Q Any sort of religious activities that R.G. G.R. sponsors or conducts for its employees?
A No.
Q Mr. Rost or another R.G. G.R. employee -- scratch that.
Has Mr. Rost ever discussed his religious beliefs with you?
A No.

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MR. SHULTZ: I think if you give me a couple minutes.
MR. PRICE: Take a break?
(Off the record at 11:16 a.m.)
(Back on the record at 11:26 a.m.)
MR. SHULTZ: Just a few followup questions to tidy up the record, then Joel will have some limited questions, I assume, and then we're almost done. So moving fast, thanks.
THE WITNESS: Okay.
BY MR. SHULTZ:
Q I'd like to go back to the chart.
A This chart?
Q Yeah. I believe you said your son works at the Detroit office, right?
A Correct.
Q David?
A Ryan.
Q Ryan. I don't see him --
A He just started with us --
Q Oh, okay.
A -- not too long ago.
Q So he received the two suits when he started?
A No. He works in the accounting department with me.

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was a friend of his that he used to work with was at a funeral home and they were looking for a funeral director but it would offer me more downstairs work that I was interested in.
Q Who was the manager at Voran that contacted you?
A It's Pat Dillon, last name Dillon.
Q And who was the friend at Harris who was looking for this funeral director downstairs work?
A Was Dave -- David, I should say, Kowalewski.
Q And which of Harris' locations does Mr. Kowalewski manage?
A Now or at the time I was hired?
Q At the time -- actually at the time you were hired?
A He worked out of the Detroit location.
Q Okay. And now what is he, the manager --
A He's the manager in Garden City.
Q Okay. So, you heard about this and what did you do?
A I'm trying to remember. I believe Dave Kowalewski called me. I was -- I'm trying to remember if I called him, but I'm pretty sure he called me.

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Q Okay. And did he explain the job to you?
A Yes.
Q Did he -- was there a discussion of whether this was going to be a mostly downstairs work type of job?
A Yes.
Q Did he indicate that to you, or did you indicate your preference, or was it kind of both agreed upon this would be that kind of job?
A Pat Dillon explained to David Kowalewski that I prefer the downstairs type work, so he had already known that that was my preference.
Q Okay. So, you spoke with Mr. Kowalewski and what did he -- did he say "Come in for an interview", that sort of thing?
A He explained the job, and then said to -- again, I'm trying to remember, I believe call Tom Rost to set up an appointment.
Q And you did so?
A I did.
Q Did you interview with Mr. Rost?
A Yes, I did.
Q Did you interview with anybody else?
A No.

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Q All right. How long did your interview with Mr. Rost go?
A I'm sorry, you said how long was it?
Q Yeah. How long was it, period of time, do you recall?
A 20 minutes.
Q What did Mr. Rost say to you about the job?
A He went over what would be my job duties had I been interested in working for him.
Q Okay. Now, did you, at this point, express your desire to do more of the downstairs work during the interview?
A It's -- it's hard to answer that, because he knew with me before I even got there, that I preferred to do the downstairs work.
Q Okay. How did he know that?
A I don't know for sure. I would be speculating to say, David Kowalewski.
Q Okay. But he told you he understood that you preferred to do downstairs work. Was there an understanding that that was going to be the focus of your work?
A That was the understanding, correct.
Q That was expressed during this interview?
A The jobs associated with it was expressed.

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Q Okay. And what were the jobs associated with it expressed?
A Removing decedents from their homes, nursing homes, hospitals, and bringing them back to the funeral home. Decedents that had the permits, transport them to the crematory. Have -- get death certificates signed by doctors, file death certificates at whichever city they died in, embalm decedents, dress them, casket them, cosmetize them, set them up in the chapel for viewing. Set the chapel accordingly to whatever the family's wishes are.
Q Okay. So you would not be doing the client -- the family contact material. You would not be meeting with them, you know, leading them on processions, any of that?
A Correct. That was --
Q No, go right ahead.
A I'm sorry. That was discussed at the interview and my understanding was the managers meet with the families.
Q And who -- we're talking about the managers of each location?
A Correct.
Q Did you understand if you would be having any

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level of contact with the families?
A Yes.
Q Okay. What kind of contacts and things would you have?
A They really try keeping me busy doing things downstairs or running death certificates, but if I don't have anything to do, then they may ask me to help run -- I'm sorry, help -- assist in funerals.
Q Okay. And in what way would you help with -- would you assist in this process?
A Parking, parking the lot, which means getting the family in procession if there is a procession to the cemetery, directing the cars as to -- if they're going in procession or not. Also, sometimes helping close the casket and taking the casket out to the hearse. Other times just stand at the front door and greet people that come in.
Q Approximately how many times per month would you be doing this sort of work away from -- non-downstairs work?
A I'm sorry, you said a month?
Q Yeah. Or can you give me some level of frequency you're more comfortable with, say?

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A It is -- it's random. But if I had to put a number on it, possibly five times in a month.
Q Possibly five times in a month. Could be more, could be less?
A Correct.
Q It could be five times a month doing one of these activities helping with the casket or getting the family in procession or, you know, getting the cars in the lot?
A Correct.
Q Okay. Now -- and again, I believe you stated this was your preference to -- you were more comfortable with doing the embalming, the casketing and preparation of the body?
A Correct.
Q Okay. And you were told this was acceptable when you were hired, correct?
A Acceptable in what sense?
Q Acceptable that you would be focusing more on downstairs work?
A Correct.
Q And has this been the case, that you -- you have been more focused on downstairs work since you were hired?
A Yes.

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Q Okay. Now, what facilities do you work out of?
A I work out of the Garden City location. But I work wherever work needs to be done, including the Livonia location and the Detroit location.
Q And you would go to the Livonia location and Detroit location to do this kind of downstairs work?
A Correct.
Q What work do you do with respect to the cremation aspect of the business, if any?
A I can tell you the procedures I do with the decedents.
Q Okay.
A But I don't do anything at the crematory. So I'm not quite sure what you're asking.
Q Do you prepare bodies to be sent to the crematory; do you deliver the bodies there?
A Yes.
Q Okay. What do you do with -- you don't actually do the cremations yourself though, correct?
A Correct, I don't.
Q So what do you do with the crematory process?
A I would pick up a decedent from wherever they may be located. When I bring them back to the

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chapel, there's a cooler we keep everybody in. I take their thumbprint for every -- every decedent, there's paperwork that I fill out, asking where the body came from, what time, any belongings, jewelry, clothes, anything -- any markings, tattoos, and basically describe what I see with the body.
Q Okay.
A And then once the family is called and the papers are signed and the permit is signed, then I take the paperwork as well as the decedent to the crematory.
Q Okay. And that's in Detroit? I'm sorry, that's in Canton?
A Canton, yes.
Q And what do you do; you just drop -- you pass the body, the custody of the body over to someone at Canton?
A I put the decedents in the back of a work van I use every day, and when I get to the crematory, sometimes there's a worker there and sometimes there isn't. If there isn't a worker present, I unlock the door, take the alarm off, pull the decedent out on kind of an electrical truck, and place them in the cooler. If there is a

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A Correct.
Q Do you have an understanding if there's a dress allowance for women who are meeting with the public?
A I've heard rumors there is. I've heard rumors there is not. I can't say with any certainty if there is or is not.
Q You simply don't know.
Okay. Have you ever heard of a person named Karl Jennings?
A No.
Q Okay. Have you ever reviewed Harris' website?
A Yes.
Q Okay. Including the mission statement page?
A Yes.
Q Were you asked to review that?
A Was I asked to?
Q Review the mission statement page?
A No.
Q Okay. What about the Facebook page for Harris? Are you familiar with that?
A No.
Q Okay. Now, when you're -- I understand you remove bodies from hospitals, nursing homes. Are you doing this on your own?

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A With removals from nursing homes and hospitals, I will do that -- those on my own. When there's a removal at a person's home, two people -- two employees go every time for that removal.
Q That makes sense. Who is normally -- if you have to do a private home removal, who goes with you?
A It varies.
Q Okay. Is it usually another funeral director or manager or something like that or --
A It could be -- it could be another manager or there's another person that has my type of job in Livonia.
Q Okay. When you say your "type of job", what do you mean?
A A person in Livonia that does the same type of jobs that I do in Garden City.
Q Okay. And who is that?
A Derek Hamer.
Q How long has Mr. Hamer been there, if you know?
A I -- I don't know precisely.
Q Now, when you say he does the same type of stuff you do, are we talking about focusing on the downstairs embalming work?

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A Correct.
Q Is it safe to say that managers of the homes are the ones who are having the most contact with families?
A Yes.
Q Okay. Helping them out with the grieving process?
A Yes.
Q The most contact helping them make arrangements and so forth?
A Yes.
Q Okay. In your workplace, are there any kind of posters on the wall that talk about your rights under the law like Equal Employment Opportunity Commission or workers' comp posters or something like that, that you can think of?
A Not that I can think of.
Q Okay.
A Not that I've noticed.
Q Okay. Is there like a break room or employee room there where you can have lunch in Garden City?
A Yes.
Q Do you recall if there's any kind of posters up there that deal with employment at all?

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A There is a poster that is about achievement and something about being successful.
Q Okay. So it's kind of a positive message poster, positive kind of thing poster --
A Correct.
Q Now, just going back a little bit, when you are interacting with the families in those situations where you're being asked to park a car or get them lined up to go to the funeral home or greeter, are you doing anything specifically with their grieving process; are you helping with their grieving process or are you just playing a different kind of role? You're not giving any kind of counseling, right?
MR, KIRKPATRICK: Objection. I mean, that's a compound question. You asked him two questions, stopped and asked him another question. If you understand, just -- compound. I try not to interrupt you too much but --
BY MR. PRICE:
Q In the times when you are interacting with the families, are you doing any kind of grief counseling?

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A I'm not doing any type of grief counseling, however, a family member may start speaking about the decedent in stories, and almost getting things off their chest, but even then I'm just more of a listening ear or I may give them positive reinforcement.
Q So you're kind of a sympathetic ear?
A Correct.
Q And you might offer the occasional affirmation if someone does unburden themselves to you?
A Sure. Anything positive that I can provide.
Q But that's certainly not the main part of your job?
A Correct.
Q Okay. It's certainly not a big part of your job either?
A Correct.
Q Have you ever heard your particular work described as a ministry before?
A I believe I've heard that before.
Q Where did you hear that?
A That, I couldn't tell you.
Q Was that at Harris or was that just a general description of the funeral industry?
A When I've heard that, I don't know if it was

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while working or on TV. I've heard it referred to as that, but I couldn't tell you where I've heard that.
Q Okay. I apologize if I've asked this before, it's just -- we're at the end of the week here. Do you recall specifically religious literature being offered in the workplace?
A I know --
Q Other than the Bible. You talked about the placement of the Bible. But anything else like being offered to people?
A There are pamphlets near the front door. One is our Daily Bread is the title of it. And those are free for anyone that would like to take one.
Q Okay. Is that all you can think of?
A Yeah.
Q Do you know who puts them there?
A No.
MR. PRICE: Okay. I don't have anything else.
MR, KIRKPATRICK: Take a break, see if I have any followup or anything like that.
MR. PRICE: Sounds good.
(Off the record at 2:03 p.m.)

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(Back on the record at 2:14 p.m.)
EXAMINATION
BY MR, KIRKPATRICK:
Q Mr. Shaffer, do you recall Mr. Price asking you questions about embalming and the procedures and processes; do you recall that?
A Yes.
Q Okay. I think you testified, if I'm not mistaken, that you had a very busy month where you had once nine embalmings; is that right?
A Yes.
Q That would be the high end of your monthly output, so to speak, for embalmings?
A Yes.
Q And I think you testified an embalming could take anywhere from half hour to two hours?
A Yes.
Q So if there was nine done in a month, talking anywhere from 4 and a half to 18 hours of embalming time?
A Correct.
Q Depending on the circumstances?
A (Shook head in an affirmative manner.)
Q I think you testified that you remove your suit only to put on appropriate garb, so to speak,

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to do these procedures, right?
A Correct.
Q So what percentage would you give, if you could, as to you being required to have your suit on during your normal workday or work month, I should say?
A I would say 90 percent of the time I'm wearing a suit.
Q Okay. And you were hired to be a licensed funeral director; is that true?
A Yes.
Q And you -- and part of your job you have to go pick up bodies times from hospitals or homes, I think you testified?
A Correct.
Q You were wearing a suit at that stage, right?
A Yes.
Q Why is that?
A Because I'm representing the funeral home and anybody that I come into contact with, needs to represent the funeral home. I need to look professional. So, that's why I wear a suit.
Q When you were hired by Mr. Rost, was there an understanding that you would be doing all job requirements of a licensed funeral director,

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review that, please.
MR. KIRKPATRICK: The date was 11/12, so I know there were two days of depositions.
MR. PRICE: It would have had to have been.
MR. KIRKPATRICK: So he was first.
Q. (By Mr. Price) Do you recognize this document?
A. I do.
Q. Okay. What is this?
A. It's the employee's handbook.
Q. Okay. Now, is this the employee handbook that was in effect during your entire tenure at R.G. & G.R.?
A. Yes, it was.
Q. All right. Were you responsible for enforcing any aspects of the handbook?
A. Yes.
Q. What were you responsible for enforcing?
A. Just making sure that all employees met the dress codes, just all aspects of the employee handbook.
Q. Now, there's basically two aspects to it. There is a dress code for men and also there's one for women. What was your understanding what the dress code for men was?
A. The dress code for men was pretty straightforward, dark blue suits. They were actually furnished by the company.

Q. It also would come with a tie, correct?
A. Correct.
Q. Now, who would be responsible -- who would be required to wear the suits?
A. All of the funeral directors.
Q. What about assistant funeral directors?
A. Assistant funeral directors, yes, they were.
Q. All right. All the embalmers?
A. Yes.
Q. All the managers?
A. Correct.
Q. Anybody else that you can think of who would have to wear a suit?
A. Anyone that was employed by the company.
Q. Any of the male employees?
A. All of the male employees were.
Q. Okay. Now, how did you get the suits?
A. They were actually furnished, there was a tailor in Farmington Hills. You would go there, you would get measured, and in about two weeks they'd call and they'd be ready.
Q. Now, my understanding is -- and correct me if I'm wrong -- that these suits would be gradually replaced as they wore out?
A. That is correct.

Q. How often would you say that you, yourself, would need to get a replacement suit?
A. I would say personally every nine months to a year.
Q. Now, did you have any understanding of how often Stevens would go through a suit at this time? Would it be more or less?
A. I wouldn't really have any knowledge of that.
Q. All right. But for yourself personally every nine to twelve months?
A. Nine to twelve months, yes.
Q. Do you know how much these suits cost?
A. I don't.
Q. Now, at any point during your tenure were women given a clothing allowance to purchase clothing?
A. I'm not aware of that.
Q. Okay. When was your last day at R.G. & G.R., if you can recall?
A. It was June, I'm going to say June 30th, '13.
Q. 2013?
A. 2013.
Q. Okay. About a year and a half -- you said year and a half?
A. Yes.
Q. Okay. What was your understanding of the female dress code?

A. They were required to wear conservative dark clothing.
Q. Anything else you can think of, any other limitations? Could they wear pant suits or did they have to wear skirts?
A. I believe it was skirts.
Q. Okay. And during the time you were there, they were responsible for providing their own clothing?
A. I believe so, yes.
Q. Okay. You don't recall any women going out to get clothing on the company's -- or being issued checks on behalf of the company?
A. I'm not aware of that.
Q. Okay. Who did you supervise or who was working at the Garden City facility while you were there, while you and Stevens were both there?
A. For office staff we had two women that worked in the office, Dolly and Sharon. Then there was myself and Anthony. We had Michelle who would do hair, cleaning, and also worked visitations.
Q. I want to just back up a little bit. You were still employed when Stevens's employment terminated, correct?
A. Correct.
Q. Okay. So if I tell you this, that -- and I don't think it would be disputed -- Stevens was still working through July of 2013, so would it be safe to say that

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Q. But it was a young lady? Young woman?
A. I honestly don't recall.
Q. Okay. Fair enough. Now, you've had a chance to review this. I just want to go over a couple things for you. You already kind of described your job duties. That's on page 2. We went over that. We talked about the dress code also on page 2. First of all, do you see any inaccuracies in this statement?
A. No, I think it's fairly accurate.
Q. Okay. Is that your signature on page 4?
A. Yes, it is.
Q. Okay. And is that your -- did you date it as well or was that the investigator who did that?
A. That looks like my writing.
Q. Okay. So approximately March 25th of 2014 you had this interview?
A. Yes.
Q. All right. And do you recall you were sworn as well when you gave this?
A. Yes.
Q. Very good. Now, you mentioned in here that you were not at work on the day that Stevens was fired.
A. Yes.
Q. Where were you at that point?
A. It would have been a day off.

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Q. Day off. What was your schedule like?
A. We would work every -- I'm trying to recall, it's been a little while. We worked two weekends and then a weekend off. On the weekends that we worked we took a day off during the week. Some days it would be Tuesday, some days Thursday.
Q. So it was one of these --
A. It was a structured schedule and the three location managers, myself, David Cash and David Kowalewski worked the same schedule with one manager off at a time.
Q. So this was one of these scheduled days off that Stevens's termination happened?
A. Correct.
Q. How did you learn that Stevens was terminated?
A. When I came back to work the following day.
Q. Who told you?
A. I believe it was Tom Rost.
Q. Were you at the Garden City facility? Did you meet him in person or by phone?
A. I don't recall that.
Q. Did you have kind of a set time when you were supposed to be into work that you can recall?
A. Yes.
Q. When was that?

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A. 8:30.
Q. And recognizing that you can -- obviously this is business, you can end up having to work later, but did you have a rough time when you generally would leave?
A. Usually 5:00.
Q. All right. So sometime that day Mr. Rost informed you that Stevens had been terminated. Did he explain to you why?
A. I don't recall that.
Q. He didn't say a reason or anything like that to you?
A. No.
Q. Did you ever learn of a reason why Stevens had been fired?
A. Yes.
Q. Okay. What was that reason?
A. It was my understanding that he wanted to leave on vacation and then come back as a woman.
Q. Come back presenting as female and working?
A. Yes.
Q. All right. From whom did you learn this?
A. I believe it was Tom.
Q. Do you know when this happened, when Tom let you know? In relation to the firing date, do you recall when he let you know this?
A. I don't recall specifically.

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Q. Do you recall any of the other factors? Was it by phone? Were you in the office or at the Garden City or anything like that?
A. I would have been in the office at Garden City. I don't recall if it was by phone or in person.
Q. Okay. Do you recall the context of it? Was it just to tell you why Stevens had been fired or was it in the course of other business as well?
A. I think in the course of other business.
Q. Okay. Now, did you ever discuss Stevens's firing with anybody else aside from Mr. Rost?
A. With other staff members, yes.
Q. Which staff members?
A. Just the office staff.
Q. Ms. Nemeth?
A. Other managers.
Q. And other managers too?
A. Yes.
Q. Was it just sort of an incidental conversation or --
A. Totally incidental.
Q. All right. Whom in the office at Garden City did you discuss the firing with?
A. With Dolly and with Sharon.
Q. And what do you recall them -- what do you recall them saying?

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Do you know who updated it the last time it was done?
A. Do not know.
Q. Okay. Now, with respect to -- we talked about a dress code and I'll get back to that in a little bit, but there is a clothing allowance policy at R.G. G.R. Harris, correct?
A. Well, not for men. No, because we give them the suits.
Q. Okay.
A. They don't buy -- we by the suits. We tell them what to wear.
Q. Okay. So the men are told what to wear?
A. And we give it to them, we provide it.
Q. Okay. Where do you get this -- what are the men given?
A. This is what they're given right here.
Q. So it's a blue --
A. It's a blue striped shirt and they get a tie.
Q. Blue striped suit and tie?
A. Yeah.
Q. Where do you get the suits from?
A. A place on 12 Mile and Middlebelt called Sam Michael's.
Q. And how often are suits issued to the male

employees?
A. Well, it's different for -- let's say -- I get suits, we'll say, like every three or four years because I'm not very hard, but I have some people that are -- they're like animals, you know, they're --
Q. They wear their suits out?
A. They wear their suits out, so they require --
Q. Okay. So you get -- how many suits are issued at hire?
A. Well, for a full-time person, he gets two. For a part-time person he gets one.
Q. So a full-time male employee gets one -- or two suits?
A. Right.
Q. And two ties?
A. And two ties.
Q. Okay. And the part-time gets one?
A. One, right.
Q. And then as they wear out they're replaced, is that correct?
A. Well, it's like every couple years normally.
Q. Every two years?
A. Yeah. But sometimes people have an emergency or something.

Q. But generally speaking every two years?
A. Two or three years, yeah.
Q. Okay. Now, how much does a suit cost you?
A. I'm going to say about 225.
Q. And how much does a tie cost?
A. Ten bucks.
Q. Do you get the ties from the same place?
A. Yep.
Q. Are they ordered all at once or just kind of --
A. No.
Q. Just periodically?
A. No. We used to do that, but we don't anymore, no.
Q. When did that cease to happen?
A. Oh, probably 20 years ago.
Q. Okay. With respect to female employees, what do they get?
A. They get a little allowance.
Q. Okay. And how is the allowance, how is it doled out?
A. They get a check.
Q. Annually?
A. They get it annually.
Q. Okay. How much -- how is it determined how much a female employee will get?

A. A female gets 150 bucks -- dollars, and a part-time gets 75.
Q. So full-time gets 150 and part-time 75?
A. Right.
Q. And who -- how is that calculated; who sets how much the men and woman are going to be getting? Let's go back to the women. Who determines -- how is it set that women would get 150 if they're full-time and 75 for part-time?
A. I guess I set it. Yeah.
Q. Okay. How long has that been the case?
A. A few years.
Q. Do you know how -- was it stretching back before Stephens was employed?
A. Just about the same time.
(Mr. Schrameck entered the conference room at 2:28 p.m.)
BY MR. PRICE:
Q. Okay. That's when women would get 150 and 75?
A. Yeah.
Q. All right. Was it different before then?
A. No, they -- they didn't get anything before.
MR. PRICE: Okay. Now we were given -- have the following marked as Exhibit 8 here. Am I correct on that?

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Q Okay. Now, there's some references in there to, you know, they don't know -- there's no awareness of who Aimee Stephens is, but there was an Anthony Stephens. Now, when Stephens presented you the letter, which was Exhibit --
A Uh-huh.
Q -- there was a reference to -- there was also signed not just Anthony Stephens, but Aimee Stephens, correct?
A Uh-huh.
Q Okay. "Yes"?
A Yes.
Q Okay. So, was there any confusion as to who was filing the charge in this case?
A Well, yes, there's confusion because everything in our employment records is Anthony. And that was his name and employment, that's his driver's license, that's his insurance policy, that's his mortuary science license, that's everything is Anthony Stephens.
There is no Aimee Stephens that's involved in our organization.
Q Okay. But the letter that was presented to you did say Aimee Stephens, correct?
A It probably did, yeah. Let's see.

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Q Let's double check.
MR. KIRKPATRICK: Here it is.
THE WITNESS: Okay. So he signs both names. Okay.
BY MR. PRICE:
Q Okay. So, was there any confusion on your end as to who was bringing this charge?
A Either Anthony or Aimee Stephens.
Q It would have been the same person, though --
A Would be the same person.
Q -- the person you knew as Anthony Stephens was filing it, right?
A Yes.
Q There's no question as to that?
A That's true.
Q Now, did you -- okay, I apologize. Did you see it before it went out or not?
A Did I see?
Q The position statement?
A Yes.
Q Okay.
A Correct.
Q Did you recommend any changes to it, that you can remember?
A I don't believe so.

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Q Okay. Does it fairly reflect your views as to the case and the position of the company?
A Yes. Yes. Uh-huh.
Q Were you uncomfortable with the fact that the name Aimee Stephens was being used in the charge?
A I'm uncomfortable with the name because he's a man.
Q Okay. And you wanted to keep referring to Stephens as Anthony Stephens, correct?
A That's who the employee was.
Q I'm sorry, the employee?
A Yeah. He was the employee.
Q Okay. And we have already talked a little bit about the fact it doesn't talk about religious freedom or free exercises and it was that -- it was your belief that you didn't have to raise this at this point?
A Yes.
Q Okay. Have you ever disciplined anyone for a violation of the dress code?
A No. I wouldn't say discipline, no.
Q Okay. Have you ever counseled somebody that they're -- they weren't adhering to the dress code?

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A We have done that.
Q Okay. How recently?
A It hasn't been very recent.
Q Okay. What was the issue?
A Hard to say. It might be a woman, possibly, on her dress, or -- pretty hard for a man since we dress them.
Q Okay. What is the woman's dress code, what do they have to wear?
A Well, they wear a skirt and usually a jacket.
Q Okay.
A A professional-looking suit.
Q Okay. What about pants, no pants?
A No pants.
Q Why is that?
A I guess I'm just old-fashioned and I believe this is a funeral home and there's a certain tradition that we want to keep there. We want -- and I think the consumer out there, families believe that they -- a male should look like a particular individual, like a man, and a woman should look like a woman. And dress accordingly.
Q And you think so as well?
A And I think so as well.

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Q With respect to the stipend, or what's paid, the dress allowance and the suit acquisition and -- where would the records be for those? You know, that showed the payouts, the buying of the suits, that sort of thing?
A Yeah, at our east side location.
Q Okay. Would that be in the care or control of Ms. Kish?
A It would be.
Q You mentioned earlier that you were concerned about, and again correct me if I'm wrong, but you were concerned about disrupting the grieving process and you believe that Stephens presenting as female would be a disruption of that, it would be -- you talked to people who said, you know, if someone was dressed -- a man was dressed as a woman they wouldn't go there. Would it -- could it also -- if I am not mistaken, isn't the Livonia kind of downriver area known for having a lot of people from the south, correct?
A You mean --
MR. KIRKPATRICK: Well, I want to place an objection, it's kind of a speculation if he knows the makeup of the geographical

area. But you can answer it if you know.
THE WITNESS: You're talking about the Garden City facility?
BY MR. PRICE:
Q Yes.
A Oh, I don't know about that. We're not downriver.
Q Okay.
A That's not downriver.
Q Okay.
A You know, that's on Ford Road, that's just south of here.
Q Well, let's try it this way, couldn't it be the case that if you -- do you have any African-American employees?
A Not at present.
Q Okay. When was the last time you had an African-American employee?
MR. KIRKPATRICK: Objection, relevance. Go ahead.
THE WITNESS: About a year ago.
BY MR. PRICE:
Q What capacity did the person work?
A At our east side location, we've had maintenance people -- no, I do have -- I have a

maintenance person there. Yes, I do. I have a cleaning lady there.
Q Okay.
A And she's black. And we've had outside personnel and we've had, oh, I guess a driver, you might say.
Q I mean, if we're talking about possible disruptions, I mean you could have an old-fashioned family, an older family of white people who don't want to see a black employee for that -- during a funeral. Couldn't that be the case?
MR. KIRKPATRICK: Objection, speculation. Answer if you can.
THE WITNESS: You know, I don't know.
BY MR. PRICE:
Q Okay.
A I don't know.
Q Okay.
A I mean, you could say that about anything.
Q You could. But that -- I mean, would -- if there was an objection to having an African-American employee present during a funeral, would you adhere to that?

A If there was an objection? Well, I can't ever see it happening, so I don't know.
Q Okay. But if there was? I mean, there are people -- unfortunately there are people out there who have racist mindsets.
MR. KIRKPATRICK: Same objection.
MR. PRICE: Okay.
BY MR. PRICE:
Q And if they thought that was -- the presence of an African-American staffer was disrupting their grieving experience, what would you do?
A I don't know.
Q Would you remove the person?
A I don't know.
Q Would you remove the employee?
A I don't know.
Q You might?
A I might. They might temporarily, but, you know, I've never had that happen, so I don't know.
Q Have you ever asked anybody about how they would feel about having a black employee? I mean, you said you already asked about having, I believe, a man in a dress; what about having a black employee, have you ever asked how

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people would react to that?
A No.
Q Okay. Would you always let the employee -- would you always let the clients' concerns and preferences govern who -- which staffers were working your funerals?
A Well, I don't think I've hardly ever had families ask unless they know a person individually, who the individuals would be.
Q Okay. Have you ever had a family object to the presence of somebody during a funeral? One of your employees?
A No.
Q Okay. Now, earlier when you talked about you spoke to these families who you -- told you that, yeah, they wouldn't come to your business anymore, what exactly did you tell them about the situation?
A I didn't tell them about the situation. I just said if there was a situation where a funeral home had an employee that was male and dressed as a female, would you utilize a funeral home like that.
Q Okay. Any employee at all; that's what you said?

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A A male employee.
Q A male employee. Okay. In any capacity; that's all you said?
A As a funeral director.
Q So you did say as a funeral director?
A Yeah, as a funeral director, yeah.
Q Okay. And that's all you asked?
A Uh-huh.
Q "Yes"?
A Yes.
Q Sorry. Do you know if any of these people you talked to knew Stephens or dealt with Stephens before?
A No.
Q Do you know or just don't know?
A No, I don't believe they had any contact ever with him.
Q Okay. You testified earlier when you were asked by your Counsel, you said that you would not have had a problem with Stephens presenting as female outside of work. Did I hear that correctly?
A That's true.
Q Okay. What if a customer would have seen that and complained to you about it, what would you

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have done?
A Don't know.
Q Do you think there might have been -- you indicated earlier, I believe, that you get a lot of word-of-mouth business, people coming back, families and stuff like that?
A Oh, yes.
Q Okay. Would you say that's the bulk of your --
A Repeat business or -- yes, or in family before we call it, yes.
Q Okay. So if -- so would you have been comfortable with word getting around that Stephens was dressing as female outside of work?
A I don't know. I probably would be uncomfortable with that. But it never came up, so --
Q Okay. Would it have affected Stephens' employment if word had gotten around?
A Don't know.
Q Don't know? Okay.
MR. KIRKPATRICK: I'm going to object to the line of speculation. Answer if you can, but this is all speculation on something that hasn't happened.

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MR. PRICE: Well, it's always the -- whether he would have kept employing him, if he would have been dressing, so -- fair enough, though.
BY MR. PRICE:
Q There's been a person identified as an expert witness named Karl Jennings; do you know that person individually?
A I do.
Q Okay. How do you know Mr. Jennings?
A He's a funeral director that's -- just west of here in Hamburg.
Q Where is Hamburg located?
A It's on the other side of U.S. 23.
Q Okay. Does he own --
A He owns funeral home.
Q How many, do you know?
A I think four.
Q Do you know him socially?
A Not socially. Just professionally.
Q Now, does he offer advice on how to run funeral homes? Or packages or, you know, guidance on how to run funeral home?
A No, I can't say that, no.
Q So how do you know Mr. Jennings other than --

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that when the letter was presented?
A I believe it was when the letter was presented.
Q Okay. Did you ever hear it from anybody else that there might be chemicals or hormones involved?
A From somebody else?
Q Yeah, somebody else at R.G. G.R. or no?
A That somebody else what?
Q Tell you that he was on -- they thought they were on chemicals?
A No. No.
Q Okay. Now you said you talked to some people about how you would set the allowance for females. Did you talk to any of the females employees about how far $150 would go or what it could be used for?
A No, just Shannon.
Q Okay. What do you recall Shannon saying?
A She thought it was fine. She thought it was fair.
MR. PRICE: Okay. Why don't we just take a break, and I might have one more question or may be done.
(Off the record at 3:06 p.m.)
(Back on the record at 3:12 p.m.)

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MR. PRICE: Okay. We do not have anything else.
MR. KIRKPATRICK: All right. I guess we'll have a few questions here.
EXAMINATION
BY MR. KIRKPATRICK:
Q Mr. Price asked you several questions using the chart here about allowances and suits and that kind of thing. I'm just going to ask you a question, why is there a difference with women getting an allowance and men having suits purchased for them?
A We want men to look a certain way as professional funeral directors as people have come to know what they would look like, a dark suit, white shirt and a tie. The difference with women, if we had a woman funeral director she would look comparable to a man, but our other female employees dress in a professional manner, as we have talked about, in a skirt and usually in a jacket, and in an appropriate blouse --
Q Okay. So -- oh, go ahead.
A But the reason we haven't given them a uniform is because they can't come to an agreement on

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what type of a uniform would be appropriate for them.
Q So did you at one point consider having a uniform, so to speak, like the men have a suit uniform for the women?
A Yes, absolutely.
Q And it was going to be something specific, the same color, that kind of thing?
A Yes.
Q And why did that not materialize?
A They couldn't come to an agreement on anything.
Q And what do you mean by that?
A One likes this color, one likes that color; one wants stripes that go this way, one wants stripes that go that way.
Q Okay. So, you came up with a policy you have now in place for women as professional business attire?
A Professional business attire, exactly.
Q Now, do you currently have any female funeral directors?
A I do not.
Q If you did have a female funeral director, what would describe what her uniform would be or what she would be required to wear?

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MR. PRICE: Objection, speculation. But go ahead.
THE WITNESS: She would have a dark jacket and a dark skirt, matching. Matching.
BY MR. KIRKPATRICK:
Q Okay. A skirt. So just like the male funeral director she would have a business suit, but a female business suit?
A Yes.
Q As a skirt?
A Yes.
Q Now, you were asked by Mr. Price about Exhibit 3. This letter here. And I know you recognize that, right?
A Yes.
Q That was actually prepared by me, correct?
A Yes, correct.
Q I kind of touched on this the first time during the first deposition, but you have no legal training, right?
A That's correct.
Q Do you fully understand all of the legal concepts that were enumerated and set forth in that letter?
A No.

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Q Okay. Thanks. Now, Mr. Price asked you about what would happen and the speculation of perhaps a customer may have seen Stephens after work, let's say, outside of the funeral home wearing a dress or presenting as a woman and they might be upset what you might do, correct, do you remember that?
A Yes.
Q I think you said you would be uncomfortable, right?
A I would be uncomfortable.
Q Would you fire him for that?
A Probably not, but I would ask him some questions.
Q Okay. How about if a customer maybe saw another employee outside of the funeral home on their own time carrying a -- several pornographic videotapes, would that make you uncomfortable?
A Make me uncomfortable, but I wouldn't fire them.
Q Okay. Why do you have a dress code?
A Well, we have a dress code because it allows us to make sure that our staff is -- is dressed in a professional manner that's acceptable to the

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families that we serve, and that is understood by the community at-large what these individuals would look like.
Q Is that based on the specific profession that you're in?
A It is.
Q And again, tell us why it fits into the specific profession that you're in that you have a dress code?
A Well, it's just the funeral profession in general, if you went to all funeral homes, would have pretty much the same look. Men would be in a dark suit, white shirt and a tie and women would be appropriately attired in a professional manner.
Q And why do you provide suits to your funeral directors?
A Well, because we want them all dressed exactly the same. We want them to look the same.
Q Is it to comply with the dress code?
A It is to comply with the dress code, yes.
MR. KIRKPATRICK: That's it, guys.
MR. PRICE: Okay.
RE-EXAMINATION
BY MR. PRICE:

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Q It's not just the funeral directors that gets suits, though, it's the funeral director assistants, correct?
A That's what -- yes, the men's, yes.
Q Okay.
A Yeah, because they're -- to the consumer they think they're funeral directors, I mean, any male person.
Q Okay. Now, have you been to funeral homes where there have been women wearing businesslike pants before?
A I believe I have.
Q Okay. So, the fact that you require women to wear skirts is something that you prefer, it's not necessarily an industry requirement?
A That's correct.
Q Okay. But women could look businesslike and appropriate in pants, correct?
A They could.
Q Okay. Now you were asked about what if a customer had seen Stephens in this hypothetical about, you know, Stephens only presented as female outside of work, if that person had said that they were not going to come back -- they were not going to use the services of the

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Harris Funeral Homes what would you have done?
A Don't know.
Q Okay. But that would have been a factor to consider in how you addressed Stephens' situation in that case, correct?
A It probably would have been.
Q And it could have been reason to let Stephens go if --
A Perhaps, yes.
Q Okay. Now, you were asked about 3 and it's true this was -- letter was drafted by Mr. Kirkpatrick, but you hired him to represent you?
A That is true.
Q You hired him to represent Harris in defense against this charge?
A Yes.
Q Okay. And if you had any questions about what was in the letter, you certainly were encouraged to ask questions; is that the case?
A Yes.
Q Did you choose to ask any questions?
A Do not know.
Q You do not recall?
A I do not recall.

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Q. Who was the manager of the Detroit location?
A. David Kowalewski.
Q. Did you show that to David Kowalewski?
A. David saw it probably July 30th.
Q. So the day before. Did you show it to him or --
A. We were talking.
Q. Did you actually show it to him or just tell him about it?
A. Yes, he saw it.
Q. So just so I'm understanding, the only people that may have seen the letter in some sort of draft form prior to approximately a week before July 31st, 2013 was Sharon, Michelle and Dolly; is that fair?
A. Michelle and Dolly.
Q. Michelle and Dolly?
A. Yes.
Q. Not Sharon?
A. Not Sharon.
Q. Did you show the final draft to Dolly and Michelle and Sharon like you showed everyone else?
A. Yes.
Q. When was the final draft shown to them?
A. In that week before.
Q. All right. So July 31st you meet with Tom Rost; correct?

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A. Yes.
Q. And you present him with this letter; right?
A. Yes.
Q. Was anyone else present at that meeting?
A. No.
Q. Where did the meeting take place?
A. It was at Garden City in the chapel.
Q. The chapel is just that really big room?
A. Yes.
Q. No one else was around?
A. No.
Q. I think you stated that.
Tell me what happened?
A. I already did. I gave him the letter, he read it, and basically that was it.
Q. So did you say anything to him other than what was on the letter?
A. Not really. The letter pretty much explains everything.
Q. Just so I understand, you gave him the letter and he read it while you were standing there?
A. We were sitting down.
Q. Okay. Sitting down.
Did you say Tom, I have something to show you?

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A. I told him, I said, Tom, I've got a letter I'd like for you to read.
Q. Okay.
A. And I gave him the letter.
Q. Did you say anything else to him about that?
A. I don't recall, no.
Q. What did he say after he read the letter?
A. I don't recall him saying much of anything.
Q. Okay. So he reads the letter, you don't recall what he said. What happened next?
A. He folded up the letter, put it in his coat pocket, and that was it.
Q. He didn't --
A. Because we were right at the end of the day.
Q. He didn't say anything to you about the letter, he just -- you don't recall him saying anything?
A. I don't recall him saying anything.
Q. And then what happened next?
A. Well, I worked for the next two weeks.
Q. All right.
A. Then he came in just before I left for my vacation.
Q. Okay.
A. And said basically this is not going to work, and handed me a letter.
Q. Not going to work is what Tom said?

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A. Paraphrasing, yes. I don't remember exactly.
Q. I understand.
Did he say anything else to you?
A. Like I said, he handed me a letter.
Q. Okay.
A. Which was a separation agreement.
Q. All right.
A. And things that he was willing to give me a specified severance agreement if I agreed not to say anything or do anything.
Q. Okay. And did you agree to sign that then?
A. No, I did not.
Q. So he gave you this letter, he said it's not going to work. You don't recall him saying anything else other than that?
A. Well, he really didn't have to. The letter pretty much explained it.
Q. And then what happened after those exchanges occurred? Did you leave?
A. Well, there again, right at the end of the day, I finished what I was doing and went home.
Q. Did you --
A. And started my vacation.
Q. Did you ever follow up with the information he gave you or was there anything else said to you? Did you

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to her?
A. Right.
Q. Any other times that you've either spoken, texted --
A. No.
Q. E-mailed, contacted Dolly?
A. No.
Q. How about Michelle?
A. Haven't seen her since that dinner.
Q. Did you talk to her before the dinner after --
A. No.
Q. Did you ever text her, e-mail or contact her in any way?
A. No.
Q. Any other employees that you may have contacted?
A. No.
Q. When you showed these drafts to people you've already discussed, or at least the final version before you -- approximately a week before you gave it to Mr. Rost, did you instruct the people you talked to or asked them not to do anything about it, not to tell anyone?
A. Oh, sure.
Q. What did you say to them?
A. I said just keep it between us.
Q. Okay.
A. I said Tom will get a copy of it.

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Q. Is it fair to say you've been involved with the funeral business for nearly 30 years?
A. Yes.
Q. And I think you've testified at every place there's been some sort of dress code?
A. Yes.
Q. Why is there a need or why does the funeral business, why is there a dress code, if you know?
A. Well, I wouldn't think you'd want somebody showing up in shorts.
Q. Okay.
A. And a t-shirt for a funeral.
Q. Why not?
A. Doesn't look professional.
Q. Okay. So in your experience, the industry standard is to have professional clothing?
A. Yes.
Q. Have you ever been in a situation where they, they, being a funeral home, have not followed any kind of professional clothing dress code?
A. Other than the ones I've mentioned, no, but it was still perceived.
Q. So there's an understanding of presenting yourself, if you work in the industry, in a professional --
A. Manner, yes.

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Q. Would the term conservative clothing mean something in the industry? If you understand what I'm saying. I could explain that if you need me to.
A. Please do.
Q. Well, I have what I would consider more of a conservative suit on, it's a dark suit, you know, not a very loud tie, at least I don't think it's loud, and shirt, whereas you may see people where wild colors. I say wild colors, they could be orange, whatever, things that might be offensive that still might be a business suit. Does that make sense?
A. I suppose it does. But I put that in non-professional wear to begin with.
Q. I just want to make sure we're kind of on the same page with professional business attire.
So you wouldn't think that somebody would show up -- I could give you all kinds of examples, but I don't know if you'd even know what I'm talking about -- but crazy orange-colored tuxedo as an appropriate funeral business attire?
A. I wouldn't think so.
Q. Well, I just want to know if there's a standard.
Now, did you get any training on that or classes on that or instruction during your mortuary science curriculum?

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A. No.
Q. They didn't talk about presentation from an employee's standpoint?
A. Only thing mentioned was professional attire.
Q. Is it because the business of the funeral business is a somber one, in a sense, because somebody has died, and people are celebrating life or mourning the loss of a loved one; would that be fair to say?
A. Yes.
Q. Now, what damages are you claiming has occurred because of your termination from your employment with R.G. & G.R. Funeral Home? Do you understand what I mean by that?
MR. PRICE: First of all, objection. Again, the Complaint was filed by the EEOC. But to the extent that you can answer that, go ahead.
A. The loss of income was rather devastating.
BY MR. KIRKPATRICK:
Q. What was your income or what was your salary when you were terminated?
A. Right at 50 grand a year, if I'm not mistaken.
Q. So 50K a year.
Do you have a dollar amount on the lost income you believe you suffered since you've been terminated?

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A. Not really attracted me or drew me there.
Q. You just remember seeing one?
A. Right.
Q. Did you share with people that you were a Baptist minister or that you pastored a church at all?
A. Oh, yeah, they all knew.
Q. I just wondered, was there any kind of just coffee shop discussions with employees about religion at all?
A. No.
Q. Was it forced on you at all?
A. No.
Q. Was there an expectation or understanding that you had to participate in any kind of prayer service?
A. No.
Q. Any kind of Bible study or anything like that?
A. No.
Q. Was there any strong expression that the funeral home was religious in nature?
A. Other than what you saw laying around on the tables, no.
Q. Did you participate in any services for clients or customers that were not of the Christian faith?
A. Yes.
Q. Such as what, Jewish?
A. No, we didn't -- I don't think we ever did any Jewish

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services.
Q. What other --
A. But there was Chinese, Hindu.
Q. So the funeral home would accommodate that?
A. Yes.
Q. Did anyone at the funeral home ever comment to you, like a manager or something, that they didn't believe that you were dressing appropriately?
A. No.
Q. Did anyone make a comment that you weren't -- strike that.
MR. KIRKPATRICK: I want to take a break actually.
MR. PRICE: Sure.
(Off the record at 1:28 p.m.)
(Back on the record at 1:35 p.m.)
MR. KIRKPATRICK: Back on the record.
BY MR. KIRKPATRICK:
Q. Do you believe that the funeral home, in this case, R.G. & G.R., can impose sex-specific dress codes on its employees?
MR. PRICE: Objection; calls for a legal conclusion. Also -- to the extent you can answer it, go ahead.
A. As it pertains to a man or a woman, yes.

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BY MR. KIRKPATRICK:
Q. Okay. We had talked about some of these funeral homes that you applied to after your removal.
A. Uh-hum.
Q. Did you believe that they discriminated against you by not hiring you?
A. That's a question I can't answer because I don't know why they didn't.
Q. Did you wonder about that?
A. Oh, I wondered.
Q. Did you pursue any claims with, say, the EEOC?
A. Got to be able to prove it first.
Q. So the answer is no, you didn't pursue it?
A. No.
MARKED FOR IDENTIFICATION:
DEPOSITION EXHIBIT 4
(Plaintiff's Witness List)
1:36 p.m.
BY MR. KIRKPATRICK:
Q. I'm going to show you Exhibit 4. This is the Plaintiff's witness list.
First of all, have you ever seen that document before?
A. This one?
Q. Yes.

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A. No.
Q. Do you know the names of the people on this witness list on the second page? Do you know all of them, I guess?
Let me first ask you, the first one is obviously your name; right?
A. Yes.
Q. Donna Stephens, that's your wife, I take it?
A. Yes.
Q. I'm sorry, I'm going to butcher the first name. Ms. Khan, I believe. Do you know who that is?
A. Not sure.
Q. You know Mr. Rost, you already said you know Mr. Rost?
A. Yes.
Q. I think you mentioned Shannon Kish; right?
A. Yes.
Q. Do you know who Shannon Kish is?
A. Yes.
Q. How about George Crawford?
A. Yes.
Q. How about Ryan Kish?
A. I would assume he's kin to Ms. Kish but --
Q. You don't have any personal knowledge?
A. No.
Q. Cody Higley?

EXHIBIT AE

Release and Severance Agreement

My employment with R.G. & G.R. HARRIS FUNERAL HOME, 31551 Ford Rd., Garden City, MI 48135, (Company) will end effective August 16, 2013 and I understand that, in exchange for signing this release and severance agreement (the "agreement") and agreeing to the terms and conditions contained in the agreement, R.G. & G.R. HARRIS FUNERAL HOME will pay me three (3) months' salary, less normal tax, Social Security and other deductions. The amount before deductions will be **$11,534.40**. R.G. & G.R. HARRIS FUNERAL HOME will cover health and dental insurance through November 16, 2013 ("severance"). After that, I have the option to elect COBRA insurance through R.G. & G.R. HARRIS FUNERAL HOME.

Other requirements

1. Turn in office key and any other property of R.G. & G.R. HARRIS FUNERAL HOME.

2. I understand and agree that I'm not otherwise entitled to receive the above referenced severance, all of which constitutes sufficient consideration for me and my personal representatives, heirs and assigns for entering into this agreement. In consideration of the above, I release and hold R.G. & G.R. HARRIS FUNERAL HOME and its directors, officers, assigns, shareholders, attorneys, insurers, representatives, successors, agents and employees (individually and collectively, the "Company") harmless from any and all claims, damages, demands and actions, whether under federal, state or local law, statute or ordinance, whether known and unknown, which I have or may have against The Company including, but not limited to, those concerning the terms and conditions of my employment, the termination of my employment with the Company and claims arising from any contractual or other legal restrictions, expressed or implied, written or oral, on the Company's right to control or terminate the employment of its employees ("release") . It is expressly understood that among the various rights and claims being waived in this release include but are not limited to: claims arising under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621. et seq.), Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, the Equal Pay Act of 1963, the Americans With Disabilities Act, the Civil Rights Act of 1866, the Age Discrimination in Employment Act of 1967 (ADEA), the Older Workers Benefit Protection Act, the Family and Medical Leave Act, any other claims of discrimination of any kind, or any other federal, state or local law or regulation. This provision is intended by the parties to be all encompassing and to act as a full and total release of any claim, whether specifically enumerated herein or not, that I might have or had, that exists or ever has existed on or to the date of this Agreement. This release does not limit my ability to seek unemployment benefits to which I might be entitled. It is the intention of the parties to make the Release as broad and general as the law permits.

EXHIBIT AF

3. In order to receive the severance, I understand that I must first successfully transfer all my knowledge, information, data and documents regarding current projects, customer information, and any other proprietary matters that I worked on during my employment. I also understand and agree that I will keep all R.G. & G.R. HARRIS FUNERAL HOME trade secrets and proprietary information confidential now and after my employment ends.

   As used in this agreement the term "confidential information" means any and all of the Company's trade secrets, confidential and proprietary information and all other information and data of the Company's that is not generally known to third persons who could derive economic value from its use or disclosure, including, but not limited to, confidential business methods and processes, research and development information, lists of customers, information pertaining to customers, personal information, marketing information, pricing information, cost information, information pertaining to the Company's relationships with business partners, business plans, financial information and information about prospective customers or prospective products or services, whether or not reduced to writing or other tangible medium of expression, including work product created by me in rendering service for the Company. I acknowledge the confidential information is valuable, special and a unique asset of the Company. I will not use or disclose to others any of the confidential information, except as authorized in writing by the Company. I agree that the Company owns the confidential information and I have no rights, title or interest in the confidential information. I will immediately deliver to the Company any and all materials (including copies and electronically stored data) containing any confidential information in my possession, custody or control. My confidentiality obligations shall continue as long as confidential information remains confidential, and shall not apply to any information which becomes generally known to the public through no fault or action of me.

4. I understand that this agreement is not and shall not be construed as an admission by the Company that my terms and conditions of employment, termination of my employment, or any event, transaction, or communication with the Company during or after my employment was discriminatory or otherwise unlawful. I understand that this agreement shall be binding upon me and my heirs, personal representatives, successors and assigns.

5. I agree to keep this agreement confidential. I also agree that if I should file a lawsuit in court or in any other legal forum which is found to be barred in whole or part by this Agreement, I will pay the legal fees incurred by the Company defending those claims found to be barred. Further, I understand and agree that if I file any lawsuit in court or in any other legal forum in violation of the release contained in this agreement, then I shall forfeit and be required to repay to R.G. & G.R. HARRIS FUNERAL HOME the

EXHIBIT AF

severance pay to me under this agreement. This agreement is the total understanding between the Company and me relating to the subject matter covered by this agreement, and I agree that all of the prior and contemporaneous written or oral agreements or representations, if any, relating to the subject matter of this agreement are null and void. It is also expressly understood and agreed to the terms of this agreement may not be altered except in writing signed by both the Company and me. I understand and agree that the Company has advised me to consult an attorney prior to executing this agreement and I acknowledge that I've had a sufficient opportunity to do so.

6. I agree to waive any argument of lack of personal jurisdiction or forum non-conveniens with respect to any claim or controversy arising out of or relating to this agreement. Should any provision of this agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be part of this agreement.

7. The Company and I agree that by entering into this agreement which I understand is covered by the requirements of the Age Discrimination in Employment Act of 1967, as amended, I am not waiving any rights or claims that may arise after the date this agreement is executed. I acknowledge that I have been informed in writing of my right to consult with an attorney of my choice prior to signing this agreement; that I have been given at least twenty-one (21) days to review and consider the contents of this agreement. I understand this agreement was signed by me knowingly and voluntarily without coercion or duress; and that it is revocable for a seven (7) day period following my signing it after which will become automatically effective and enforceable without any further act by me, unless specifically revoked by me during such seven (7) day period. I understand that no severance will be paid until the seven (7) day revocation period expires.

8. I acknowledge that if I execute this agreement at any time prior to the end of the twenty-one (21) day period that the Company provided me within which to consider this agreement, such early execution was a knowing and voluntary waiver of my right to review and consider the contents of this agreement for at least twenty-one (21) days and was due to my desire to merely receive the consideration provided under this agreement and my belief that ample time in which to consider, understand, and review this agreement with an attorney.

EXHIBIT AF

9. I have carefully read this agreement and confirm that I had sufficient time to decide whether to consult with an attorney and that I agree to and understand all of its provisions. After due deliberation, I am entering into this agreement freely and voluntarily, without duress, coercion or undue influence and with the intent to be bound by its terms and conditions.

Date: _____

_____

Anthony Stevens

Date: _____

R.G. & G.R. HARRIS FUNERAL HOME

_____

Thomas F. Rost
Its: President

EXHIBIT AF

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A. Yes. Oh, yes, I'm wearing a skirt.
Q. How much did you spend on that skirt?
A. I can't recall, to be honest. I've had it for a while.
Q. How often do you have to buy new skirts for work?
A. When they fall off. I wear them to the bitter end.
Q. I'm just asking, like, the best that you can answer.
A. Probably every few months.
Q. Okay. So every few months you probably have to buy a new skirt because it's worn out?
A. Yeah.
Q. And how about your -- do you always wear a blazer at work?
A. Correct. Yes.
Q. And how often do you have to replace your blazers?
A. About the same.
Q. Same.
A. I'm hard on clothes.
Q. Well, you have 600 things you do.
A. I do.
Q. How much do you typically spend on a blazer?
A. It depends on lots. Depends if it's on sale. It

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could be up to a hundred.
Q. That's the typical range for a blazer is a hundred dollars?
A. Or less. Sales. Just all depends --
Q. Okay.
A. -- if you're hunting or not.
Q. And I just want, you know, just general. I understand I'm asking pretty abstract questions so I just want to get an idea of how much it cost for you to present at work in accordance with R.G. & G.R.'s dress code for you.
How about your blouse? Like your undershirt is called a blouse, right?
A. Yeah, a blouse.
Q. I'm getting into unknown territory on my side.
MR. KIRKPATRICK: Oh, I think we know the territory you're getting into, but go ahead.
BY MR. SHULTZ:
Q. How much do you typically spend on a blouse?
A. About ten.
Q. Ten to 20?
A. Correct.
Q. Always looking for a sale?
A. Yeah, definitely.
Q. How often do you have to replace a blouse?

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A. I can wear the same skirt for ten years so I don't know. As needed. I'm not much of a shopper. Probably every so many months.
Q. Okay. So with the same frequency that you replace the skirt and blazer?
A. Yes. Yeah.
Q. How many different work outfits do you have?
A. Work outfits. Lots. Quite a few.
Q. So you can go an entire week without repeating an outfit?
A. Correct.
Q. Could you go two weeks without repeating an outfit?
A. That's pushing it, but yes.
Q. Okay. And I was being very confusing earlier when we were talking about the distinction between the paragraph that Amy had showed you and the letter.
A. Correct.
Q. So I would just like to go back and kind of clear that up.
A. Okay.
Q. So you testified that the paragraph had to deal with Amy's father and Amy's feelings?
A. He -- she had me asked me to read -- he verbally

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stated it was going -- you know, he was working on to tell his father what he was doing.
Q. And by what he was doing you mean the --
A. The transition.
Q. The transition. Okay.
And then do you remember any of the other specifics of that other than just giving him a hug?
A. I just remember us being in the garage. Probably close to one of the last times I seen him. I remember being in the garage. He was leaving. It was brief.
MR. SHULTZ: I think I'm done for the moment. I might have some followup after Joel, but I'm done.
EXAMINATION
BY MR. KIRKPATRICK:
Q. Thanks. Just a few questions.
Mr. Shultz was asking questions about the dress code. Do you recall that?
A. Yes.
Q. Obviously, you just kind of discussed it now. And about the men -- the male employees. They get suits. Do you recall that?
A. Yes.

EXHIBIT AG

ABOUT

BLACK TIE
CASUAL
DENIM
DRESS SHIRTS
FOOTWEAR
PROM
SHIRTS
SPORT COATS
SUITS
TIES
TROUSERS
TUXEDOS
VESTS
WEDDING
WHITE TIE

"We are highly skilled tailors - guaranteeing that every item fits as if it were custom made just for you."

Serving the Southeast Michigan area since 1986, Sam Michael's has consistently provided excellent quality, great service, and unmatched prices. Our attention to detail and commitment to our customers has made us one of the most respected names in fine menswear and custom tailoring. Because we are family owned and operated, we offer you the personal, individualized service that you simply will not find in chain stores.

Three generations of family work at our Farmington Hills, Michigan store. We pride ourselves on ensuring that every customer looks and feels their very best – whether they are shopping for business attire, casual clothing, shoes, accessories or formalwear.

EXHIBIT AH

KIRKPATRICK
LAW OFFICES, P.C.

Joel J. Kirkpatrick
Attorney at Law
Admitted to practice in Michigan & Ohio

AIMEE STEPHENS
v.
R. G. & G .R. HARRIS FUNERAL HOME, INC.
EEOC CHARGE NO. 471-2013-03381

RESPONSE OF R. G. & G. R. HARRIS FUNERAL HOME, INC.

In response to the *Charge of Discrimination* filed by "Aimee Stephens," R. G. & G. R. Harris Funeral Home, Inc. (hereinafter "Funeral Home"), by and through its attorney Joel J. Kirkpatrick, states as follows:

Identification of R. G. & G. R. Harris Funeral Home: R. G. & G. R. Harris Funeral Home, Inc. is a Michigan corporation in the business of providing embalming, funeral, burial, and related services as allowed under Michigan law. The Funeral Home has been in business since 1932. The Funeral Home is a closely-held family owned business.

Identification of Complainant: The Complainant is identified as "Aimee Stephens."

1. The Funeral Home has never employed anyone by the name of "Aimee Stephens." Therefore, the Complaint must be dismissed on the basis that the named Complainant has never been employed by the Funeral Home.

2. The Funeral Home *has* employed an employee by the name of "Wm. Anthony B. Stephens." If this is the person who filed the Complaint under the name "Aimee Stephens," then the Complaint must be dismissed as not having been filed under the Complainant's legal name. If the real Complainant is Wm. Anthony B. Stephens, then the name "Aimee Stephens" is a fictitious name concealing the Complainant's true and legal identity. It is hornbook law that complaining parties are required to file complaints under their legal names so as to clearly identify who the parties are and so as to avoid fraud and confusion. See, for example, Doe v. Frank, 951 F.2d 320 (11th Cir. 1992) quoting Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979)(basic fairness dictates that party plaintiffs

must participate in suits under their real names); Doe v. State of Alaska, 122 F.3d 1070 (9th Cir. 1997)(a plaintiff must file a complaint in his own name).

Statement of Nonwaiver of Defenses: Without waiving its defense that the Complainant's Charge of Discrimination must be dismissed because either (1) the Funeral Home has never employed anyone by the name of "Aimee Stephens" or (2) if the real name of the Complainant is "Wm. Anthony Stephens" then Mr. Stephens has attempted to bring a claim under an erroneous and fictitious name rather than his true and legal name, the Funeral Home responds to the Charge of Discrimination as follows:

Facts

The Funeral Home has never employed at any time or in any capacity anyone by the name of "Aimee Stephens." Therefore, the Funeral Home denies in their entirety all facts and claims asserted by any such person.
The Funeral Home did employ a "Wm. Anthony B. Stephens" – a male – from September 2007 until August 2013. Mr. Stephens was an at will employee employed as a funeral director. In the summer of 2013, Mr. Stephens advised the Funeral Home in no uncertain terms that he would no longer comply with the Funeral Home's Dress Code, which requires men to wear suits and ties. Due to Mr. Stephens' refusal to abide by the Funeral Home's Dress Code, the Funeral Home terminated Mr. Stephens' employment.
Claims

The Complainant claims he was discharged "*due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964.*"

I. Gender Identity Claim

A. Gender Identity is Not a Protected Class Under Title VII.

Title VII provides:

> *(a) Employer practices: It shall be an unlawful employment practice for an employer:*
> *(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or*
> *(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin.*

EXHIBIT AI

42 U.S.C. Sec. 2000e-2.

Due to the fact that Title VII does not list "gender identity" as one of the its protected classes, it is clear from the face of the statute that "gender identity" is not a protected class. If that were not clear enough, Congressional history demonstrates that Congress did not intend to include "gender identity" as a protected class under Title VII. That is evidenced by the fact that the "Employment Non-Discrimination Act" (ENDA) – which would make "sexual orientation" and "gender identity" protected classes under Title VII – has been introduced in Congress every year since 1994 (except the 109th Congress) and has been rejected every year. If "gender identity" was already a protected class under Title VII there would be no reason for sexual orientation and gender identity advocates to introduce ENDA every year. And if Congress intended to include "gender identity" as a protected class it would not have repeatedly rejected the enactment of ENDA for nearly 20 years. (It is also relevant to note that Congress specifically excluded "*transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders*" (our emphasis) from the definition of what constitutes a disability under the Americans With Disabilities Act. 42 U.S.C. Sec. 12211(b)(1).)

Case law supports this position. See Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007)(the court agrees with the vast majority of federal courts to have addressed this issue and concludes that discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII). See also Vickers v. Fairfield Medical Center, et al., 453 F.3d 757 (6th Cir. 2006)(because sexual orientation is not one of the listed protected classes under Title VII, sexual orientation is not a prohibited basis for discriminatory acts under Title VII).

Therefore, since "gender identity" is not a protected class under Title VII, the Complainant's gender identity claim must fail.

To the extent the Complainant's claim is that he was discriminated against due to gender stereotyping under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), that claim must fail as well. Price Waterhouse neither confronted nor addressed the issue of whether a person suffering from gender identity confusion and expressing that confusion in the workplace states a claim under Title VII. Price Waterhouse involved a woman, identifying herself as a woman, whose fellow employees recognized as a woman but who felt was not behaving in a sufficiently feminine manner – not a woman who was claiming to be a man and purporting to change and express herself accordingly. The two situations are so different that any attempt to stretch the Price Waterhouse holding to encompass transgender claimants is untenable.

Therefore, to the extent the Complainant is asserting a gender stereotyping claim under Price Waterhouse, that claim must fail as well.

EXHIBIT AI

B. The EEOC has no Authority to Pursue the Complainant's Claim and, in Doing So, is Acting *Ultra Vires*.

Since "gender identity" is not a protected class under Title VII and because there is no reasoned basis to apply the gender stereotyping theory of Price Waterhouse to transgender claims, the EEOC has no authority to recognize either, and the EEOC's actions in doing so are *ultra vires*, without legal authority, and therefore null and void.
Therefore, the Complainant's "gender identity" claims must be denied.

C. The Employee's Employment Was Not Terminated On Account of the Employee's Male Sex or Unlawful Gender Stereotyping, but Rather on Account of the Employee's Refusal to Comply with the Funeral Home's Dress Code.

The Complainant's claims must also fail because the complained of employment termination was not based on the employee's male sex or on unlawful gender stereotyping. As do most if not all funeral homes, the Funeral Home here has a dress code. The Funeral Home's *Dress Code* is in writing and is provided to all Funeral Home staff.

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

The *Dress Code* then goes on to distinguish between what men are required to wear and what women are required to wear.

Men are required to wear suits and ties. The suits must be black, gray, or dark blue. Shirts must be white with regular medium length collars. Ties must be Funeral Home issued or similar. Only black or dark blue socks and black or dark blue shoes may be worn. To assist men in complying with the Dress Code, the Funeral Home provides men with Dress Code compliant suits and ties.

It is clear that reasonable regulations requiring male and female employees to conform to different dress and grooming standards do not violate Title VII. Etsitty v. Utah Transit Authority, supra, at 1224-1225. See also Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001) and Creed v. Family Express Corp., 2009 WL 35237 (N.D.Ind. 2009).

If Anthony Stephens is the true identity of the Complainant in this case, he is a man. He is a male biologically, anatomically, and legally. He was a man when he was hired and a man when he was terminated. All the documentation in the Funeral Home's possession – including Mr. Stephens' *Certificate* from the Conference of Funeral Service Examining Board of the United States, his *Associate of Applied Science in Funeral Service* degree from Fayetteville Technical Community College, his cover letter and resume, his Funeral

EXHIBIT AI

Service License issued by the State of Michigan, his employment tax records, his driver's license issued by the State of Michigan, his 08/29/2013 Unemployment Insurance Claim, all identify Mr. Stephens as a man. In addition, Mr. Stephens is currently married to a woman, which would not be legally possible under the laws of Michigan was Mr. Stephens a woman. Indeed, despite *referring* to himself on occasion as "female," nowhere does Mr. Stephens ever claim he is not biologically, anatomically, and legally a male.

Therefore, the Funeral Home is entitled to treat Mr. Stephens as a man for purposes of the Funeral Home's Dress Code.

Despite being a man, however, Mr. Stephens made it clear to the Funeral Home that he no longer intended to comply with the Dress Code's attire requirements for men.

The Funeral Home did not care *why* one of its employees was refusing to comply with the Funeral Home's Dress Code. It only cared that he *did* refuse. Any male employee of the Funeral Home who refused to comply with the Dress Code's attire requirements for men would be treated the same as Mr. Stephens was treated. The Dress Code is a perfectly appropriate employment requirement – particularly in the funeral services profession – and was applied consistently and non-discriminatorily. All men were treated the same. Any man's refusal to comply with the Man's Dress Code is grounds for termination.

Therefore, Mr. Stephens' refusal to comply with the Funeral Home's Dress Code – not Mr. Stephens' gender identity or unlawful gender stereotyping – was the reason for his termination. That being the case, if Anthony Stephens is the true identity of the Complainant, Mr. Stephens' claim must fail.

II. Sex Discrimination Claim

The Complainant also claims he was discriminated against on the basis of his "female" sex – evidently apart from his gender identity.

Assuming the Complainant is "Wm. Anthony B. Stephens," his sex discrimination claim must fail. His claim is that he was the subject of sex discrimination in that his employment was terminated because he is a "female." This claim is made clear by virtue of the Complainant's statement in the Charge of Discrimination, to wit: "*Moreover, during my entire employment I know there are no other female Funeral Directors/Embalmers*" (our emphasis). Thus Mr. Stephens is stating, for purposes of his sex discrimination claim, that he was terminated because he is a female.

But Mr. Stephens is not a female. He is biologically, anatomically and legally a male. He may claim he is a female. He may intend to undergo therapy and surgery that would to some extent change his physical appearance to resemble a female. But doing so would not make him a female and, in any event, he has not done so yet. And the Funeral Home is not aware of any change in Mr. Stephens' legal status as a male.

EXHIBIT AI

Since it is an undisputable fact that Mr. Stephens is a male – not a female – he cannot claim his employment was terminated *on account of his being female*.

To the extent Mr. Stephens is claiming his employment was terminated not because he *is* a female (something he cannot factually claim), but rather because of his present or anticipated female *appearance*, his "sex discrimination" claim is not any different than his "gender identity discrimination" claim – which is discussed and refuted above. Therefore, the Complainant's sex discrimination claim must fail.

Please contact me if you have any questions.

Yours very truly,

KIRKPATRICK LAW OFFICES, P.C.

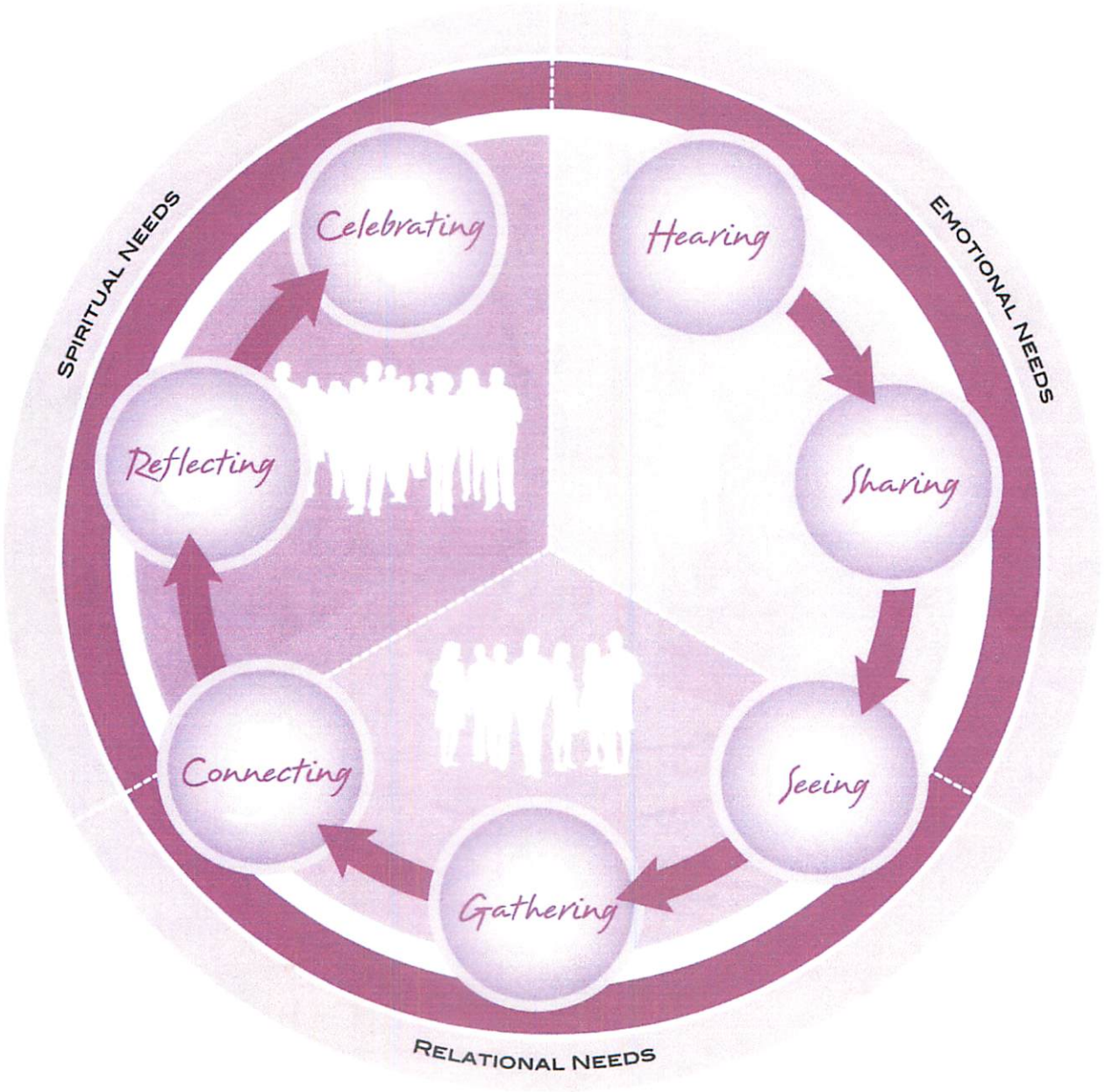
Joel J. Kirkpatrick

EXHIBIT AI

Exhibit AJ


THE
EXPERIENCE
OF
Healing
Begin
Healing
1
Hearing
2
Sharing
3
Seeing
4
Gathering
5
Connecting
6
Reflecting
7
Celebrating
EMOTIONAL NEEDS
RELATIONAL NEEDS
SPIRITUAL NEEDS

The Experience of Healing™



2016 WL 158820
United States Court of Appeals,
Eleventh Circuit.

Jennifer CHAVEZ, Plaintiff–Appellant,
v.
CREDIT NATION AUTO SALES, LLC, f.k.a. Synergy Motor Company, Defendant–Appellee.

No. 14–14596.
|
Jan. 14, 2016.

Synopsis

Background: Former employee, who underwent a male-to-female gender transition, brought action against her former employer, alleging sex-based discrimination in violation of Title VII. The United States District Court for the Northern District of Georgia, William S. Duffey, Jr., J., 49 F.Supp.3d 1163, adopting recommendation of J. Clay Fuller, United States Magistrate Judge, granted summary judgment for employer. Employee appealed.

Holdings: The Court of Appeals held that:

[1] employer terminating employee for sleeping while on the clock was not pretext;

[2] genuine issue of material fact existed as to whether employer had discriminatory intent; and

[3] genuine issue of material fact existed as to whether sex was a motivating factor in terminating employee.

Affirmed in part and reversed in part.

Wilson, Circuit Judge, filed a concurring opinion.

Attorneys and Law Firms

Jillian T. Weiss, Jillian T. Weiss Law Office, Tuxedo Park, NY, Jerry L. Worthy, Worthy & Associates, Dallas, GA, for Plaintiff–Appellant.

Marc Celello, Celello Law Group, LLC, Woodstock, GA, for Defendant–Appellee.

Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 1:13–cv–00312–WSD.

Before HULL and WILSON, Circuit Judges, and MARTINEZ, * District Judge.

Opinion

PER CURIAM:

***1** In this Title VII case, Jennifer Chavez appeals from the grant of summary judgment to her former employer, Credit Nation Auto Sales, LLC ("Credit Nation"). Chavez, an auto mechanic, filed this lawsuit for sex discrimination and alleges she was terminated because she is a transgender person.

Title VII declares unlawful any "employment practice" that "discriminate[s] against any individual with respect to ... compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). Title VII forbids intentional employment discrimination predicated on any of the protected characteristics of race, color, religion, sex, or national origin. *See Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir.2001). Sex discrimination includes discrimination against a transgender person for gender nonconformity. *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir.2011).

Chavez's appeal may be distilled into three enumerations: that the district court erred in granting summary judgment by (1) deciding that she did not present direct evidence of discriminatory intent by Credit Nation in terminating her; (2) concluding that she did not establish a genuine issue of material fact regarding pretext pursuant to *McDonnell Douglas* to survive summary judgment on her sex discrimination claim; and (3) ruling that Chavez's circumstantial evidence did not create triable issues as to whether her employer Credit Nation had discriminatory intent and whether that animus was "a motivating factor" in its terminating her. *See* 42 U.S.C. §§ 2000e–2(a)(1) and 2(m). Upon review of the record, consideration of the parties' briefs, and after the benefit of oral argument, we affirm in part and reverse in part.

I. DIRECT EVIDENCE

In a Title VII case, a plaintiff may use either direct or indirect evidence to show that her employer discriminated against her because of her sex. Direct evidence is evidence that proves the existence of a discriminatory motive to terminate without inference or presumption. *See Holland v. Gee,* 677 F.3d 1047, 1054–55 (11th Cir.2012); *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir.2004). Indirect evidence is circumstantial evidence. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir.2012). Chavez argues that she has shown Credit Nation's discriminatory intent by direct evidence.

Under our precedent, "only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." *Wilson,* 376 F.3d at 1086 (quotation marks omitted). "If the alleged statement suggests, but does not prove, a discriminatory motive, then it is circumstantial evidence." *Id* .

None of Chavez's evidence satisfies the exacting standard of direct evidence of a gender-discriminatory motive.[1] On November 24, 2009, Chavez met with James Torchia, President of Credit Nation, about her gender transition. In support of her claim, Chavez relies primarily upon certain comments made by President Torchia during that meeting.

***2** We conclude, however, that Torchia's comments are not the kind of "blatant remarks whose intent could mean nothing other than to discriminate" that we require to qualify as direct evidence. *Holland,* 677 F.3d at 1055 (quotation marks omitted). Alternatively, in the district court, Chavez failed to object to the magistrate judge's conclusion that she did not present any direct evidence.

Thus, we review Chavez's case as a circumstantial evidence case. We outline the Title VII law about circumstantial evidence and then apply it to Chavez's evidence.

II. CIRCUMSTANTIAL EVIDENCE

"There is more than one way to show discriminatory intent using indirect or circumstantial evidence." *Hamilton,* 680 F.3d at 1320. "One way is through the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)." *Id.* (alterations added).

In *Hamilton,* this Court explained that another way is by "presenting circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.* (quoting *Smith v. Lockheed–Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir.2011)) (quotation marks and alterations omitted). "A triable issue of fact exists if the record, viewed in the light most favorable to the plaintiff, presents enough circumstantial evidence to raise a reasonable inference of intentional discrimination." *Id.* If the plaintiff presents enough such evidence, "her claim will survive summary judgment." *Id.*

Similarly, in *Lockheed–Martin,* this Court emphasized that: "establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment discrimination case." 644 F.3d at 1328. "Rather, the plaintiff will always survive summary judgment if [she] presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.; see also Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir.1997) (declaring that, in cases where a plaintiff cannot establish a prima facie case, summary judgment only will be "appropriate where no other evidence of discrimination is present." (emphasis removed)).

"[A] plaintiff may use 'non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination' and thereby create a triable issue." *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1255 (11th Cir.2012) (quoting *Hamilton,* 680 F.3d at 1320); *see also Lockheed–Martin,* 644 F.3d at 1328. "Whatever form it takes, if the circumstantial evidence is sufficient to raise 'a reasonable inference that the employer discriminated against the plaintiff, summary judgment is improper.' " *Chapter 7,* 683 F.3d at 1256 (quoting *Lockheed–Martin,* 644 F.3d at 1328); *accord Hamilton,* 680 F.3d at 1320.

***3** Here, Chavez attempts to travel on both circumstantial-evidence routes to a jury trial. First, she claims her evidence is sufficient to create a genuine issue of material fact regarding pretext under the *McDonnell Douglas* framework. Second, and alternatively, she argues her circumstantial evidence creates triable issues as to whether her employer Credit Nation had discriminatory intent and whether that animus was "a motivating factor" in its terminating her. We review both routes.

III. *MCDONNELL DOUGLAS*

A. Burden–Shifting Framewor

In *McDonnell Douglas,* the Supreme Court announced a burden-shifting framework for Title VII cases based on circumstantial evidence. Under this framework, a plaintiff must first make out a prima facie case of intentional discrimination. *Wilson,* 376 F.3d at 1087.[2] The plaintiff's prima facie case gives rise to an inference or presumption of discrimination. *See id.* The burden then shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Id.* This places upon the defendant merely an intermediate burden of production. *Turnes v. AmSouth Bank,* 36 F.3d 1057, 1060 (11th Cir.1994).

After the defendant has met its burden, the plaintiff bears the burden of showing that the employer's proffered reason "was not the true reason" for the employment decision and was merely pretext. *Jackson v. State of Ala. State Tenure Comm'n,* 405 F.3d 1276, 1289 (11th Cir.2005). If the plaintiff does not proffer sufficient evidence to create a genuine issue of fact as to pretext, the defendant employer is entitled to summary judgment. *See id.*

If the plaintiff's evidence creates a fact issue as to pretext, the defendant employer may then attempt to prove that it would have made the same employment decision in the absence of the alleged bias or unlawful motive.

The district court assumed without deciding that Chavez established a prima facie case of discrimination under the *McDonnell Douglas* framework. For purposes of this appeal, the parties do not dispute that Chavez established a prima facie case of sex discrimination, and Credit Nation articulated a legitimate, nondiscriminatory reason for Chavez's termination: Chavez was found sleeping on the job in a customer's car. Rather, the parties dispute whether Chavez's evidence is sufficient to create a jury issue as to pretext.

B. Pretext Prong

To establish pretext, an employee must specifically respond to the employer's explanation and produce sufficient evidence for a reasonable factfinder to conclude that the employer's stated reason is pretextual. *See Combs v. Plantation Patterns,* 106 F.3d 1519, 1529 (11th Cir.1997) (explaining that the plaintiff must present "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action"). A reason is not pretextual unless the employee shows both that the given reason was false and that discrimination was the real reason. *Brooks v. Cty. Comm'n of Jefferson Cty.,* 446 F.3d 1160, 1163 (11th Cir.2006). To survive summary judgment, the plaintiff must "come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Chapman v. AI Transp.,* 229 F.3d 1012, 1024 (11th Cir.2000) (en banc) (quoting *Combs,* 106 F.3d at 1528). The plaintiff must meet the employer's reason "head on" and rebut it. *Wilson,* 376 F.3d at 1088.

C. Chavez Failed to Show Pretext

***4** **[1]** Chavez's evidence failed to create a jury issue as to pretext. Credit Nation said that it fired Chavez, an auto mechanic, for sleeping while on the clock. In fact, Chavez slept for 40 minutes in a repair customer's vehicle while on the clock. Chavez admitted to this conduct. Credit Nation also fired another employee for sleeping on the job. Credit Nation's reason was both a true and legitimate reason.

Accordingly, the district court did not err in concluding that Chavez's evidence failed to show that the reason given—sleeping on the job—was pretextual under the *McDonnell Douglas* framework.[3]

VI. DISCRIMINATORY INTENT AND "A MOTIVATING FACTOR"

Even if she failed to show pretext, Chavez alternatively argues that she still presented sufficient circumstantial evidence that Credit Nation had discriminatory intent and that such intent was "a motivating factor" in her termination. *See* 42 U.S.C. § 2000e–2(m). Chavez asserts her termination was motivated not only by a legitimate reason, but also by an impermissible reason, to wit bias against her transgender status. In this regard, we review (1) the causation standard of "a motivating factor" in § 2000e–2(m); (2) Credit Nation's arguments about § 2000e–2(m); and then (3) Chavez's evidence.

A. Section 2000e–2(m)–"A Motivating Factor" Causation

Prior to the enactment of § 2000e–2(m), if a plaintiff employee proved the defendant employer had discriminatory intent based on sex under § 2000e–2(a)(1), the defendant could avoid all liability by showing the defendant would have made the same decision to terminate the plaintiff in the absence of discriminatory motive. *Price Waterhouse v. Hopkins*, 490 U.S. 244–46, 258, 109 S.Ct. 1775, 1787–88 (1989). This "but for" causation allowed a defendant to avoid liability even if the plaintiff had shown discriminatory intent in the employment decision.

After *Price Waterhouse*, Congress passed the Civil Rights Act of 1991, which made the same-decision defense no longer a complete affirmative defense to liability in Title VII discrimination cases that are based on "race, color, religion, sex, or national origin." *See* Civil Rights Act of 1991, Pub.L. No. 102–166, § 107, 105 Stat. 1071, 1075–76 (codified at 42 U.S.C. §§ 2000e–2(m), 2000e–5(g)(2)(B) (2012)).

Importantly, if a plaintiff has evidence of discriminatory intent, § 2000e–2(m) now provides that Plaintiff Chavez may establish causation by showing gender bias "was a motivating factor" in her termination, "even though other factors also motivated" her termination. 42 U.S.C. § 2000e–2. The full text of § 2000e–2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, *even though other factors also motivated the practice.*

42 U.S.C. § 2000e–2(m) (emphasis added). Under § 2000e–2(m), Plaintiff Chavez may prevail if she proves that her sex was a "motivating factor" behind her termination, even if there were other, even legitimate, factors motivating that decision as well. *See Harris v. Shelby Cty. Bd. of Educ.*, 99 F.3d 1078, 1084 (11th Cir.1996). [4]

***5** More recently, the Supreme Court has told us that "Section 2000e–2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes *the causation standard* for proving a violation defined elsewhere in Title VII." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, —— U.S. ——, at ——, 133 S.Ct. 2517, 2530, 186 L.Ed.2d 503 (2013) (emphasis added). "[B]ut-for causation is not the test"; rather, "[i]t suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." *Id.* at 2523. The Supreme Court has also instructed that (1) the language of § 2000e–2(m) indicates Congress's intent to confine that provision's change to the listed five types of discrimination—"race, color, religion, sex, or national origin," 42 U.S.C. § 2000e–2(m)—and (2) that § 2000e–2(m) does not apply to retaliation claims under § 2000e–3(a). *Id.* at 2532–33; *see also Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1304–05 (11th Cir.2000) (indicating retaliation is not among the employment practices listed in § 2000e–2(m)). [5]

Further, the Supreme Court recently abrogated the requirement of direct evidence for § 2000e–2(m) cases. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92, 123 S.Ct. 2148, 2150, 156 L.Ed.2d 84 (2003). The Supreme Court held that a plaintiff can rely on circumstantial evidence to show mixed motives under § 2000e–2(m). *Id.* at 101, 123 S.Ct. at 2155.

This Court's own decision in *Harris v. Shelby County Board of Education* is instructive as to how § 2000e–2(m) applies. In *Harris*, the plaintiff's lawsuit, brought under Title VII and § 1983, alleged the defendants discriminated against him by not selecting him as a school principal because of his race. 99 F.3d at 1080. The *Harris* Court concluded (1) that the plaintiff presented sufficient circumstantial evidence to create a jury issue on racially discriminatory intent in the hiring decision, but (2) that the defendant board proved it would have made the same hiring decision even in the absence of discriminatory intent. *Id.* at 1084–85. This Court affirmed the grant of summary judgment to the defendants on the plaintiff's § 1983 claim based on that same-decision, affirmative defense. *Id.* at 1085. *But this Court remanded the Title VII claim to the district court to permit the plaintiff to prove race was "a motivating factor" behind the hiring decision, even though we found, based on overwhelming evidence, that the employer defendant would have made the same decision anyway. Id.* (citing § 2000e–2(m)).

The *Harris* Court also pointed out that on remand the remedy for a § 2000e–2(m) violation was limited by § 2000e–5(g)(2)(B). [6] *Id.* Specifically, if a defendant employer proves that it would have taken the same employment action in the absence of the illegal motivating factor, § 2000e–5(g)(2)(B) provides that the court "may grant" certain declaratory or injunctive relief and attorney's fees and costs directly attributable to the pursuit of a § 2000e–2(m) claim, but "shall not award

damages" or order "reinstatement." 42 U.S.C. § 2000e–5(g)(2)(B); *see also Harris,* 99 F.3d at 1085 (quoting 42 U.S.C. § 2000e–5(g)(2)(B)). In § 2000e–2(m) cases, the employer's same-decision defense, if proven, effectuates only a limitation on liability, not a complete avoidance of it. *See Canup v. Chipman–Union, Inc.*, 123 F.3d 1440, 1442 (11th Cir.1997). However, if the defendant fails to carry this same-decision burden, the plaintiff prevails without the remedy limitation in § 2000e–5(g)(2)(A).

B. Credit Nation's Arguments

***6** Despite the plain language in § 2000e–2(m) and our precedent, Credit Nation in effect argues that Chavez must still prove pretext to recover. Credit Nation in essence asserts that if Chavez cannot show pretext, she cannot show mixed-motive causation under § 2000e–2(m). That argument lacks merit because, as explained above, *McDonnell Douglas* is one route, but not the only available avenue in sex discrimination cases. *See Chapter 7,* 683 F.3d at 1255; *Lockheed–Martin,* 644 F.3d at 1328; *Hamilton,* 680 F.3d at 1320; *Harris,* 99 F.3d at 1084–85.

We recognize this Court has indicated that if *a retaliation claim* fails at the summary judgment stage under *McDonnell Douglas,* it also fails under a "mixed-motive" analysis for the same reasons. *See Crawford v. City of Fairburn,* 482 F.3d 1305, 1309 (11th Cir.2007) (holding that because the plaintiff failed to show the non-discriminatory reason for his termination "was pretextual" under *McDonnell Douglas,* "he has also failed to establish that the City [employer] was motivated by the consideration of an impermissible factor"). However, examined closely, *Crawford* involved *only a retaliation claim,* the Supreme Court has told us that § 2000e–2(m) does not apply to retaliation claims, and *Crawford* is thus not "a motivating factor" case under § 2000e–2(m) and is not applicable here.

Alternatively, Credit Nation argues that even if Chavez is not required to show pretext under *McDonnell Douglas,* she still failed to present sufficient circumstantial evidence for a reasonable jury to find that Credit Nation had any discriminatory intent or that her transgender status was "a motivating factor" in Credit Nation's termination of her employment. We consider below whether Chavez met that burden.

D. Analysis of Chavez's Evidence

[2] **[3]** Chavez worked as an auto mechanic at Credit Nation from June 18, 2008 to January 11, 2010. She was never disciplined before she announced her gender transition on October 28, 2009. Chavez was fired on January 11, 2010 for "[s]leeping while on the clock on company time."

President Torchia, Credit Nation's owner, was responsible for and made the decision to terminate Chavez. There is some evidence Torchia was initially accommodating of Chavez's gender transition. Torchia agreed to front Chavez an additional week of unaccrued vacation time to allow Chavez additional time to recover after one of her gender transition surgeries. And on November 9, 2009, Chavez wrote a letter to the Atlanta Journal Constitution that initially praised her employer's support for her gender transition. Chavez's letter noted that her boss Torchia "was very supportive," that he said Chavez had "nothing to worry about," and that he "made sure that all employees understood the no-harassment policy."

But Chavez also presented plenty of circumstantial evidence suggesting that Torchia's attitude was not without reservation and that it changed. First, as to discriminatory intent, on November 24, 2009, about a month after Chavez announced her plans to undergo a gender transition and several weeks after Chavez wrote her letter to the newspaper, Chavez met with Torchia to discuss the matter. Chavez reported that Torchia was "very nervous" about her gender transition and the "possible ramifications." Torchia stated that "he did not want any problems created for [Chavez] or any of his other employees" due to Chavez's "condition." Torchia said it was Chavez's fault that Credit Nation had lost a tech applicant. Notably, Torchia added that he thought Chavez was going to "negatively impact his business."

***7** After Chavez asked Torchia if it was "okay to talk about it" and to "educate others about [her] condition (transexualism) [*sic*] so they might understand and not be afraid," Chavez reports that Torchia obliged but "only if [Chavez] was asked."[7] Torchia admonished that Chavez "shouldn't bring it up."

Also in this November 24 meeting, Torchia discussed what Chavez was allowed to wear to and from work. Even though Chavez changed into a uniform before her shift started and shortly before leaving work each day, Chavez reports that Torchia asked her "not to wear a dress back and forth to work." After Chavez told Torchia that she had not been wearing anything "outlandish" back and forth from work

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—"only ... jeans and a top with tennis shorts"—Torchia said what Chavez had been wearing was acceptable, just so that she did not "wear a dress or miniskirt." Chavez asked about whether she could wear a dress to and from work once her gender transition was complete. Torchia said no. He said that "would be disruptive and any woman that wears a dress at the service department would be disruptive."

Also, on November 12, 2009, Vice President Cindy Weston told Chavez that Chavez needed to "tone it down," to not talk as much about her gender transition in the shop, and to be "very careful" because Torchia "didn't like" the implications of Chavez's planned gender transition. Weston admitted there was a problem with co-workers who were uncomfortable with Chavez's conversations about some of her upcoming surgeries. And after Chavez's termination, shop foreman Kirk Nuhibian told Chavez, "i [*sic*] know for a fact you were run out of credit nation [*sic*]."

Chavez has also offered evidence suggesting Credit Nation subjected her to heightened scrutiny after learning about her gender transition plans and was simply looking for a legitimate work-related reason to terminate her. President Torchia told Chavez in their November 24 meeting, "I know you [Chavez] are the best mechanic here and I have heard that from everyone." And yet, even though Chavez was an excellent employee and had no prior disciplinary history, after disclosing her gender transition, Chavez soon found herself the subject of discipline.

As evidence of heightened scrutiny, Chavez points to an email exchange between Vice President Weston and attorney John McManus on which President Torchia was carbon copied. After Chavez complained that she had been told she could no longer use a unisex customer bathroom that other female employees were permitted to use, Weston solicited advice from attorney McManus, who responded. McManus wrote, "I am concerned that no matter what you do, that Employee is going to come up with come [*sic*] complaint." McManus suggested Credit Nation write up reports "indicating the issues about the restroom and how that was resolved," adding, "[t]omorrow will bring more issues and I think this will get to a breaking point before very long. Just have the management focus on work and performance of required duties and the other issues should be written up one at a time." Chavez argues that a reasonable inference in her favor is that Credit Nation solicited its attorney for advice on how to find a legitimate work-related reason to terminate Chavez.

***8** Chavez also points to a disciplinary write-up in mid-December that she alleges was gender-based. Several employees complained that Chavez was receiving special treatment in connection with her gender transition. After one of Chavez's co-workers, Richard Randall, complained that Chavez was receiving "special treatment" from Vice President Weston because Chavez was permitted to attend medical appointments related to her gender transition, Chavez warned Randall to stop harassing her and that Chavez had Weston's phone number.[8] Chavez was then written up as a result of this exchange.

Chavez also emphasized how Credit Nation's progressive disciplinary process was bypassed in her termination. Credit Nation's "Progressive Discipline" policy, outlined in Rule 716 of its handbook, lays out a four-step procedure for employee discipline. It states:

> Disciplinary action may call for any of four steps—verbal warning, suspension with or without pay, or termination of employment—depending on the severity of the problem and the number of occurrences. There may be circumstances when one or more steps are bypassed.

While the handbook notes that "certain types of employee problems ... are serious enough to justify ... in extreme situations, termination of employment, without going through the usual progressive discipline steps," the handbook nonetheless clarified that "[p]rogressive discipline means that, with respect to most disciplinary problems, these steps will normally be followed." It adds that "[t]he major purpose of any disciplinary action is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future."

Credit Nation's handbook also contains a "Disciplinary Procedures" policy, listed as Rule 717. This policy explains that "corrective or disciplinary measures ... are not intended to inflict punishment, but rather to correct whatever problems may exist and/or make employees aware of the importance of abiding by [Credit Nation's] policies, procedures and standards of conduct and behavior." While this policy did list a number of employee behaviors that "may result in immediate discharge," "sleeping while on the clock on company time"—the reason Credit Nation provided in Chavez's termination notice—was not included in this list.

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While Credit Nation's disciplinary policy gave it discretion in whether to follow each step progressively or to bypass "one or more steps" based on the circumstances, Chavez argues that her evidence at least creates the inference that Credit Nation deviated from the steps that were "normally to be followed." None of the progressive steps was followed prior to her termination. Further, Credit Nation's argument that there was a legitimate reason to terminate Chavez—sleeping on the clock—misunderstands the plaintiff's burden under § 2000e–2(m). Again, Chavez need not show that the legitimate reason for her termination was pretextual, as she would under a *McDonnell Douglas* analysis. Rather, it is enough that she show that discriminatory animus existed and was at least "a motivating factor."

***9** Considering all the evidence put forth by Chavez and Credit Nation together and viewing it in the light most favorable to Chavez, we conclude triable issues of fact exist as to (1) her employer's discriminatory intent and (2) whether gender bias was "a motivating factor" in Credit Nation's terminating her. [9]

AFFIRMED IN PART, REVERSED IN PART. [10]

WILSON, Circuit Judge, concurring:
I concur in the result.

All Citations

--- Fed.Appx. ----, 2016 WL 158820, 128 Fair Empl.Prac.Cas. (BNA) 1049, 99 Empl. Prac. Dec. P 45,473

Footnotes

* Honorable Jose E. Martinez, United States District Judge for the Southern District of Florida, sitting by designation.

1 We review *de novo* a summary judgment determination, viewing all evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor. *Baloco v. Drummond Co., Inc.,* 767 F.3d 1229, 1246 (11th Cir.2014). Summary judgment is appropriately granted only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The non-moving party cannot survive summary judgment by presenting "[a] mere scintilla of evidence," but must present evidence from which a jury could reasonably find for the non-moving party. *Baloco,* 767 F.3d at 1246.

2 To establish a prima facie case of employment discrimination under Title VII, a plaintiff must show (1) she is a member of a protected group; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) employment or disciplinary policies were differently applied to her. *Chapter 7,* 683 F.3d at 1255 (11th Cir.2012). To be an adequate comparator, the preferentially treated individual from outside the plaintiff's protected class has to be similarly situated in all relevant aspects, yet disciplined in different ways for the same conduct. *Lockheed–Martin,* 644 F.3d at 1326 n. 17; *Holifield,* 115 F.3d 1555 at 1562.

3 Chavez also argues that her Seventh Amendment right to a jury trial was violated when the district court granted summary judgment to Credit Nation. This argument wholly lacks merit. *See Zivojinovich v. Barner,* 525 F.3d 1059, 1066 (11th Cir.2008) (concluding that where summary judgment is appropriate, no Seventh Amendment violation occurs).

4 In this regard, the 1991 Act as codified in § 2000e–2(m) legislatively overruled that part of the plurality's holding in *Price Waterhouse* which allowed defendants to completely avoid all liability upon proving that they would have taken the same employment action in the absence of discriminatory intent. *Harris,* 99 F.3d at 1084 & n. 4.

5 This Title VII case involves only status-based discrimination based on sex, 42 U.S.C. § 2000e–2(a)(1). Title VII also prohibits retaliating against an employee for reporting or opposing discrimination. 42 U.S.C. § 2000e–3(a). Plaintiff Chavez has made no retaliation claims.

6 The full text of § 2000e–5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e–5(g)(2)(B).

7 Chavez memorialized in hand-written notes the content of her November 24 discussion with Torchia. We quote those notes here verbatim.

8 While a Credit Nation employee reported that Chavez's exact words to Richard Randall were, "I have Cindy's Personal Cell Phone Number And No One Can Fuck With Me," Chavez testified that she did not recall phrasing her words this way. We must view material disputes in the light most favorable to the non-moving party.

9 Because the district court concluded that under § 2000e–2(m) Chavez failed to present sufficient evidence that her gender was "a motivating factor" in her termination, the district court's opinion did not address the "same-decision" issue under § 2000e–5(g)(2). One sentence of Credit Nation's appellate brief summarily asserts that "Chavez has presented no evidence that suggests the decision to fire her because of her sleeping on the clock would have been different if she were not transgender." We decline to address that issue raised on appeal in such a conclusory fashion.

10 Credit Nation's motion requesting sanctions against Chavez is **DENIED.**

2015 WL 5437101
Only the Westlaw citation is currently available.
United States District Court,
E.D. Arkansas, Western Division.

Patricia Y. Dawson, Plaintiff
v.
H&H Electric, Inc., Defendant

NO: 4:14CV00583 SWW
|
Signed September 15, 2015

Attorneys and Law Firms

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OPINION and ORDER

Susan Webber Wright, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Patricia Dawson ("Dawson"), a transgender woman, brings this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, against her former employer, H&H Electric, Inc. ("H&H"). Dawson charges that H&H wrongfully terminated her employment because of her sex. Before the Court is H&H's motion for summary judgment [ECF Nos. 16, 17, 18], Dawson's response in opposition [ECF Nos. 19, 20, 21], and H&H's reply [ECF No. 25]. Also before the Court is an *amicus curiae* brief by the Equal Employment Opportunity Commission [ECF No. 26]. [1] After careful consideration, and for reasons that follow, the motion is denied.

I. Summary Judgment Standard

Summary judgment is proper if the evidence, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the defendant is entitled to entry of judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 371, 322 (1986). When a nonmoving party cannot make an adequate showing on a necessary element of the case on which that party bears the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 at 322-23. A factual dispute is genuine if the evidence could cause a reasonable jury to enter a verdict for either party. *Miner v. Local 373*, 513 F.3d 854, 860 (8th Cir. 2008). "The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under prevailing law." *Celotex*, 477 U.S. at 331.

II. Background

Dawson has been diagnosed with gender dysphoria, which she explains "is the medical diagnosis given to individuals whose gender identity–their innate sense of being male of female—differs from the sex they were assigned at birth and who experience distress as a result." [2] In 2008, when Dawson was known as Steven and presented as a male, H&H hired her to work as an electrical apprentice. H&H provided electrical contract work for Remington Arms Company ("Remington"), and Dawson was assigned to work at Remington's plant in Lonoke, Arkansas. Dawson worked at the Lonoke job site from June 2012 until her termination in September 2012, and during that time period, Marcus Holloway ("Holloway"), H&H's vice president, served as her direct supervisor.

***2** As part of her therapy for gender dysphoria, Dawson began the process of transitioning from male to female, and in June 2012, she changed her legal name to Patricia Yvette Dawson. Initially, Dawson refrained from discussing her transition with anyone at work, and she continued to use the name Steve. But on Friday, June 22, 2012, Dawson informed Holloway that she was transgender, and she showed him her new driver's license, which bore her new name and a female gender designation.

The parties present entirely different accounts of events that followed Dawson's disclosure to Holloway. Dawson testifies that when she told Holloway about her transgender status, he appeared stunned and stated: "You're one of the best people I have. I'd hate to lose you." [3] She also recalls that Holloway instructed her not to tell anyone else at work about her gender transition, and he stated that he needed the weekend to think about what to do. [4] Contrary to Dawson's recollection, Holloway remembers only that he and Dawson had a brief

discussion about her name change and the need to have her payroll information changed.[5] According to Holloway, he merely told Dawson that he was on his way out of town and that the following Monday, he would notify payroll about her name change.[6]

Dawson testifies that on Monday, June 25, 2012, Holloway instructed her to complete new employment forms with her legal name, but he repeated that she should not discuss her gender transition with anyone at work, and he denied her request to openly use her legal name, wear women's clothing, or use the women's restroom at work.[7] Remington's policies required H&H employees to complete safety training, which was documented, and to sign daily log books upon entering the plant. Dawson asked Holloway if she could use her legal name to sign Remington's safety training documents and log books, but Holloway refused her request.[8]

Dawson reports that she obeyed Holloway's orders and refrained from discussing her gender transition at work, but her coworkers began discussing her name change and transgender status when she was not present. Dawson recalls that one coworker told her that he knew about her name change and asked which name he should use to address her. Dawson testifies that she repeatedly sought Holloway's permission to use her legal name at work and explained to him that, despite her silence, other employees were aware of her gender transition. According to Dawson, Holloway denied each request and cautioned her: "We are guests here [at Remington's job site]. Let's not rock the boat."[9]

Beginning the week of September 7, 2012, Dawson defied Holloway's orders and began to wear a bra, women's clothing, and makeup to work. Subsequently, Holloway told Dawson that he had received a report that she had worn a blouse to work, and he ordered her not to do it again.[10] Dawson testifies that when Holloway reprimanded her for inappropriate attire, he asked her whether she was trying to drive him into early retirement, and he complained that people were constantly approaching him to talk about her.[11] Holloway denies making those statements.[12]

***3** On September 17, 2012, Dawson trained an H&H employee named Stephan Wood. Dawson recalls that Wood asked her whether she was permitted to sign Remington's safety records and log books with her legal name. Dawson states that when she responded that she was required to sign the name "Steven," Woods inquired whether the circumstances raised falsification of documents, safety, or liability issues, to which Dawson responded, "I would think so."[13] Later that afternoon, Holloway terminated Dawson's employment. Dawson testifies that Holloway approached her and said, "I'm sorry, Steve. You do excellent work, but you're too much of a distraction. I'm going to have to let you go. I cannot afford to risk this contract over one person."[14]

After exhausting her administrative remedies, Dawson commenced this lawsuit, claiming that H&H terminated her employment because of her sex, in violation of Title VII. Specifically, Dawson charges that H&H terminated her employment "because of her gender transition" and "because it perceived [her] to be a man who did not conform to gender stereotypes associated with men ... or because it perceived [her] to be a woman who did not conform to gender stereotypes associated with women .... "[15]

III. Discussion

In moving for summary judgment, H&H initially argues: "[T]ranssexuals may not claim protection under Title VII solely from discrimination based solely on their status as a transsexual; as has been repeatedly recognized by federal courts, Title VII does not provide a basis for protected status because sexual orientation is not listed as a protected class under Title VII .... "[16] This argument ignores Dawson's asserted theory of discrimination—that she was terminated because of her gender transition and her failure to conform to gender stereotypes.

It is well settled that Title VII's interdiction of discrimination "because of [an] individual's sex," 42 U.S.C. § 2000e-2(a)(1), prohibits an employer from taking adverse action because an employee's behavior or appearance fails to conform to gender stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775 (1989), *superseded on other grounds by statute as stated in Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014);[17] *see also Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1039 (8th Cir. 2010)(noting that "an adverse employment decision based on gender non-conforming behavior and appearance is impermissible under *Price Waterhouse*"). The Court finds that Dawson pleads facts sufficient to state a legally viable claim that H&H discriminated against her because of her sex in violation of Title VII.

CASE 2

***4** H&H next argues that there are no genuine issues for trial because Dawson is unable to establish a *prima facie* case of sex discrimination, and she cannot show pretext. Consistent with the parties' arguments, the Court will analyze Dawson's claim under the three-part framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Under that framework, Dawson must establish a *prima facie* case by showing that (1) she is a member of a protected class; (2) she met the legitimate expectations of her employer; (3) she suffered adverse employment action (termination); and (4) the adverse employment action (termination) occurred under circumstances giving rise to an inference of discrimination. *See Wheeler v. Aventis Pharms.*, 360 F.3d 853, 857 (8th Cir. 2004). If Dawson makes a *prima facie* showing, the burden shifts to H&H to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Then, the burden shifts back to Dawson to present evidence that the stated reason for adverse action is pretext for discrimination. *Id.*

With respect to Dawson's *prima facie* showing, H&H does not dispute that she met the legitimate expectations of her employer[18] or that she suffered adverse employment action. H&H contends only that Dawson is without evidence sufficient to establish an inference of sex discrimination because she cannot show that she received less favorable treatment than similarly-situated employees, who are not members of her protected class. However, such comparative evidence is not the exclusive means by which Dawson may establish an inference of discrimination. *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1039-1040 (8th Cir. 2010). "The touchstone inquiry remains whether *circumstances* permit a reasonable inference of discrimination." *Id.* (emphasis added). Here, Dawson presents evidence that when she told Holloway about her transgender status, he stated: "You're one of the best people I have. hate I'd to lose you." Dawson also offers evidence that Holloway instructed her not to "rock the boat" and that he repeatedly forbade her to use her legal name, talk about her transgender status, or wear feminine clothes at work. Dawson's evidence further shows that soon after she disobeyed Holloway's orders and began wearing makeup and feminine attire at work, Holloway terminated her employment and told her that she was too much of a distraction. The Court finds that Dawson has provided ample evidence from which a reasonable juror could find that she was terminated because of her sex.

The Court now turns to the issue of pretext. H&H's proffered reason for terminating Dawson is that she threatened to sue Remington and did so without first discussing her work-related problem with her immediate supervisor, as required by H&H's employment handbook. Holloway testifies that on September 17, 2012, the day he terminated Dawson, Remington employees Virgil Bennett and Danny Hopkins ("Hopkins") beckoned him to a meeting.[19] According to Holloway, Hopkins told him that he called the meeting because a Remington employee overheard Dawson state that she could sue Remington because she had not received safety training under her legal name. Holloway further testifies that Hopkins stated: "We don't appreciate one of your employees making a comment about Remington and where we work. We feel like you need to remove her from our job site due to, you know, the threat that she made."[20]

Dawson presents evidence that casts serious doubt on Holloway's testimony. In deposition, Hopkins recalled that he talked to Holloway only once regarding Dawson and that the topic of discussion was that Dawson's hoop earrings presented a safety concern. Hopkins denied that he told Holloway that Dawson had threatened to sue Remington or that Hopkins suggested that Holloway should remove Dawson from Remington's job site.[21] Considering this evidence, together with Holloway's alleged comments evidencing a discriminatory attitude and the close temporal proximity between Dawson's feminine appearance at work and Holloway's decision to terminate her employment, the Court finds that Dawson has carried her burden to show that H&H's proffered reason is merely pretext for sex discrimination. *See Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 727 (8th Cir. 2001)(explaining that evidence of a discriminatory attitude may serve as evidence of pretext); *Fitzgerald v. Action, Inc.*, 521 F.3d 867, 876 (8th Cir. 2008)(noting that temporal proximity may affect the reasonableness of inferences drawn from other evidence).

IV. Conclusion

***5** For the reasons stated, Defendant's motion for summary judgment [ECF No. 16] is DENIED, and the case will proceed to a jury trial.

IT IS SO ORDERED.

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All Citations

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Footnotes

1 The Commission takes the position that discrimination against an individual because he or she is transgender is cognizable as discrimination because of sex in violation of Title VII.

2 Dawson Dec., ¶7 [ECF No. 19-1, at 3]. Regarding the terms "gender dysphoria," "transgender," and "transsexual," the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Fifth ed. 2013)("DSM–5") provides as follows:

> *Gender dysphoria* as a general descriptive term refers to an individual's affective/cognitive discontent with the assigned gender but is more specifically defined when used as a diagnostic category. *Transgender* refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender. *Transsexual* denotes an individual who seeks, or has undergone, a social transition from male to female or female to male, which in many, but not all, cases also involves a somatic transition by cross-sex hormone treatment and genital surgery *(sex reassignment surgery*).

DSM-V at 451.

3 Dawson Dec., ¶11 [ECF No. 19-1, at 3]; *see also* Dawson Dep., 118 [ECF No. 19-2, at 16].

4 Dawson Dec., ¶11 [ECF No. 19-1, at 3].

5 Holloway Dec., ¶9 [ECF No. 16-1, at 2].

6 *Id.*

7 Dawson Dec., ¶12 [ECF No. 19-1, at 2-3].

8 Dawson Dec., ¶ 16 [ECF No. 19-1, at 4].

9 Dawson Dec., ¶13 [ECF No. 19-1, at 4]; *see also* Dawson Dep., 126-127 [ECF No. 19-2, at 22-23].

10 Holloway Dep., 21 [ECF No. 19-3, at 17]. In deposition, Holloway stated that Dawson's blouse presented a safety issue. *See* Holloway Dep., 19-19 [ECF No. 19-2, at 14-15]. Holloway acknowledges that he didn't see the blouse in question, but he recalls receiving a report that it was low cut. *See id.* When asked to specify the safety concern presented by a low-cut blouse, Holloway responded: "Your safety." *Id.*

11 Dawson Dec., ¶21 [ECF No. 19-1, at 5].

12 Holloway Dep. 66 [ECF No. 19-3, at 28].

13 Dawson Dec., ¶22 [ECF No. 19-1, at 6; *see also* Dawson Dep., 131-132 [ECF No. 19-2, at 26-27].

14 Dawson Dec., ¶ 23 [ECF No. 19-1, at 6].

15 Compl., ¶ 36-37 [ECF No. 1, at 6].

16 Def.'s Br. Supp. Summ. J. [ECF No. 18], 4-5.

17 In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989), the plaintiff adduced evidence that she was denied a partnership at Price Waterhouse because she did not conform to the decision makers' expectations of how a woman should behave and appear. The decision makers called the plaintiff "macho," commented that she needed "a course at charm school," and advised her that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse*, 490 U.S. at 235, 109 S.Ct. at 1782. A plurality of the Court found that such comments were indicative of gender discrimination and held that Title VII's prohibition of discrimination because of sex encompasses discrimination based on a failure to act in conformity with gender stereotypes. *See id.,* 490 U.S. at 250–51, 109 S.Ct. 1775 (plurality opinion); *id.* at 258–61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272–73, 109 S.Ct. 1775 (O'Connor, J., concurring). The Court noted: "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group .... " *Id.* at 251, 109 S.Ct. 1775.

18 It is undisputed that prior to Dawson's termination, she had received merit-based pay raises.

19 Holloway Dep., 5-6 [ECF 19-3, at 21-28].

20 Holloway Dep., 26 [ECF 19-3, at 72].

21 Hopkins Dep., 33-36 [ECF 19-11, at 5-7].

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CASE 2

2016 WL 1089178
United States District Court,
D. Connecticut.

Deborah Fabian, Plaintiff,
v.
Hospital of Central Connecticut, et al., Defendants.

No. 3:12-cv-1154 (SRU)
|
Signed March 18, 2016

Synopsis

Background: Transgender prospective employee brought action against prospective employer under Title VII and Connecticut Fair Employment Practices Act (CFEPA) alleging she was nearly hired as an on-call orthopedic surgeon, but employer declined to hire her because she disclosed her identity as a transgender woman. Employer moved for summary judgment.

Holdings: The District Court, Stefan R. Underhill, J., held that:

[1] prospective employee made prima facie showing of discrimination under Title VII;

[2] fact issues regarding whether employer's reasons for declining to hire prospective employee were pretextual precluded summary judgment;

[3] fact issues precluded summary judgment on issue of whether prospective employee was covered by Title VII; and

[4] as a matter of first impression, discrimination on the basis of transgender identity is cognizable under Title VII as discrimination because of sex.

Motion denied.

Attorneys and Law Firms

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MEMORANDUM OF DECISION AND ORDER

Stefan R. Underhill, United States District Judge

***1** The plaintiff in this case, Dr. Deborah Fabian, brings this action under Title VII of the Civil Rights Act and the Connecticut Fair Employment Practices Act ("CFEPA"). She alleges that she was very nearly hired as an on-call orthopedic surgeon at the Hospital of Central Connecticut and relied reasonably and substantially on the impending finalization of her hiring, but that the hospital declined to hire her because she disclosed her identity as a transgender woman who would begin work after transitioning to presenting as female. The hospital moves for summary judgment on the grounds that Dr. Fabian has not met her burden under the *McDonnell Douglas* burden-shifting framework, because she would have been an independent contractor rather than an employee and therefore is not covered by the relevant statutes, and because Title VII (and the CFEPA at the time of the alleged discrimination) does not prohibit employment discrimination on the basis of transgender identity. For the reasons discussed below, I reject all three arguments and deny the Hospital's motion.

I. Standard of Review

Summary judgment is appropriate when the record demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment).

When ruling on a summary judgment motion, the court must construe the facts of record in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *see also Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.1992) (court is required to "resolve all ambiguities

and draw all inferences in favor of the nonmoving party"). When a motion for summary judgment is properly supported by documentary and testimonial evidence, however, the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but must present sufficient probative evidence to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995).

"Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.1991); *see also Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780, 788 (2d Cir.1992). If the nonmoving party submits evidence that is "merely colorable," or is not "significantly probative," summary judgment may be granted. *Anderson*, 477 U.S. at 249–50, 106 S.Ct. 2505.

> The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

***2** *Id.* at 247–48, 106 S.Ct. 2505. To present a "genuine" issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248, 106 S.Ct. 2505.

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof at trial, then summary judgment is appropriate. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. In such a situation, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322–23, 106 S.Ct. 2548; *accord Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995) (movant's burden satisfied if he can point to an absence of evidence to support an essential element of nonmoving party's claim). In short, if there is no genuine issue of material fact, summary judgment may enter. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

II. Background

Deborah Fabian is an orthopedic surgeon and a transgender woman. [1] She alleges that she was very nearly hired by the Hospital of Central Connecticut ("HCC" or the "Hospital") as an on-call orthopedic surgeon for its Emergency Department, albeit with the involvement of a third-party provider of physicians and management services—Delphi Healthcare Partners, Inc. ("Delphi")—that the Hospital used as a means to find physicians. Fabian entered the hiring process with Delphi and subsequently went to interview at HCC believing that she was all but hired. At that time, she was publicly presenting as male and was known as David Fabian; she informed her interviewers at the end of her interview, however, that she is a transgender woman and transitioning to presenting as female, and that she would work at the hospital as Deborah Fabian. She subsequently learned that she would not be hired, and she alleges that she would have been except for her disclosure of her identity as a transgender woman. She alleges that the interview was barely more than a formality, that she had already been told she would get the job, that she had already been given a contract with a start date (which she executed and returned), and that it was in reliance on that reasonable understanding that she and her wife sold their home in Massachusetts.

***3** Fabian's four-count complaint alleges that Delphi (Counts One and Two) and HCC (Counts Three and Four) violated Title VII of the Civil Rights Act and the CFEPA. The present motion for summary judgment was filed only by HCC with respect to Counts Three and Four. [2] HCC asserts that it chose not to hire Fabian not because she is a transgender woman but because she showed what her interviewers perceived as reluctance (or insufficient enthusiasm) about late-night calls to the Emergency Department and their new electronic records systems, and that she wanted to perform more surgery, which is not what the job would likely entail. HCC also claims that the "contract" she received was merely a sample contract. Moreover, HCC argues that its relationship to Fabian if she had been hired would not have been as employer under Title VII, because she would have been an independent contractor of Delphi, and thus an independent contractor of an independent contractor; and that, in any case, discrimination on the basis of transgender identity is not prohibited by Title VII and was not prohibited by the

CFEPA at the time. In sum, HCC argues that summary judgment should be granted because: (1) HCC had legitimate nondiscriminatory reasons not to hire Fabian, which Fabian has not shown to be pretextual; (2) even if HCC had hired Fabian, it would not have been her "employer" under Title VII or the CFEPA; and (3) transgender is not a protected status under Title VII and was not a protected status under the CFEPA at the time of the events giving rise to this case, and the subsequent amendment of the CFEPA to cover that status should not be applied retroactively.

III. Discussion

The central factual dispute in this case is whether the decision not to hire Fabian was or was not made as a result of her transgender identity. If she would have been an independent contractor rather than an employee under Title VII and the CFEPA and therefore not covered by the statutes anyway, or if transgender status is not cognizable under them, then that factual dispute is immaterial. I will address those arguments below. But assuming for the moment that the discrimination she alleges is not outside the scope of the protective statutes, her claim is subject to the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Because in this case that analysis is relatively simple, I will take it up first.

A. *McDonnell-Douglas* Burden Shifting

[1] **[2]** **[3]** It is unlawful under Title VII for an employer "to fail or refuse to hire ... any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). Discriminatory failure-to-hire claims under Title VII[3] are analyzed under the familiar burden-shifting framework of *McDonnell Douglas*. Under that test:

> a plaintiff complaining of a discriminatory failure to hire must first make out a *prima facie* case of discrimination by showing that (1) [she] is a member of a protected class, (2) [she] was qualified for the job for which [she] applied, (3) [she] was denied the job, and (4) the denial occurred under circumstances that give rise to an inference of invidious discrimination. Once the plaintiff has made such a *prima facie* showing, the burden shifts to the employer to come forward with a nondiscriminatory reason for the decision not to hire the plaintiff. If the employer articulates such a reason, the plaintiff is given an opportunity to adduce admissible evidence that would be sufficient to permit a rational finder of fact to infer that the employer's proffered reason is pretext for an impermissible motivation.

Vivenzio v. City of Syracuse, 611 F.3d 98, 106 (2d Cir.2010).

***4** **[4]** **[5]** There is no dispute that Fabian was qualified for the job and that she was denied it. Whether she is a member of a protected class pertinent to her claim is disputed and is addressed below. Assuming for now that she is, she need only show that "the denial occurred under circumstances that give rise to an inference of invidious discrimination" to make her *prima facie* showing. She has proffered evidence that she was led to believe she was all but formally hired, that she received some sort of contract (though its significance is disputed), that she relied to her detriment on such representations to such an extent that she sold her home in Massachusetts, that she was not hired after disclosing her transgender identity, and that other doctors who are not transgender were subsequently hired. Taken together, that evidence is easily sufficient to give rise to an inference of discrimination. Assuming that the employment relationship in question is covered by the statute and that Fabian is a member of a protected class because discrimination on the basis of transgender identity constitutes sex discrimination, her *prima facie* case is therefore easily made. HCC proffers nondiscriminatory reasons for not hiring her—that in an interview she expressed reluctance about being called in to the Hospital at late hours and about the Hospital's new electronic recordkeeping systems, and wanted to perform more surgery—but the factual basis of those reasons (*i.e.*, the statements Fabian made in the interview) is disputed. A reasonable jury could find that those reasons were mere pretext and that Fabian's disclosure of her gender identity was the reason she was not hired. The Hospital's motion for summary judgment should therefore not be granted on the basis of any failure of Fabian to meet her burden under the *McDonnell Douglas* framework.

B. Employee or Independent Contractor

[6] **[7]** **[8]** "Title VII cover[s] 'employees,' not independent contractors," *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 113 (2d Cir.2000), but the mere

fact that HCC formally designates its doctors as "independent contractors" does not make them so (or, rather, it does not exclude them as "employees") under Title VII. Instead, the question "whether a worker is an 'employee'—or whether he or she is merely an independent contractor—requires the application of the common law of agency. In turn, whether a hired person is an employee under the common law of agency depends largely on the thirteen factors articulated by the Supreme Court in *Community for Creative Non–Violence v. Reid*." *Id.* at 113–14 (citations omitted). The *Reid* factors are:

> [1] the hiring party's right to control the manner and means by which the product is accomplished ... [;] [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.

Reid, 490 U.S. 730, 751–52, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (footnotes omitted).

[9] [10] [11] Weighing the *Reid* factors is a highly fact-specific task, and "a court must disregard those factors that, in light of the facts of a particular case, are (1) irrelevant or (2) of indeterminate weight—that is, those factors that are essentially in equipoise and thus do not meaningfully cut in favor of either the conclusion that the worker is an employee or the conclusion that he or she is an independent contractor." *Eisenberg*, 237 F.3d at 114 (quotation omitted). *See also Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106, 110–11 (2d Cir.1998) ("Not all the *Reid* factors will be significant in every case, and we must weigh in the balance only those factors that are actually indicative of agency in the particular circumstances before us."). The *Reid* factors are also "a non-exhaustive list of factors to be considered," because they merely seek to synthesize the common law of agency. *Frankel v. Bally*, 987 F.2d 86, 90 (2d Cir.1993). They act, therefore, as a kind of starting point—some of them might not be significant in a particular case, and other factors not listed in *Reid* may matter instead. In general, "[t]hough no single factor is dispositive, the greatest emphasis should be placed on the first factor—that is, on the extent to which the hiring party controls the 'manner and means' by which the worker completes his or her assigned tasks. The first factor is entitled to this added weight because, under the common law of agency, an employer-employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the 'manner and means' by which the purported employee brings about that result." *Eisenberg*, 237 F.3d at 114 (citations and quotations omitted). [4]

***5 [12]** It is clear that doctors who staff hospitals will often fall near the borderline, and under the *Reid* factors or the common law of agency they may seem in some ways to be a hybrid of employee and independent contractor. Hospitals, by setting policy and performance review procedures, may have significant control over the "manner and means" of a doctor's practice, yet medicine is a highly skilled profession and doctors will necessarily always maintain a significant degree of autonomy. Hospital physicians are not for that reason, however, simply excluded as a class from protection under Title VII. The Second Circuit has reversed a grant of summary judgment that overemphasized the role of professional judgment as a factor militating against "control over the manner and means of one's work," because such overemphasis "would carve out all physicians, as a category, from the protections of the antidiscrimination statutes. While a physician, like any professional, must be given latitude in which to choose a course of action, especially considering the exigencies of medical practice, the mere existence *vel non* of that latitude is not dispositive of the manner-and-means test." *Salamon v. Our Lady of Victory Hosp.*, 514 F.3d at 228–29. The Second Circuit held that "[w]hile summary judgment may be appropriate in some cases concerning staff physicians suing hospitals, it is not appropriate in all," and in that particular case, the plaintiff had "demonstrated a genuine factual conflict regarding the degree of control [the hospital] exercised over her." *Id.* at 231. The source of tools and instrumentalities, as well as the location of work, will weigh in favor of seeing hospital physicians as employees; the duration of employment, the right to assign additional projects, the degree of discretion over when and how long to work, the method of payment, the doctor's role in hiring and

paying assistants, and various other factors, are likely to vary widely from case to case.

[13] The decision about employee status in a failure-to-hire case like this one may be even harder than in other cases of staff physicians suing hospitals, because the physician never started work and some of the dynamics that would have obtained are therefore less apparent. It is clear, however, that under the agreement that HCC had with Delphi (and under the contract Fabian received and executed), any doctors hired would be subject to the Hospital's bylaws, rules, regulations, policies, and procedures. They would be required to maintain "Medical Staff privileges" and appropriate credentials. Their schedules were to be subject to Hospital review and approval (though the extent of control over their own schedules remains unclear). They would be required to participate in the Hospital's programs pertaining to quality assurance, medical audit, risk management, utilization review, safety, infection control, and peer review, and to participate in various compliance programs. They would be required to follow policies and procedures with respect to medical records and timekeeping, to participate in staff committees, and to attend staff meetings, and the Hospital would have broad authority over administration generally. Doctors would have supervisory responsibility over hospital employees (and would not, for instance, hire their own staff and assistants).

The Hospital's right to control the manner and means of Fabian's work would be far less than in the case of less skilled workers, but the high degree of skill and autonomy involved in being a physician is not a *per se* bar on employee status. She would have had far *less* autonomy—and the Hospital would have had correspondingly greater control over the manner and means of her work—than she would have had in an individual practice, or in a partnership with a few other doctors, or if she merely had privileges to use the Hospital's facilities but was responsible for bringing in her own patients or performing her own billing (both tasks, in this case, were performed through the Hospital).

The location of the work and the source of the instrumentalities and tools weigh in favor of employee status. The duration of the relationship between the parties also weighs in favor of employee status, insofar as Fabian would not have been brought in to perform a specific task until completion—like a contractor hired to shingle a roof—or a particular task intermittently on an as-needed basis, but would become a regular part of the Hospital personnel. The Hospital's interest and involvement in the hiring process, and the fact that it interviewed and declined to hire Fabian, weigh still further in favor of employee status. If the Hospital had simply contracted with Delphi to fill its staffing needs in the way many businesses outsource custodial duties, for instance, Delphi would have hired whomever Delphi hired and the Hospital would have had little say in the matter. By interviewing and considering candidates, the Hospital was undertaking a traditional employer's task, and was not relying on Delphi to perform the tasks of a medical practice with its own staff but rather was relying on it to provide candidates for consideration by Hospital staff.

***6** None of those factors is dispositive, and I do not consider their balance to be obvious in this case, but it does appear that the relationship Fabian would have had with the Hospital if she had been hired would have been more like a traditional employee than like a traditional independent contractor. I need not decide now as a matter of law that Fabian would have been an employee under Title VII and foreclose further evidence and argument on the issue (and she has not cross-moved for summary judgment on it), and I do not do so. But I conclude that when construing the facts of record in the light most favorable to the nonmoving party and resolving all ambiguities and drawing all reasonable inferences against the moving party, the Hospital has not shown that Fabian as a matter of law would not have been an employee under Title VII, and summary judgment should not be granted on that basis.

C. Transgender Identity and Title VII

Title VII of the Civil Rights Act, as amended, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). The effect of the words "because of ... sex" is called into question in this case. Specifically, the parties disagree about the scope of those words' meaning, and whether they prohibit employment discrimination against transgender people because they are transgender people, or if they only encompass discrimination against women (transgender or otherwise) because they are women and men (transgender or otherwise) because they are men. Framed differently, the question is this: If an employer does not discriminate against women as a class or against men as a class, but does discriminate against transgender people (irrespective of whether they are transgender men or transgender women), does that employer violate Title VII?

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Neither the Supreme Court nor the Second Circuit has ever addressed that question.[5] Several other Circuits have addressed it, however, and though most of the earliest cases held that Title VII does not protect gender identity, the weight of authority has begun to shift the other way, especially (though not uniformly) after the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Because it is an open question in this Circuit, I consider the reasoning of other courts and closely examine the language of the statute below.

1. *The Early Cases and Congressional Intent*

The earliest appellate decisions to examine the applicability of Title VII to discrimination on the basis of transgender identity were *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir.1977),[6] and *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir.1982). In each case, the respective Circuit held that Title VII does not prohibit such discrimination, and subsequent cases that have come to the same conclusion have generally followed the same or essentially similar reasoning (as the Hospital urges me to do in the present case). *Holloway* and *Sommers* (and their progeny) were decided principally on two grounds: (1) the "traditional" definition or "plain" meaning of the word "sex," and (2) the intention of Congress.

***7** The Ninth Circuit in *Holloway* acknowledged that "[t]here is a dearth of legislative history" on the relevant provision, at least in part because "[t]he major concern of Congress at the time the Act was promulgated was race discrimination," and "[s]ex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." 566 F.2d at 662. The Court noted, however, that "the clear intent" of the Title VII amendments in the Equal Employment Opportunity Act of 1972—though that Act did not alter the relevant provision—"was to remedy the economic deprivation of women as a class." *Id.* The Court reasoned that "[g]iving the statute its plain meaning" is sufficient to show that "Congress had only the traditional notions of 'sex' in mind," *id.* and concluded that "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning." *Id.* at 663. *But see id.* at 664 (Goodwin, J., dissenting) (reasoning that discrimination because plaintiff "had changed her sex ... would have to be classified as [discrimination] based upon sex"). The Court referred several times to the "plain" meaning or "traditional" definition of sex and included a quotation from *Webster's Seventh New Collegiate Dictionary* in a footnote, *see id.* at 662 n. 4, but it did not discuss the language of the statute at length or engage with any definition in depth.

The Eight Circuit in *Sommers* ruled along the same lines. "[F]or purposes of Title VII," the Court held, "the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise," and "the legislative history does not show any intention to include transsexualism in Title VII." 667 F.2d at 750. Like the *Holloway* Court, the *Sommers* Court acknowledged that the word "sex" was added to Title VII in an amendment "one day before the House passed the Act without prior legislative hearings and little debate," but it nevertheless reasoned that "[i]t is ... generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for women." *Id.* The Court therefore held that "discrimination based on one's transsexualism does not fall within the protective purview of the Act." *Id.*

Both *Holloway* and *Sommers* rely on the supposedly "plain" or "traditional" meaning of the word "sex," but they do not elaborate on that supposed meaning; and, as I will discuss below (and as one might infer from Judge Goodwin's *Holloway* dissent), their treatment of the word is superficial. The apparently dual grounds for those decisions might therefore be collapsed into one, because both decisions use the "plain" meaning of the statute as a proxy for Congressional intent: rather than examining what the word "sex" means, they intuit what Congress must have intended the statute to do with respect to sex (while acknowledging that there is virtually no legislative history to guide them).

In the years since *Holloway* and *Sommers*, the use of legislative history and congressional intent has become more controversial and less prominent in statutory interpretation, and the addition of the word "sex" to Title VII is about as vivid an example imaginable of why that change occurred. U.S. District Judge John F. Grady in the Northern District of Illinois (in a decision issued from the bench and reported in the form of a transcript) disagreed with *Holloway* and *Sommers* about the Congressional intent behind the sex amendment to Title VII:

> those who have looked a little further into the matter know that this amendment introducing sex into the picture was a gambit of a Southern senator who sought thereby to scuttle

> the whole Civil Rights Act, and, much to his amazement and no doubt undying disappointment, it did not work. We not only got an act including race discrimination, which he had sought to bar, but we got sex as well.

Ulane v. Eastern Airlines, Inc., 581 F.Supp. 821, 822 (N.D.Ill.1983) ("*Ulane I* "), *rev'd*, 742 F.2d 1081 (7th Cir.1984) ("*Ulane II* "). There may be some uncertainty about the precise motives of that Southern congressman (who was not a senator, as Judge Grady said, but Representative Howard Smith of Virginia), but he was ostensibly an opponent of the bill, and it is clear that adding the word "sex" to Title VII was regarded by some of his colleagues as a welcome expansion of the Civil Rights Act's protective scope and by others as a prank or a poison pill to prevent it from becoming law. [7] Even if one considers some conception of a coherent and singular congressional intent to be a useful interpretive tool, it must be acknowledged that any such conception will, at least in cases like this one, be a legal fiction: there simply was no coherent and singular intent. Judge Grady thus disregarded the question of what Congress intended to do when it added the prohibition of sex discrimination to Title VII, asking instead: "What did we get when we got sex?" *Id.*

***8** Fifteen years later, Justice Scalia writing for a unanimous Supreme Court applied that same lens to Title VII in a decision holding that male-on-male sexual harassment claims fall under its purview:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). When Judge Grady disregarded the question of "the principal concerns of our legislators" and looked instead to the provision of the law itself—that is, to what "we g[o]t when we got sex" in Title VII—he concluded that the complaint before him, which alleged employment discrimination on the basis of transgender identity, clearly alleged discrimination that was "related to sex or had something to do with sex." *Ulane I*, 581 F.Supp. at 822. He characterized that conclusion as a "layman's reaction to the simple word," *id.* and held that "the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII." *Id.* at 825.

The Seventh Circuit reversed that decision. It agreed with and restated Judge Grady's summary of the circumstances of the sex amendment's adoption—it called the amendment "the gambit of a congressman seeking to scuttle" the Act, *Ulane II*, 742 F.2d at 1085—but it nevertheless indicated, perhaps paradoxically, that its responsibility was "to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex." *Id.* at 1084. The Court took the "total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption" as an indication that "Congress never considered nor intended that this ... legislation apply to anything other than the traditional concept of sex." *Id.* at 1085. The *Ulane II* Court thus relied, as the *Holloway* and *Sommers* courts relied, on what it characterized as the "traditional concept of sex" and the "plain meaning" of the statute, *id.* but it did not examine why or how that meaning differed from Judge Grady's "layman's reaction" in *Ulane I* (which also appears to have been Judge Goodwin's reaction in his *Holloway* dissent). Rather, it simply asserted that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* As the *Ulane II* Court saw it, to construe the provision as doing anything more would be "to judicially expand the definition of sex ... beyond its common and traditional interpretation," and only Congress has the prerogative to decide "whether it wants such a broad sweeping of the untraditional and unusual within" the term. *Id.* at 1086.

***9** By the mid-1980s—after *Holloway*, *Sommers*, and *Ulane II*—it was thus settled in the Seventh, Eighth, and Ninth Circuits that Title VII did not prohibit employment discrimination on the basis of transgender identity, and that result was premised in all three Circuits on congressional intent and a "plain reading" or "traditional definition" of the word "sex." Congress's intention in passing the sex amendment to Title VII, however, is a highly dubious basis

for interpreting the statute. And the supposed plainness of that "plain reading"—which itself may have been premised on an intuition about what Congress would or would not have intended—is at least in tension with the contrary "layman's reaction" of Judge Grady in *Ulane I* (and seemingly shared by Judge Goodwin in the *Holloway* dissent) that discrimination on the basis of transgender identity "relate[s] to sex or ha[s] something to do with sex," 581 F.Supp. at 822, and might therefore be "because of sex." None of the opinions discussed the basis of either allegedly plain reading, or the source of the chasm between them, so I will do so below. But first I will discuss the effect of a Supreme Court decision that does not directly address transgender identity, but which, according to the Ninth Circuit, implicitly overruled *Holloway* (and if so, *Sommers* and *Ulane II* as well), and thereby shifted the direction of Title VII cases on this issue.

2. *Gender Stereotyping and the Effect of* Price Waterhouse

The principal issues before the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), were questions of evidentiary burdens and causation in "mixed-motive" discrimination cases under Title VII. The Court produced no majority opinion—it issued a plurality opinion, two opinions concurring in the judgment, and a dissent—and part of the outcome was subsequently superseded by statute. *See Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 123–24 (2d Cir.1997) ("[Section 107(a) of the Civil Rights Act of 1991] modifies *Price Waterhouse* to make sure that a successful affirmative defense only limits the plaintiff's relief, rather than avoiding the defendant's liability."). One aspect of *Price Waterhouse* that survives, however, is a result of the fact that the plaintiff in that case did not allege her employer straightforwardly discriminated "against women because they are women," as the *Ulane II* Court described the reach of Title VII's prohibition of sex discrimination. Rather, she alleged that her employer discriminated against her because she was, in her employer's view, insufficiently feminine. By ruling in her favor, a majority of the Court agreed that Title VII reaches such claims of discrimination based on gender stereotypes.

The *Price Waterhouse* dissent stressed that "Title VII creates no independent cause of action for sex stereotyping," though it considered evidence of stereotyping by employers to be "quite relevant to the question of discriminatory intent." 490 U.S. at 294, 109 S.Ct. 1775 (Kennedy, J., dissenting). Litigants and courts have sometimes nevertheless treated *Price Waterhouse* as having created an independent cause of action or a new theory of "gender stereotyping" discrimination under Title VII, and some of the arguments on the present motion treat gender stereotyping as a distinct theory. I agree with the *Price Waterhouse* dissent, however, that there is no independent gender-stereotyping cause of action separate from sex discrimination *per se*; rather, *Price Waterhouse* shows that gender-stereotyping discrimination *is* sex discrimination *per se*. That is, the plurality and concurrences do not create a fundamentally new cause of action, but rather rely on an understanding of the scope of Title VII's prohibition against discrimination "because of sex" that reaches discrimination based on stereotypical ideas about sex.

In the words of the *Price Waterhouse* plurality, the "simple but momentous announcement" that Congress made with Title VII was that "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees," *id.* at 239, 109 S.Ct. 1775 (except for "the special context of affirmative action," *id.* at 239 n. 3, 109 S.Ct. 1775). The plurality recognized the "somewhat bizarre path by which 'sex' came to be included as a forbidden criterion for employment ... in an attempt to *defeat* the bill," *id.* at 244 n. 9, 109 S.Ct. 1775, but nevertheless considered legislative history pertaining to the rest of the Act (mostly legislative statements about race) as indicative of congressional intent that applied by analogy to sex. And by the plurality's reading, "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute," *id.* at 239, 109 S.Ct. 1775, and the words that prohibit employment discrimination on the basis of sex "mean that gender must be irrelevant to employment decisions." *Id.* at 240, 109 S.Ct. 1775. "In the specific context of sex stereotyping," just as an employer who simply refuses to hire a woman because she is a woman has acted on the basis of gender, so too an employer who "acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250, 109 S.Ct. 1775.

***10** The acknowledgement in *Price Waterhouse* that discrimination by means of gender stereotyping is discrimination "because of sex" under Title VII eventually led to a significant shift in the direction of decisions examining alleged discrimination on the basis of transgender identity. As the Ninth Circuit wrote, recognizing the abrogation of its earlier Title VII caselaw:

> The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In *Price Waterhouse,* which was decided after *Holloway* and *Ulane* [*I* & *II*], the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman"—that is, to conform to socially-constructed gender expectations. What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one. Thus, under *Price Waterhouse,* "sex" under Title VII encompasses both sex—that is, the biological differences between men and women —*and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.

Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir.2000) (citation omitted). The Court therefore held, largely on the basis of *Price Waterhouse*, that the Gender Motivated Violence Act (which parallels the sex discrimination standard of Title VII) reaches conduct motivated by transgender identity and other gender nonconformity.

The Sixth Circuit came to the same conclusion in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir.2004). "[T]he approach in *Holloway*, *Sommers*, and *Ulane* [*II*]," it wrote, "has been eviscerated by *Price Waterhouse*." *Id.* at 573. Rejecting the argument that transgender plaintiffs sought to bootstrap a new protected class into Title VII, the Court reasoned that, on the contrary, because discrimination "because of sex" reaches discrimination based on gender nonconformity, the *exclusion* of discrimination on the basis of transgender identity from the protective scope of Title VII would be to take a certain class of gender nonconformity and reclassify it as a nonprotected status solely in order to exclude it:

> Discrimination against the transsexual is then found not to be discrimination "because of ... sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender nonconformity by formalizing the non-conformity into an ostensibly unprotected classification.
>
> ...
>
> Such analyses cannot be reconciled with *Price Waterhouse,* which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual.

Id. at 574–75. Discrimination on the basis of transgender identity is thus "no different from the discrimination directed against Ann Hopkins in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a woman." *Id.* at 575.

***11** Similarly, the Eleventh Circuit in *Glenn v. Brumby* reasoned that:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.
>
> Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

663 F.3d 1312, 1316–17 (11th Cir.2011) (quotation, modification, and citations omitted). And likewise the Equal Employment Opportunity Commission has written:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has

> transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."

Macy v. Holder, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (quoting *Price Waterhouse*, 490 U.S. at 244, 109 S.Ct. 1775) (citations and quotation omitted).

The only post-*Price Waterhouse* federal appellate decision to uphold pre-*Price Waterhouse* doctrine on transgender identity and Title VII is *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir.2007). In that opinion, the Tenth Circuit cited *Holloway* (without acknowledging that the Ninth Circuit had already recognized it as abrogated), *Sommers*, and *Ulane II*, and agreed with them that "the plain meaning of 'sex' encompasses [no]thing more than male and female." *Id.* at 1221–22. It relied on "the traditional binary conception of sex" to conclude that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." *Id.* at 1222. The Court separately described the "*Price Waterhouse* theory" of gender stereotyping, apparently as an independent theory of liability, but declined to decide whether it applied to transgender identity and ruled against the plaintiff on other grounds. *Id.* at 1224.

In sum, discrimination on the basis of transgender identity is now recognized as discrimination "because of sex" in the Ninth Circuit (as *Schwenk* recognized the abrogation of *Holloway*), the Sixth Circuit (as recognized in *Smith*), and in the Eleventh Circuit (as recognized in *Glenn*); and the E.E.O.C. (in *Macy*) and has agreed with that authority. Discrimination on the basis of transgender identity is regarded as not constituting discrimination "because of sex" in the Tenth Circuit (under *Etsitty*). The continued vitality the pre-*Price Waterhouse* decisions in the Seventh and Eighth Circuits (*Ulane II* & *Sommers*, respectively) is unclear. [8]

3. *"Because of Sex"*

***12** The split in the caselaw on the question whether employment discrimination on the basis of transgender identity is prohibited by Title VII is the result of two competing views of the effect of the words "because of sex"—which, in turn, reflect two competing views of the meaning of the word "sex." Neither view has been very thoroughly explained or justified, but both purport to be plain readings.

The view typified by *Holloway*, *Sommers*, *Ulane II*, and *Etsitty* is that the "plain meaning" or "traditional binary conception" of sex means nothing more than "male and female," *see, e.g.*, *Etsitty*, 502 F.3d at 1221–22, and thus that discrimination "because of sex" can only mean discrimination "against women because they are women and against men because they are men," *Ulane II*, 742 F.2d at 1085. Discrimination against transgender people because they are transgender people, by that reading, is not discrimination "because of sex."

The view typified by Judge Grady's "layman's reaction" in *Ulane I* and implied by Judge Goodwin in his *Holloway* dissent—and apparent in varying degrees in the majority of post-*Price Waterhouse* cases—is less well described in the cases, but it interprets Title VII's prohibition of discrimination "because of sex" to include discrimination on the basis of factors that are sufficiently "related to sex or [that] ha[ve] something to do with sex." *Ulane I*, 581 F.Supp. at 822. Discrimination against transgender people because they are transgender people, by that reading, is quite literally discrimination "because of sex." A majority of the Supreme Court in *Price Waterhouse* agreed that discrimination on the basis of nonconformity with stereotypical gender norms constitutes discrimination "because of sex." That view is more expansive than the narrow *Ulane II* view and is consonant with Judge Grady's broader view in *Ulane I*, and subsequent cases have thus shifted markedly toward the latter.

I agree with those courts that have held that *Price Waterhouse* abrogates the narrow view of *Holloway*, *Sommers*, and *Ulane II*. Moreover, even without considering *Price Waterhouse*, I would conclude that that narrow view is erroneous and that Judge Grady's analysis was correct. The narrower view relies on the notion that the word "sex" simply and only means "male or female." That notion is not closely examined in any of the cases, but it is mistaken. "Male or female" is a relatively weak definition of "sex" for the same reason that "A, B, AB, or O" is a relatively weak definition of "blood type": it is not a formulation of meaning, but a list of instances. It might be an exhaustive list, or it might not be, but either way it says nothing about why or how the items in the list are instances of the same thing; and the word "sex" refers not just to the instances, but also to the "thing" that the instances are instances of. In some usages, the word "sex" can indeed

mean "male or female," but it can also mean the distinction between male and female, or the property or characteristic (or group of properties or characteristics) by which individuals may be so distinguished. Discrimination "because of sex," therefore, is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which individuals may be classified as male or female.

***13** There is nothing unplain, untraditional, unusual, or new-fangled about this understanding. It is simply attentive to what the words in the statute mean, and what they have meant since long before the statute was formulated. The first definition of "sex" in Samuel Johnson's seminal 1755 dictionary—among the earliest and most influential English dictionaries ever published—is "[t]he property by which any animal is male or female." [9] That definition reflects the traditional binary conception of sex, but unlike the allegedly "plain" or "traditional" view of the pre-*Price Waterhouse* cases, it is clear that the word "sex" refers to the *property* by which individuals are so classified. That is consonant with the (harder to read, but more descriptive) second definition of "sex" in the much more recent *Webster's Third New International Dictionary*, which was published roughly contemporaneously with the passage of the Civil Rights Act: "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction ... and that is typically manifested as maleness and femaleness ...." [10] The *Oxford English Dictionary*'s definitions of several senses of the word "sex" include a "[q]uality in respect of being male or female, or an instance of this" and "[t]he distinction between male and female ... ; this distinction as a social or cultural phenomenon, and its manifestations or consequences ...." [11]

Discrimination on the basis of the "peculiarities" that "typically" manifest as maleness and femaleness, or on the basis of "the property by which" people are classified as male or female, is much broader than discrimination against women because they are women and discrimination against men because they are men—it would surely include discrimination on the basis of gender stereotypes, and just as surely discrimination on the basis of gender identity, which Judge Grady rightly recognized as "related to sex or ha[ving] something to do with sex" by means of his "layman's reaction." *Ulane I*, 581 F.Supp. at 822.

Judge James Robertson of the U.S. District Court for the District of Columbia has issued two thoughtful opinions in *Schroer v. Billington* (first on a motion to dismiss, 424 F.Supp.2d 203 (D.D.C.2006), and then after a trial, 577 F.Supp.2d 293 (D.D.C.2008)) in which he recognized that Judge Grady was right that discrimination on the basis of transgender identity is discrimination on the basis of sex. He made a useful analogy (which was in substance repeated by the E.E.O.C. in *Macy*) to discrimination on the basis of religion:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

577 F.Supp.2d at 306. No court would make such a mistake because no court would implicitly define religion as synonymous with a purportedly exhaustive list of religions, and thus could not conclude that discrimination "because of religion" must be limited to discrimination against members of particular religions on the list because they are such members. Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the "wrong" way, is obviously discrimination "because of religion." Similarly, discrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination "because of sex."

***14** **[14]** On the basis of the plain language of the statute, and especially in light of the interpretation of that language evident in *Price Waterhouse*'s acknowledgement that gender-stereotyping discrimination is discrimination "because of sex," I conclude that discrimination on the basis of transgender identity is cognizable under Title VII. [12]

IV. Conclusion

Employment discrimination on the basis of transgender identity is employment discrimination "because of sex" and constitutes a violation of Title VII of the Civil Rights Act. HCC has not shown that the position Fabian sought is as a matter of law beyond the scope of Title VII as a result of being for an independent contractor rather than an employee. And Fabian has met her burden under *McDonnell Douglas* to make a *prima facie* case of discrimination and to proffer sufficient evidence for a reasonable jury to find that the non-discriminatory reasons HCC offers for not hiring her are pretextual. Whether the Hospital discriminated against Deborah Fabian on the basis of her gender identity is a question for a jury. Because she has proffered sufficient evidence for a reasonable jury to find that it did, the defendant's motion for summary judgment is denied.

So ordered.

All Citations

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Footnotes

1 Some of the cases that will be discussed below use the word "transgender," some use the word "transsexual," and some use both. I preserve the terminology in direct quotations but otherwise use the term "transgender." "Transsexual" is an older term with a more clinical origin, and though it is used by some people who identify with it, it is not favored by others. *See generally* GLAAD Media Reference Guide—Transgender Issues, http://www.glaad.org/reference/transgender. "Transgender" appears to be the more inclusive term, and it is the one Fabian uses of herself, so I follow her practice. Relatedly, the briefs on the present motion are inconsistent in their use of masculine and feminine pronouns. The better practice is to defer to the preference of the individual to whom the pronouns refer, *see id.*, and I accordingly use feminine pronouns throughout in deference to what would appear to be Fabian's preference.

2 HCC states both that Delphi "will likely have all counts against it withdrawn in the near future," Def.'s Mem. 1, and that it "is no longer a defendant in this matter," *id.* at 2 n.3. In fact Delphi is still a defendant and the counts have not yet been withdrawn. It may be that HCC was mistaken, that circumstances have changed, or that Delphi intends to settle and has postponed finalizing a settlement until after a ruling on the issues in this motion, but in any event it is still formally a defendant and has not filed any dispositive motions.

3 The relevant federal precedent is generally applicable to CFEPA claims as well. *See, e.g.*, *Levy v. Commission on Human Rights and Opportunities*, 236 Conn. 96, 103, 671 A.2d 349 (1996) ("Although this case is based solely on Connecticut law, we review federal precedent concerning employment discrimination for guidance in enforcing our own anti-discrimination statutes."); *Wroblewski v. Lexington Gardens, Inc.*, 188 Conn. 44, 53, 448 A.2d 801 (1982) ("In interpreting and applying [CFEPA] we are properly guided by the case law surrounding federal fair employment legislation, since this court has previously confirmed our legislature's intention to make the Connecticut statute coextensive with the federal." (citation and quotation omitted)).

4 I briefly note that the question whether it is ultimately for the court or a jury to find that an individual is an employee or an independent contractor remains unsettled, as the Second Circuit noted in *Salamon v. Our Lady of Victory Hospital*, 514 F.3d 217, 231 n. 15 (2d Cir.2008), *as amended* (Apr. 22, 2008). The issue was not briefed or argued before the Second Circuit in *Salamon*, so the Court merely collected divergent authority and indicated that the district court should consider it in the first instance. The Second Circuit had previously held, however, that "[t]he District Court's determination as to the presence or absence of each *Reid* factor is a finding of fact which [is reviewed] for clear error" and that its "ultimate determination as to whether a worker is an employee or an independent contractor—that is, the District Court's balancing of the *Reid* factors—is a question of law which [is reviewed] *de novo*." *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 115 (2d Cir.2000). I need not resolve that question at this stage of the case.

5 The nearest the Second Circuit has come to addressing the question was in *Mario v. P & C Food Markets, Inc.*, when it noted that "[i]t is also not clear that Mario, as a transsexual, is a member of a protected class," and cited (without elaboration) two cases from other circuits that will be discussed below. 313 F.3d 758, 767 (2d Cir.2002). The Court did not need to reach the question, however, so it did not discuss it beyond that brief remark.

6 *Holloway* is no longer good law in the Ninth Circuit, but the opinion that announced that fact did not formally overrule it; rather, it announced that "*Holloway* has been overruled by the logic and language of *Price Waterhouse* [*v. Hopkins*]," a Supreme Court decision that will be discussed below. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir.2000). If

the Ninth Circuit is correct (and I think it is, for reasons that will follow), then *Sommers* is similarly abrogated, though the Eighth Circuit has not yet acknowledged it.

7 *See generally* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, http://www.jofreeman.com/lawandpolicy/titlevii.htm; Louis Menand, *The Sex Amendment: How women got in on the Civil Rights Act*, THE NEW YORKER, July 21, 2014, http://www.newyorker.com/magazine/2014/07/21/sex-amendment.

8 In a related but distinct line of cases, courts have generally held that "Title VII does not prohibit harassment or discrimination because of sexual orientation." *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir.2000). Under that rule, as the Second Circuit has recognized, "gender stereotyping claims can easily present problems for an adjudicator," *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir.2005), because nonconformity with gender stereotypes is stereotypically associated with homosexuality—and Title VII thus prohibits discrimination on the basis of such nonconformity insofar as it is discrimination on the basis of the gender stereotypes but not insofar as it is discrimination on the basis of homosexuality. Thus, for example, a woman might have a Title VII claim if she was harassed or fired for being perceived as too "macho," but not if she was harassed or fired for being perceived as a lesbian, and courts and juries have to sort out the difference on a case-by-case basis.

U.S. District Judge Katherine P. Failla recently addressed that difficulty in *Christiansen v. Omnicom Group, Inc.*, —— F.Supp.3d ——, 2016 WL 951581 (S.D.N.Y. March 9, 2016). She called for the reconsideration of *Simonton* and *Dawson*'s rule on the basis of its impracticability, also noting related changes to the legal landscape since those decisions were made, citing the Supreme Court's same-sex marriage opinions in *United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), and *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), as well as the July 2015 decision of the E.E.O.C. that sexual-orientation discrimination *is* cognizable under Title VII. *Christiansen*, at —— – ——, slip op. at 30–37, 2016 WL 951581, *12–15. The present case, however, is not determined by the holding of *Simonton*, as Judge Failla found *Christiansen* to be, because this case is about gender identity itself and the expression of that identity, and not about the orientation of romantic or sexual attraction—which, as the *Simonton* Court noted, may or may not be associated in a particular case with broader gender stereotypes. *See* 232 F.3d at 38 ("[N]ot all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."). My statutory analysis below might nevertheless suggest an additional statutory basis to support the reconsideration Judge Failla urges.

Another recent decision that addresses and exemplifies the changes to the legal landscape that Judge Failla describes, and which unlike *Christiansen* does pertain to transgender identity, is *Adkins v. City of New York*, —— F.Supp.3d ——, 2015 WL 7076956 (S.D.N.Y. Nov. 15, 2015). *Adkins* is a Section 1983 case, and U.S. District Judge Jed S. Rakoff held that under the same analysis applied in *Windsor*, transgender people are a "quasi-suspect" class and therefore that disparate treatment alleged to violate the Equal Protection Clause is subject to the elevated "intermediate scrutiny" standard.

9 Page View 1804, *A Dictionary of the English Language: A Digital Edition of the 1755 Classic by Samuel Johnson*, (Brandi Besalke ed.), http://johnsonsdictionaryonline.com/?page_id=7070 & i=1804.

10 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1961).

11 Oxford English Dictionary Third Edition, December 2008, http://www.oed.com/view/Entry/176989.

12 I interpret the same way the parallel CFEPA provision, as it stood prior to the 2011 amendment that added "gender identity or expression" to the list of protected classes. *See* Conn. Gen. Stat. § 46a–60. The fact that the Connecticut legislature added that language does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it.

2016 WL 1567467
Only the Westlaw citation is currently available.
United States Court of Appeals,
Fourth Circuit.

G.G., by his next friend and mother, Deirdre Grimm, Plaintiff–Appellant,
v.
GLOUCESTER COUNTY SCHOOL BOARD, Defendant–Appellee.
Judy Chiasson, Ph. D., School Administrator California; David Vannasdall, School Administrator California; Diana K. Bruce, School Administrator District of Columbia; Denise Palazzo, School Administrator Florida; Jeremy Majeski, School Administrator Illinois; Thomas A. Aberli, School Administrator Kentucky; Robert Bourgeois, School Administrator Massachusetts; Mary Doran, School Administrator Minnesota; Valeria Silva, School Administrator Minnesota; Rudy Rudolph, School Administrator Oregon; John O'Reilly, School Administrator New York; Lisa Love, School Administrator Washington; Dylan Pauly, School Administrator Wisconsin; Sherie Hohs, School Administrator Wisconsin; The National Women's Law Center; Legal Momentum; The Association of Title IV Administrators; Equal Rights Advocates; Gender Justice; The Women's Law Project; Legal Voice; Legal Aid Society—Employment Law Center; Southwest Women's Law Center; California Women's Law Center; The World Professional Association for Transgender Health; Pediatric Endocrine Society; Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital; Center for Transyouth Health and Development at Children's Hospital Los Angeles; Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago; Fan Free Clinic; Whitman–Walker Clinic, Inc., d/b/a Whitman–Walker Health; GLMA: Health Professionals Advancing LGBT Equality; Transgender Law & Policy Institute; Gender Benders; Gay, Lesbian & Straight Education Network; Gay–Straight Alliance Network; Insideout; Evie Priestman; Rosmy; Time Out Youth; We are Family; United States of America; Michelle Forcier, M.D.; Norman Spack, M.D., Amici Supporting Appellant,
State of South Carolina; Paul R. LePage, In his official capacity as Governor State of Maine; State of Arizona; The Family Foundation of Virginia; State of Mississippi; John Walsh; State of West Virginia; Lorraine Walsh; Patrick L. McCrory, In his official capacity as Governor State of North Carolina; Mark Frechette; Judith Reisman, Ph.D.; Jon Lynsky; Liberty Center for Child Protection; Bradly Friedlin; Lisa Terry; Lee Terry; Donald Caulder; Wendy Caulder; Kim Ward; Alice May; Jim Rutan; Issac Rutan; Doretha Guju; Doctor Rodney Autry; Pastor James Larsen; David Thornton; Kathy Thornton; Joshua Cuba; Claudia Clifton; Ilona Gambill; Tim Byrd; Eagle Forum Education and Legal Defense Fund, Amici Supporting Appellee.

No. 15–2056.
|
Argued Jan. 27, 2016.
|
Decided April 19, 2016.

Synopsis

Background: Transgender high school student, by his next friend and mother, brought action against school board under the Equal Protection Clause and Title IX of the Education Amendments of 1972, challenging school board's policy requiring students to use the restroom consistent with their birth sex, rather than their gender identity. Student moved for preliminary injunction allowing him to use the boys' restroom, and school board filed motion to dismiss for failure to state a claim. The United States District Court for the Eastern District of Virginia, 2015 WL 5560190, ---F.Supp.3d---, Robert G. Doumar, Senior District Judge, dismissed Title IX claim and denied student's request for preliminary injunction. Student appealed.

Holdings: The Court of Appeals, Floyd, Circuit Judge, held that:

[1] Department of Education's letter interpreting its Title IX regulation permitting schools to provide sex-segregated bathrooms, in which Department instructed that schools must treat transgender students consistent with their gender identity

CASE 4

if they provided sex-segregated bathrooms, was entitled to deference;

[2] District Court applied incorrect evidentiary standard on motion for preliminary injunction; and

[3] reassignment to another judge following remand was not warranted.

Reversed in part, vacated in part, and remanded.

Davis, Senior Judge, concurred and filed opinion.

Niemeyer, Circuit Judge, concurred in part and dissented in part and filed opinion.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert G. Doumar, Senior District Judge. (4:15–cv–00054–RGD–DEM).

Attorneys and Law Firms

ARGUED: Joshua A. Block, American Civil Liberties Union Foundation, New York, New York, for Appellant. David Patrick Corrigan, Harman, Claytor, Corrigan & Wellman, Richmond, Virginia, for Appellee. **ON BRIEF:**Rebecca K. Glenberg, Gail Deady, American Civil Liberties Union of Virginia Foundation, Inc., Richmond, Virginia; Leslie Cooper, American Civil Liberties Union Foundation, New York, New York, for Appellant. Jeremy D. Capps, M. Scott Fisher, Jr., Harman, Claytor, Corrigan & Wellman, Richmond, Virginia, for Appellee. Cynthia Cook Robertson, Washington, D.C., Narumi Ito, Amy L. Pierce, Los Angeles, California, Alexander P. Hardiman, Shawn P. Thomas, New York, New York, Richard M. Segal, Nathaniel R. Smith, Pillsbury Winthrop Shaw Pittman LLP, San Diego, California; Tara L. Borelli, Atlanta, Georgia, Kyle A. Palazzolo, Lambda Legal Defense and Education Fund, Inc., Chicago, Illinois; Alison Pennington, Transgender Law Center, Oakland, California, for Amici School Administrators Judy Chiasson, David Vannasdall, Diana K. Bruce, Denise Palazzo, Jeremy Majeski, Thomas A. Aberli, Robert Bourgeois, Mary Doran, Valeria Silva, Rudy Rudolph, John O'Reilly, Lisa Love, Dylan Pauly, and Sherie Hohs. Suzanne B. Goldberg, Sexuality and Gender Law Clinic, Columbia Law School, New York, New York; Erin E. Buzuvis, Western New England University School of Law, Springfield, Massachusetts, for Amici The National Women's Law Center, Legal Momentum, The Association of Title IX Administrators, Equal Rights Advocates, Gender Justice, The Women's Law Project, Legal Voice, Legal Aid Society–Employment Law Center, Southwest Women's Law Center, and California Women's Law Center. Jennifer Levi, Gay & Lesbian Advocates & Defenders, Boston, Massachusetts; Thomas M. Hefferon, Washington, D.C., Mary K. Dulka, New York, New York, Christine Dieter, Jaime A. Santos, Goodwin Procter LLP, Boston, Massachusetts; Shannon Minter, Asaf Orr, National Center for Lesbian Rights, San Francisco, California, for Amici The World Professional Association for Transgender Health, Pediatric Endocrine Society, Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital, Center for Transyouth Health and Development at Children's Hospital Los Angeles, Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago, Fan Free Clinic, Whitman–Walker Clinic, Inc., GLMA: Health Professionals Advancing LGBT Equality, Transgender Law & Policy Institute, Michelle Forcier, M.D. and Norman Spack, M.D. David Dinielli, Rick Mula, Southern Poverty Law Center, Montgomery, Alabama, for Amici Gender Benders, Gay, Lesbian & Straight Education Network, Gay–Straight Alliance Network, InsideOut, Evie Priestman, Rosmy, Time Out Youth, and We Are Family. James Cole, Jr., General Counsel, Francisco Lopez, Vanessa Santos, Michelle Tucker, Attorneys, Office of the General Counsel, United States Department of Education, Washington, D.C.; Gregory B. Friel, Deputy Assistant Attorney General, Diana K. Flynn, Sharon M. McGowan, Christine A. Monta, Attorneys, Civil Rights Division, Appellate Section, United States Department of Justice, Washington, D.C., for Amicus United States of America. Alan Wilson, Attorney General, Robert D. Cook, Solicitor General, James Emory Smith, Jr., Deputy Solicitor General, Office of the Attorney General of South Carolina, Columbia, South Carolina, for Amicus State of South Carolina; Mark Brnovich, Attorney General, Office of the Attorney General of Arizona, Phoenix, Arizona, for Amicus State of Arizona; Jim Hood, Attorney General, Office of the Attorney General of Mississippi, Jackson, Mississippi, for Amicus State of Mississippi; Patrick Morrisey, Attorney General, Office of the Attorney General of West Virginia, Charleston, West Virginia, for Amicus State of West Virginia; Amicus Paul R. LePage, Governor, State of Maine, Augusta, Maine; Robert C. Stephens, Jr., Jonathan R. Harris, Counsel for the Governor of North Carolina, Raleigh, North Carolina, for Amicus Patrick L. McCrory, Governor of North Carolina. Mary E. McAlister, Lynchburg, Virginia, Mathew D. Staver, Anita L. Staver, Horatio G. Mihet, Liberty

Counsel, Orlando, Florida, for Amici Liberty Center for Child Protection and Judith Reisman, PhD. Jeremy D. Tedesco, Scottsdale, Arizona, Jordan Lorence, Washington, D.C., David A. Cortman, J. Matthew Sharp, Rory T. Gray, Alliance Defending Freedom, Lawrenceville, Georgia, for Amici The Family Foundation of Virginia, John Walsh, Lorraine Walsh, Mark Frechette, Jon Lynsky, Bradly Friedlin, Lisa Terry, Lee Terry, Donald Caulder, Wendy Caulder, Kim Ward, Alice May, Jim Rutan, Issac Rutan, Doretha Guju, Rodney Autry, James Larsen, David Thornton, Kathy Thornton, Joshua Cuba, Claudia Clifton, Ilona Gambill, and Tim Byrd. Lawrence J. Joseph, Washington, D.C., for Amicus Eagle Forum Education and Legal Defense Fund.

Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

Opinion

Reversed in part, vacated in part, and remanded by published opinion. Judge FLOYD wrote the opinion, in which Senior Judge DAVIS joined. Senior Judge DAVIS wrote a separate concurring opinion. Judge NIEMEYER wrote a separate opinion concurring in part and dissenting in part.

FLOYD, Circuit Judge:

***1** G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education's (the Department) regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity." J.A. 55. Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery. [1]

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom. [2] G.G. used this restroom without incident for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

***2** Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." J.A. 15. Hook proposed the following resolution (hereinafter the "transgender restroom policy" or "the policy"):

> Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 15–16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a "young lady." J.A. 16. Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or "young lady." J.A. 18. One speaker called G.G. a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* Following this second comment period, the Board voted 6–1 to adopt the proposed policy, thereby barring G.G. from using the boys' restroom at school.

G.G. alleges that he cannot use the girls' restroom because women and girls in those facilities "react[ ] negatively because they perceive[ ] G.G. to be a boy." *Id.* Further, using the girls' restroom would "cause severe psychological distress" to G.G. and would be incompatible with his treatment for gender dysphoria. J.A. 19. As a corollary to the policy, the Board announced a series of updates to the school's restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they "make him feel even more stigmatized .... Being required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different.' " *Id.* G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences "severe and persistent emotional and social harms." *Id.* G.G. avoids using the restroom while at school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

***3** G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys' restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution. On July 27, 2015, the district court held a hearing on G.G.'s motion for a preliminary injunction and on the Board's motion to dismiss G.G.'s lawsuit. At the hearing, the district court orally dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. The district court followed its ruling from the bench with a written order dated September 4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.'s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed

that the regulations implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.'s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.'s request for an injunction, the district court found that G.G. had not made the required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.'s presence in the boys' restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court's dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court's rulings and also asks us to dismiss G.G.'s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an *amicus* brief supporting G.G.'s Title IX claim in order to defend the government's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

[1] **[2]** **[3]** We turn first to the district court's dismissal of G.G.'s Title IX claim.[3] We review *de novo* the district court's grant of a motion to dismiss. *Cruz v. Maypa*, 773 F.3d 138, 143 (4th Cir.2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citations and quotations omitted).

***4** **[4]** **[5]** **[6]** As noted earlier, Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm.[4] *See Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir.1994) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir.2007).

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department's regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity."[5] J.A. 55.

A.

[7] **[8]** **[9]** G.G., and the United States as *amicus curiae*, ask us to give the Department's interpretation of its own regulation controlling weight pursuant to *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). *Auer* requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Id.* at 461. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, "reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded *Auer* deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a *post hoc* rationalization. *Christopher v. Smithkline Beecham Corp.*, —U.S. ——, ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012) (citations omitted).

***5** The district court declined to afford deference to the Department's interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because "[i]t clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 WL 5560190, at *8 (E.D.Va. Sept.17, 2015). The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone. *Id.*

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls "without running afoul of Title IX." Br. for the United States as Amicus Curiae 24–25 (hereinafter "U.S. Br."). However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because "the regulation is silent on what the phrases 'students of one sex' and 'students of the other sex' mean in the context of transgender students." *Id.* at 25. The United States contends that the interpretation contained in OCR's January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

[10] We will not accord an agency's interpretation of an unambiguous regulation *Auer* deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to provide "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

[11] **[12]** "[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine *de novo*." *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir.2004). We determine ambiguity by analyzing the language under the three-part framework set forth in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole. *Id.* at 341.

First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX ...." U.S. Br. 22 n. 8. Third, the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited."[6] This repeated formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

***6** Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity. *Cf. Dickenson–Russell Coal Co. v. Sec'y of Labor*, 747 F.3d 251, 258 (4th Cir.2014) (refusing to afford *Auer* deference where the language of the regulation at issue was "not susceptible to more than one plausible reading" (citation and quotation marks omitted)). It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X–X–Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility,

the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

C.

[13] Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to *Auer* deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Auer*, 519 U.S. at 461. "Our review of the agency's interpretation in this context is therefore highly deferential." *Dickenson–Russell Coal*, 747 F.3d at 257 (citation and quotation marks omitted). "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, ——U.S. ——, ——, 133 S.Ct. 1326, 1337, 185 L.Ed.2d 447 (2013). An agency's view need only be reasonable to warrant deference. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) ("[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency's] view need be only reasonable to warrant deference.").

Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. 45 Fed.Reg. 30802, 30955 (May 9, 1980). Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished...." *American College Dictionary* 1109 (1970). The second defines "sex" as:

> ***7** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness ....

Webster's Third New International Dictionary 2081 (1971).

Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive.[7] The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness." Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual "dichotomous occurrence" of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the "character of being either male or female" where those indicators diverge. We conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation. The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, "the morphological, physiological, and behavioral peculiarities"—included in the term "sex."

D.

Finally, we consider whether the Department's interpretation of § 106.33 is the result of the agency's fair and considered judgment. Even a valid interpretation will not be accorded *Auer* deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a *post hoc* rationalization. *Christopher*, 132 S.Ct. at 2166 (citations omitted).

Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice.

See Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 131 S.Ct. 2254, 2263, 180 L.Ed.2d 96 (2011). As the United States explains, the issue in this case "did not arise until recently," *see id.*, because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities. The Department contends that "[i]t is to those 'newfound' policies that [the Department's] interpretation of the regulation responds." U.S. Br. 29. We see no reason to doubt this explanation. *See Talk Am., Inc.*, 131 S.Ct. at 2264.

***8** Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014. *See* J.A. 55 n. 5 & n. 6 (providing examples of OCR enforcement actions to secure transgender students access to restrooms congruent with their gender identities). Finally, this interpretation cannot properly be considered a *post hoc* rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.[8] U.S. Br. 17 n. 5 & n. 6 (citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management). None of the *Christopher* grounds for withholding *Auer* deference are present in this case.

E.

We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.[9] We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that "sex" should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex. We agree that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed.[10] Post at 56. It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys' restroom pursuant to the Department's interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court's guidance in *Chevron*, *Auer*, and *Christopher* and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns[11]—fundamentally questions of policy—is a task committed to the agency, not to the courts.

The Supreme Court's admonition in *Chevron* points to the balance courts must strike:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

***9** *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Not only may a subsequent administration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our *Auer* analysis complete, we leave policy formulation to the political branches.

III.

[14] **[15]** **[16]** G.G. also asks us to reverse the district court's denial of the preliminary injunction he sought which would have allowed him to use the boys' restroom during the pendency of this lawsuit. "To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir.2014) (citation omitted). We review a district court's denial of a preliminary injunction for abuse of discretion. *Id.* at 235. "A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir.2006) (citation and quotations omitted). "We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter *de novo*." *Id.* (citation omitted). Instead, "we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (citations and quotations omitted).

The district court analyzed G.G.'s request only with reference to the third factor—the balance of hardships—and found that the balance of hardships did not weigh in G.G.'s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions." *G.G.*, 2015 WL 5560190, at *11.

[17] **[18]** The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." *Id.* at *9. Preliminary injunctions, however, are governed by less strict rules of evidence:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

***10** *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *see also Elrod v. Burns*, 427 U.S. 347, 350 n. 1, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (taking as true the "well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction"); *compare* Fed.R.Civ.P. 56 (requiring affidavits supporting summary judgment to be "made on personal knowledge, [and to] set out facts that would be admissible in evidence"), *with* Fed R. Civ. P. 65 (providing no such requirement in the preliminary injunction context). Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial.

[19] Additionally, the district court completely excluded some of G.G.'s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to "weight, not preclusion" and have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir.2010); *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir.2004); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir.1997); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir.1995)

("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." (citation and internal quotations omitted)); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir.1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir.1986); *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.1984). We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.'s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was "guided by erroneous legal principles." We therefore conclude that the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence. We vacate the district court's denial of G.G.'s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein.

IV.

***11** **[20]** **[21]** **[22]** Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir.1991) (citation and internal quotation marks omitted). In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Id.* (citation omitted).

G.G. argues that both the first and second *Guglielmi* factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." Appellant's Br. 53. For example, the court accepted the Board's "mating" concern by noting:

> There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teen-age years. All of that is accepted by all medical science, as far as I can determine in reading information.

J.A. 85–86.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. J.A. 111–12. The district court characterized gender dysphoria as a "mental disorder" and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. *See* J.A. 88–91; 101–02. The district court also seemed to reject G.G.'s representation of what it meant to be transgender, repeatedly noting that G.G. "wants" to be a boy and not a girl, but that "he is biologically a female." J.A. 103–04; *see also* J.A. 104 ("It's his mind. It's not physical that causes that, it's what he believes."). The district court's memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Further, although the district court has a distinct way of

proceeding in court, the hearing record and the district court's written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the *Guglielmi* standard. We deny G.G.'s request for reassignment to a different district judge on remand.

V.

***12** For the foregoing reasons, the judgment of the district court is

REVERSED IN PART, VACATED IN PART, AND REMANDED.

DAVIS, Senior Circuit Judge, concurring:

I concur in Judge Floyd's fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, *this Court* would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir.2013) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board's restroom policy discriminates against him "on the basis of sex" in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir.2011); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir.2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir.2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir.2000).

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse's office. *See* J.A. 32–33. His affidavit also indicates that he has "repeatedly developed painful urinary tract infections" as a result of holding his urine in order to avoid using the restroom at school. *Id.*

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.'s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is "inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child" and explains why access to a restroom appropriate to one's gender identity is important for transgender youth. J.A. 39. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board's restroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm." J.A. 41. In particular, Dr. Ettner opines that

> ***13** [a]s a result of the School Board's restroom policy, ... G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his 'otherness,' undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs

> to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

J.A. 42.

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.'s or Dr. Ettner's affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.'s presentation in support of his claim of irreparable harm, such as "evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s'] restroom," evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner "differentiating between the distress that G.G. may suffer by not using the boy[s'] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12." Br. Appellee 42–43. As to the alleged deficiency concerning Dr. Ettner's opinion, the Board's argument is belied by Dr. Ettner's affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing "[a]s a result of the School Board's restroom policy." J.A. 42. With respect to the other purported inadequacies, the absence of such evidence does nothing to undermine the uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board's policy or Dr. Ettner's unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.'s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.

C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students' constitutional right to privacy will be imperiled by G.G.'s presence in the boys' restroom.

As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students' unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school's restrooms already undertaken by the Board. To the extent that a student simply objects to using the restroom in the presence of a transgender student even where there is no possibility that either student's genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.'s presence in the communal restroom thus does not tip the scale in the Board's favor. The balance of hardships weighs heavily toward G.G.

D.

***14** Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest. *Cf. Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir.2002) (citation omitted) (observing that upholding constitutional rights is in the public interest).

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.

II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us. *See, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir.2014) (expressly observing that appellate courts have the power to vacate a denial of a preliminary injunction and direct entry of an injunction); *Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs.*, 197 F.3d 123, 134 (4th Cir.1999) (directing entry of injunction "because the record clearly establishes the plaintiff's right to an injunction and [an evidentiary] hearing would not have altered the result").

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year.

With these additional observations, I concur fully in Judge Floyd's thoughtful and thorough opinion for the panel.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court's opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G's motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.'s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority's decision on those issues.

***15** G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school's policy for assigning students to restrooms and locker rooms based on biological sex. The school's policy provides: (1) that the girls' restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys' restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school's three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls' restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates against him because it denies him, as one who identifies as male, the use of the boys' restrooms, and he seeks an injunction compelling the high school to allow him to use the boys' restrooms.

The district court dismissed G.G.'s Title IX claim, explaining that the school complied with Title IX and its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex," so long as the facilities are "comparable." 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

Strikingly, the majority now reverses the district court's ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute's and regulations' use of the term "sex" means a person's gender identity, not the person's biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education's Office for Civil Rights to G.G., in which the Office for Civil Rights stated, "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally *must treat transgender students consistent with their gender identity*." (Emphasis added). Accepting that new definition of the statutory term "sex," the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls' restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys' restrooms and locker rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And, unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the "severe psychological distress" it would inflict on him and because female students had "reacted negatively" to his presence

in girls' restrooms. Surely biological males who identify as females would encounter similar reactions in the girls' restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

***16** This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is *not* law but which is the only authority on which the majority relies, states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]." This appears to approve the course that G.G.'s school followed when it created unisex restrooms in addition to the boys' and girls' restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, provided that the facilities are "proportionate" and "comparable," 34 C.F.R. § 106.32(b), and to provide "separate toilet, locker room, and shower facilities on the basis of sex," again provided that the facilities are "comparable," 34 C.F.R. § 106.33. Because the school's policy that G.G. challenges in this action comports with Title IX and its regulations, I would affirm the district court's dismissal of G.G.'s Title IX claim.

I

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but "did not feel like a girl" from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one's biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of his requests. Officials changed school records to reflect G.G.'s new male name; the guidance counselor supported G.G.'s sending an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical education requirement through a home-bound program, as he preferred not to use the school's locker rooms; and the school allowed G.G. to use a restroom in the nurse's office "because [he] was unsure how other students would react to [his] transition." G.G. was grateful for the school's "welcoming environment." As he stated, "no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns." And he was "pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy."

***17** As the school year began, however, G.G. found it "stigmatizing" to continue using the nurse's restroom, and he requested to use the boys' restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving "numerous complaints from parents and students about [G.G.'s] use of the boys' restrooms." The School Board thus faced a dilemma. It recognized G.G.'s feelings, as he expressed them, that "[u]sing the girls' restroom[s][was] not possible" because of the "severe psychological distress" it would inflict on him and because female students had previously "reacted negatively" to his presence in the girls' restrooms. It now also had to recognize that boys had similar feelings caused by G.G.'s use of the boys' restrooms, although G.G. stated that he continued using the boys' restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education's Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board's policy was discriminatory, in violation of the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction "requiring the School Board to allow [him] to use the boys' restrooms at school."

***18** The district court dismissed G.G.'s Title IX claim because Title IX's implementing regulations permit schools to provide separate restrooms "on the basis of sex." The court also denied G.G.'s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it "will hear evidence" and "get a date set" for trial to better assess the claim.

From the district court's order denying G.G.'s motion for a preliminary injunction, G.G. filed this appeal, in which he also challenges the district court's Title IX ruling as inextricably intertwined with the district court's denial of the motion for a preliminary injunction.

II

G.G. recognizes that persons who are born biologically female "typically" identify psychologically as female, and likewise, that persons who are born biologically male "typically" identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for "different and unequal treatment," "discriminat[ing] against him based on sex [by denying him use of the boys' restrooms], in violation of Title IX." He argues, "discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account." He concludes that the School Board's policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is "prevent [ed] ... from using the same restrooms as other students and relegat[ed] ... to separate, single-stall facilities."

As noted, the School Board's policy designates the use of restrooms and locker rooms based on the student's biological sex—biological females are assigned to the girls' restrooms and unisex restrooms; biological males are assigned to the boys' restrooms and unisex restrooms. G.G. is thus assigned to the girls' restrooms and the unisex restrooms, but is denied the use of the boys' restrooms. He asserts, however, that because

neither he nor the girls would accept his use of the girls' restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

> The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

***19** While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

> No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

20 U.S.C. § 1681(a) (emphasis added). The Act, however, provides, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities *for the different sexes*." *Id.* § 1686 (emphasis added); *see also* 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing *on the basis of sex* " as long as the housing is "proportionate" and "comparable" (emphasis added)). Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

> A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33 (emphasis added). Thus, although Title IX and its regulations provide generally that a school receiving federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on "sex," a term that must be construed uniformly throughout Title IX and its implementing regulations. *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)); *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir.2013) ("Canons of construction ... require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning. This presumption of consistent usage ... ensure[s] that the statutory scheme is coherent and consistent" (alterations in original) (internal quotation marks and citations omitted)); *see also Kentuckians for Commonwealth Inc. v. Riverburgh*, 317 F.3d 425, 440 (4th

Cir.2003) ("[B]ecause a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well" (quoting John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L.Rev. 612, 627 n. 78 (1996))).

***20** Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. *See, e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir.2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir.2008) (explaining that "the constitutional right to privacy ... includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir.2005) ("Students of course have a significant privacy interest in their unclothed bodies"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir.1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir.1989) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating").

Moreover, we have explained that separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"). Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women," which, as the Supreme Court explained, are "enduring" and render "the two sexes ... not fungible," *id.* at 533 (distinguishing sex from race and national origin), not because of "one's sense of oneself as belonging to a particular gender," as G.G. and the government as amicus contend.

***21** Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote *the privacy and safety* of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an environment where children are still developing, both emotionally and physically."

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term "sex" were to encompass only a person's gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls' dorm or shower in a girls' shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower. G.G.'s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to "restroom access by transgender individuals." *Ante* at 26. But this effort to restrict the effect of G.G.'s argument hardly matters when the term "sex" would have to

be applied uniformly throughout the statute and regulations, as noted above and, indeed, as agreed to by the majority. *See ante* at 26.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of enactment. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (explaining that courts should not defer to an agency's interpretation of its own regulation if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent *at the time of the regulation's promulgation* " (emphasis added) (internal quotation marks and citation omitted)); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (discussing dictionary definitions of the regulation's "critical phrase" to help determine whether the agency's interpretation was "plainly erroneous or inconsistent with the regulation" (internal quotation marks and citation omitted)). Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions. *See, e.g., The Random House College Dictionary* 1206 (rev. ed.1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change ..."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished ..."). Indeed, although the contemporaneous meaning controls our analysis, it is notable that, *even today*, the term "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g., Webster's New World College Dictionary* 1331 (5th ed.2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam–Webster's Collegiate Dictionary* 1140 (11th ed.2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"). Any new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

***22** Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of "sex" as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term "sex" in Title IX and its regulations refers to a person's "gender identity" simply to accommodate G.G.'s wish to use the boys' restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term "sex" as used in Title IX and its regulations refers (1) to *both* biological sex *and* gender identity; (2) to *either* biological sex *or* gender identity; or (3) to *only* "gender identity." In his brief, G.G. seems to take the position that the term "sex" *at least* includes a reference to gender identity. This is the position taken in his complaint when he alleges, "Under Title IX, discrimination 'on the basis of sex' encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity." The government seems to be taking the same position, contending that the term "sex" "encompasses both sex—that is, the biological differences between men and women—*and* gender [identity]." (Emphasis in original). The majority, however, seems to suggest that the term "sex" refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights' letter of January 7, 2015, which said, "When a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally

must treat transgender students consistent with *their gender identity*." (Emphasis added). But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term "sex" as used in the statute and regulations refers to *both* biological sex *and* gender identity, then, while the School Board's policy is in compliance with respect to most students, whose biological sex aligns with their gender identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished consistent with the regulation because a transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools' ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms, a position that G.G. does not advocate.

***23** If the position of G.G., the government, and the majority is that the term "sex" means *either* biological sex *or* gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys' restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that "sex" as used in Title IX and its regulations means *only* gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a *separate* use "on the basis of sex," and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom.

Yet, by interpreting Title IX and the regulations as "requiring schools to treat students consistent with their gender identity," and by disallowing schools from treating students based on their biological sex, the government's position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls' restrooms, G.G. states that "it makes no sense to place a transgender boy in the girls' restroom in the name of protecting student privacy" because "girls objected to his presence in the girls' restrooms because they perceived him as male." But the same argument applies to his use of the boys' restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex" if "sex" means gender identity.

***24** The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools "generally must treat transgender students consistent with their gender identity," whatever that means, and in the next sentence, it encourages schools to provide "gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High School, to provide unisex single-stall restrooms for any

students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, *on the basis of sex*, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.'s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse's restroom. And, after both girls and boys objected to his using the girls' and boys' restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm the district court's decision dismissing G.G.'s Title IX claim and therefore dissent.

I also dissent from the majority's decision to vacate the district court's denial of G.G.'s motion for a preliminary injunction. As the Supreme Court has consistently explained, "[a] preliminary injunction is an extraordinary remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," and " '[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.' " *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22–24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quoting *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)). Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can "form a definite and firm conviction that the court below committed a clear error of judgment," *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir.2006) (quotation marks and citation omitted), particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

***25** As noted, however, I concur in Part IV of the court's opinion.

All Citations

--- F.3d ----, 2016 WL 1567467

Footnotes

1 The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association. *Id.* The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

2 G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case.

3 We decline the Board's invitation to preemptively dismiss G.G.'s equal protection claim before it has been fully considered by the district court. "[W]e are a court of review, not of first view." *Decker v. Nw. Envtl. Def. Ctr.*, —— U.S. ——, ——, 133 S.Ct. 1326, 1335, 185 L.Ed.2d 447 (2013) (citation and quotation marks omitted). We will not proceed to the merits of G.G.'s equal protection claim on appeal without the benefit of the district court's prior consideration.

4 The Board suggests that a restroom may not be educational in nature and thus is not an educational program covered by Title IX. Appellee's Br. 35 (quoting *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657, 682 (W.D.Pa.2015)). The Department's regulation pertaining to "Education programs or activities" provides:

> Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> ...

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). We have little difficulty concluding that access to a restroom at a school, under this regulation, can be considered either an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity," which, when offered by a recipient institution, falls within the meaning of "educational program" as used in Title IX and defined by the Department's implementing regulations.

5 The opinion letter cites to OCR's December 2014 "Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities." This document, denoted a "significant guidance document" per Office of Management and Budget regulations, states: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) *available at* http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

The dissent suggests that we ignore the part of OCR's opinion letter in which the agency "also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities," as the Board did here. Post at 66. However, because G.G. *does* want to use shared sex-segregated facilities, the agency's suggestion regarding students who *do not* want to use such shared sex-segregated facilities is immaterial to the resolution of G.G.'s claim. Nothing in today's opinion restricts any school's ability to provide individual-user facilities.

6 For example, § 106.32(b)(2) provides that "[h]ousing provided ... to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: proportionate in quantity ... and [c]omparable in quality and cost to the student"; § 106.37(a)(3) provides that an institution generally cannot "[a]pply any rule ... concerning eligibility [for financial assistance] which treats persons of one sex differently from persons of the other sex with regard to marital or parental status"; and § 106.41(b) provides that "where [an institution] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex ... members of the excluded sex must be allowed to try-out for the team offered ...."

7 Modern definitions of "sex" also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." *Black's Law Dictionary* 1583 (10th ed.2014). The American Heritage Dictionary includes in the definition of "sex" "[o]ne's identity as either female or male." *American Heritage Dictionary* 1605 (5th ed.2011).

8 We disagree with the dissent's suggestion that the result we reach today renders the enforcement of separate restroom facilities impossible because it "would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity." Post at 65. Accepting the Board's position would equally require the school to assume "biological sex" based on "appearances, social expectations, or explicit declarations of [biological sex]." Certainly, no one is suggesting mandatory verification of the "correct" genitalia before admittance to a restroom. The Department's vision of sex-segregated restrooms which takes account of gender identity presents no greater "impossibility of enforcement" problem than does the Board's "biological gender" vision of sex-segregated restrooms.

9 The Board urges us to reach a contrary conclusion regarding the validity of the Department's interpretation, citing *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F.Supp. 657 (W.D.Pa.2015). Although we recognize that the *Johnston* court confronted a case similar in most material facts to the one before us, that court did not consider the Department's interpretation of § 106.33. Because the *Johnston* court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in *Johnston* to be unpersuasive.

10 We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent. For example, G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present in *Brannum v. Overton Cty. Sch. Bd.,* 516 F.3d 489, 494 (6th Cir.2008) (involving the videotaping of students dressing and undressing in school locker rooms), *Beard v. Whitmore Lake Sch. Dist.,* 402 F.3d 598, 604 (6th Cir.2005) (involving the indiscriminate strip searching of twenty male and five female students), or *Supelveda v. Ramirez,* 967 F.2d 1413, 1416 (9th Cir.1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).

11 The dissent accepts the Board's invocation of amorphous safety concerns as a reason for refusing deference to the Department's interpretation. We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature

of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the existence of danger caused by "sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." Post at 58. The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent's formulation, present a safety risk because of the "sexual responses prompted" by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.

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Only the Westlaw citation is currently available.
United States Court of Appeals,
Fourth Circuit.

G.G., by his next friend and mother, Deirdre Grimm, Plaintiff–Appellant,
v.
GLOUCESTER COUNTY SCHOOL BOARD, Defendant–Appellee.
Judy Chiasson, Ph. D., School Administrator California; David Vannasdall, School Administrator California; Diana K. Bruce, School Administrator District of Columbia; Denise Palazzo, School Administrator Florida; Jeremy Majeski, School Administrator Illinois; Thomas A. Aberli, School Administrator Kentucky; Robert Bourgeois, School Administrator Massachusetts; Mary Doran, School Administrator Minnesota; Valeria Silva, School Administrator Minnesota; Rudy Rudolph, School Administrator Oregon; John O'Reilly, School Administrator New York; Lisa Love, School Administrator Washington; Dylan Pauly, School Administrator Wisconsin; Sherie Hohs, School Administrator Wisconsin; The National Women's Law Center; Legal Momentum; The Association of Title IV Administrators; Equal Rights Advocates; Gender Justice; The Women's Law Project; Legal Voice; Legal Aid Society—Employment Law Center; Southwest Women's Law Center; California Women's Law Center; The World Professional Association for Transgender Health; Pediatric Endocrine Society; Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital; Center for Transyouth Health and Development at Children's Hospital Los Angeles; Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago; Fan Free Clinic; Whitman–Walker Clinic, Inc., d/b/a Whitman–Walker Health; GLMA: Health Professionals Advancing LGBT Equality; Transgender Law & Policy Institute; Gender Benders; Gay, Lesbian & Straight Education Network; Gay–Straight Alliance Network; Insideout; Evie Priestman; Rosmy; Time Out Youth; We are Family; United States of America; Michelle Forcier, M.D.; Norman Spack, M.D., Amici Supporting Appellant,
State of South Carolina; Paul R. LePage, In his official capacity as Governor State of Maine; State of Arizona; The Family Foundation of Virginia; State of Mississippi; John Walsh; State of West Virginia; Lorraine Walsh; Patrick L. McCrory, In his official capacity as Governor State of North Carolina; Mark Frechette; Judith Reisman, Ph.D.; Jon Lynsky; Liberty Center for Child Protection; Bradly Friedlin; Lisa Terry; Lee Terry; Donald Caulder; Wendy Caulder; Kim Ward; Alice May; Jim Rutan; Issac Rutan; Doretha Guju; Doctor Rodney Autry; Pastor James Larsen; David Thornton; Kathy Thornton; Joshua Cuba; Claudia Clifton; Ilona Gambill; Tim Byrd; Eagle Forum Education and Legal Defense Fund, Amici Supporting Appellee.

No. 15–2056.
|
Argued Jan. 27, 2016.
|
Decided April 19, 2016.

Synopsis

Background: Transgender high school student, by his next friend and mother, brought action against school board under the Equal Protection Clause and Title IX of the Education Amendments of 1972, challenging school board's policy requiring students to use the restroom consistent with their birth sex, rather than their gender identity. Student moved for preliminary injunction allowing him to use the boys' restroom, and school board filed motion to dismiss for failure to state a claim. The United States District Court for the Eastern District of Virginia, 2015 WL 5560190, ---F.Supp.3d---, Robert G. Doumar, Senior District Judge, dismissed Title IX claim and denied student's request for preliminary injunction. Student appealed.

Holdings: The Court of Appeals, Floyd, Circuit Judge, held that:

[1] Department of Education's letter interpreting its Title IX regulation permitting schools to provide sex-segregated bathrooms, in which Department instructed that schools must treat transgender students consistent with their gender identity

CASE 4

if they provided sex-segregated bathrooms, was entitled to deference;

[2] District Court applied incorrect evidentiary standard on motion for preliminary injunction; and

[3] reassignment to another judge following remand was not warranted.

Reversed in part, vacated in part, and remanded.

Davis, Senior Judge, concurred and filed opinion.

Niemeyer, Circuit Judge, concurred in part and dissented in part and filed opinion.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert G. Doumar, Senior District Judge. (4:15–cv–00054–RGD–DEM).

Attorneys and Law Firms

ARGUED: Joshua A. Block, American Civil Liberties Union Foundation, New York, New York, for Appellant. David Patrick Corrigan, Harman, Claytor, Corrigan & Wellman, Richmond, Virginia, for Appellee. **ON BRIEF:**Rebecca K. Glenberg, Gail Deady, American Civil Liberties Union of Virginia Foundation, Inc., Richmond, Virginia; Leslie Cooper, American Civil Liberties Union Foundation, New York, New York, for Appellant. Jeremy D. Capps, M. Scott Fisher, Jr., Harman, Claytor, Corrigan & Wellman, Richmond, Virginia, for Appellee. Cynthia Cook Robertson, Washington, D.C., Narumi Ito, Amy L. Pierce, Los Angeles, California, Alexander P. Hardiman, Shawn P. Thomas, New York, New York, Richard M. Segal, Nathaniel R. Smith, Pillsbury Winthrop Shaw Pittman LLP, San Diego, California; Tara L. Borelli, Atlanta, Georgia, Kyle A. Palazzolo, Lambda Legal Defense and Education Fund, Inc., Chicago, Illinois; Alison Pennington, Transgender Law Center, Oakland, California, for Amici School Administrators Judy Chiasson, David Vannasdall, Diana K. Bruce, Denise Palazzo, Jeremy Majeski, Thomas A. Aberli, Robert Bourgeois, Mary Doran, Valeria Silva, Rudy Rudolph, John O'Reilly, Lisa Love, Dylan Pauly, and Sherie Hohs. Suzanne B. Goldberg, Sexuality and Gender Law Clinic, Columbia Law School, New York, New York; Erin E. Buzuvis, Western New England University School of Law, Springfield, Massachusetts, for Amici The National Women's Law Center, Legal Momentum, The Association of Title IX Administrators, Equal Rights Advocates, Gender Justice, The Women's Law Project, Legal Voice, Legal Aid Society–Employment Law Center, Southwest Women's Law Center, and California Women's Law Center. Jennifer Levi, Gay & Lesbian Advocates & Defenders, Boston, Massachusetts; Thomas M. Hefferon, Washington, D.C., Mary K. Dulka, New York, New York, Christine Dieter, Jaime A. Santos, Goodwin Procter LLP, Boston, Massachusetts; Shannon Minter, Asaf Orr, National Center for Lesbian Rights, San Francisco, California, for Amici The World Professional Association for Transgender Health, Pediatric Endocrine Society, Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital, Center for Transyouth Health and Development at Children's Hospital Los Angeles, Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago, Fan Free Clinic, Whitman–Walker Clinic, Inc., GLMA: Health Professionals Advancing LGBT Equality, Transgender Law & Policy Institute, Michelle Forcier, M.D. and Norman Spack, M.D. David Dinielli, Rick Mula, Southern Poverty Law Center, Montgomery, Alabama, for Amici Gender Benders, Gay, Lesbian & Straight Education Network, Gay–Straight Alliance Network, InsideOut, Evie Priestman, Rosmy, Time Out Youth, and We Are Family. James Cole, Jr., General Counsel, Francisco Lopez, Vanessa Santos, Michelle Tucker, Attorneys, Office of the General Counsel, United States Department of Education, Washington, D.C.; Gregory B. Friel, Deputy Assistant Attorney General, Diana K. Flynn, Sharon M. McGowan, Christine A. Monta, Attorneys, Civil Rights Division, Appellate Section, United States Department of Justice, Washington, D.C., for Amicus United States of America. Alan Wilson, Attorney General, Robert D. Cook, Solicitor General, James Emory Smith, Jr., Deputy Solicitor General, Office of the Attorney General of South Carolina, Columbia, South Carolina, for Amicus State of South Carolina; Mark Brnovich, Attorney General, Office of the Attorney General of Arizona, Phoenix, Arizona, for Amicus State of Arizona; Jim Hood, Attorney General, Office of the Attorney General of Mississippi, Jackson, Mississippi, for Amicus State of Mississippi; Patrick Morrisey, Attorney General, Office of the Attorney General of West Virginia, Charleston, West Virginia, for Amicus State of West Virginia; Amicus Paul R. LePage, Governor, State of Maine, Augusta, Maine; Robert C. Stephens, Jr., Jonathan R. Harris, Counsel for the Governor of North Carolina, Raleigh, North Carolina, for Amicus Patrick L. McCrory, Governor of North Carolina. Mary E. McAlister, Lynchburg, Virginia, Mathew D. Staver, Anita L. Staver, Horatio G. Mihet, Liberty

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Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

Opinion

Reversed in part, vacated in part, and remanded by published opinion. Judge FLOYD wrote the opinion, in which Senior Judge DAVIS joined. Senior Judge DAVIS wrote a separate concurring opinion. Judge NIEMEYER wrote a separate opinion concurring in part and dissenting in part.

FLOYD, Circuit Judge:

***1** G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education's (the Department) regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity." J.A. 55. Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery. [1]

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom. [2] G.G. used this restroom without incident for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

***2** Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." J.A. 15. Hook proposed the following resolution (hereinafter the "transgender restroom policy" or "the policy"):

> Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 15–16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a "young lady." J.A. 16. Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or "young lady." J.A. 18. One speaker called G.G. a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* Following this second comment period, the Board voted 6–1 to adopt the proposed policy, thereby barring G.G. from using the boys' restroom at school.

G.G. alleges that he cannot use the girls' restroom because women and girls in those facilities "react[ ] negatively because they perceive[ ] G.G. to be a boy." *Id.* Further, using the girls' restroom would "cause severe psychological distress" to G.G. and would be incompatible with his treatment for gender dysphoria. J.A. 19. As a corollary to the policy, the Board announced a series of updates to the school's restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they "make him feel even more stigmatized .... Being required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different.' " *Id.* G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences "severe and persistent emotional and social harms." *Id.* G.G. avoids using the restroom while at school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

***3** G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys' restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution. On July 27, 2015, the district court held a hearing on G.G.'s motion for a preliminary injunction and on the Board's motion to dismiss G.G.'s lawsuit. At the hearing, the district court orally dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. The district court followed its ruling from the bench with a written order dated September 4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.'s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed

that the regulations implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.'s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.'s request for an injunction, the district court found that G.G. had not made the required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.'s presence in the boys' restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court's dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court's rulings and also asks us to dismiss G.G.'s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an *amicus* brief supporting G.G.'s Title IX claim in order to defend the government's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

[1] **[2]** **[3]** We turn first to the district court's dismissal of G.G.'s Title IX claim.[3] We review *de novo* the district court's grant of a motion to dismiss. *Cruz v. Maypa*, 773 F.3d 138, 143 (4th Cir.2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citations and quotations omitted).

***4** **[4]** **[5]** **[6]** As noted earlier, Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm.[4] *See Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir.1994) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir.2007).

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department's regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity."[5] J.A. 55.

A.

[7] **[8]** **[9]** G.G., and the United States as *amicus curiae*, ask us to give the Department's interpretation of its own regulation controlling weight pursuant to *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). *Auer* requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Id.* at 461. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, "reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded *Auer* deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a *post hoc* rationalization. *Christopher v. Smithkline Beecham Corp.*, —U.S. ——, ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012) (citations omitted).

***5** The district court declined to afford deference to the Department's interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because "[i]t clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 WL 5560190, at *8 (E.D.Va. Sept.17, 2015). The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone. *Id.*

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls "without running afoul of Title IX." Br. for the United States as Amicus Curiae 24–25 (hereinafter "U.S. Br."). However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because "the regulation is silent on what the phrases 'students of one sex' and 'students of the other sex' mean in the context of transgender students." *Id.* at 25. The United States contends that the interpretation contained in OCR's January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

[10] We will not accord an agency's interpretation of an unambiguous regulation *Auer* deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to provide "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

[11] **[12]** "[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine *de novo*." *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir.2004). We determine ambiguity by analyzing the language under the three-part framework set forth in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole. *Id.* at 341.

First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX ...." U.S. Br. 22 n. 8. Third, the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited."[6] This repeated formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

***6** Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity. *Cf. Dickenson–Russell Coal Co. v. Sec'y of Labor*, 747 F.3d 251, 258 (4th Cir.2014) (refusing to afford *Auer* deference where the language of the regulation at issue was "not susceptible to more than one plausible reading" (citation and quotation marks omitted)). It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X–X–Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility,

the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

C.

[13] Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to *Auer* deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Auer*, 519 U.S. at 461. "Our review of the agency's interpretation in this context is therefore highly deferential." *Dickenson–Russell Coal*, 747 F.3d at 257 (citation and quotation marks omitted). "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, ——U.S. ——, ——, 133 S.Ct. 1326, 1337, 185 L.Ed.2d 447 (2013). An agency's view need only be reasonable to warrant deference. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) ("[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency's] view need be only reasonable to warrant deference.").

Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. 45 Fed.Reg. 30802, 30955 (May 9, 1980). Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished...." *American College Dictionary* 1109 (1970). The second defines "sex" as:

> ***7** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness ....

Webster's Third New International Dictionary 2081 (1971).

Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive.[7] The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness." Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual "dichotomous occurrence" of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the "character of being either male or female" where those indicators diverge. We conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation. The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, "the morphological, physiological, and behavioral peculiarities"—included in the term "sex."

D.

Finally, we consider whether the Department's interpretation of § 106.33 is the result of the agency's fair and considered judgment. Even a valid interpretation will not be accorded *Auer* deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a *post hoc* rationalization. *Christopher*, 132 S.Ct. at 2166 (citations omitted).

Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice.

See Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 131 S.Ct. 2254, 2263, 180 L.Ed.2d 96 (2011). As the United States explains, the issue in this case "did not arise until recently," *see id.*, because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities. The Department contends that "[i]t is to those 'newfound' policies that [the Department's] interpretation of the regulation responds." U.S. Br. 29. We see no reason to doubt this explanation. *See Talk Am., Inc.*, 131 S.Ct. at 2264.

***8** Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014. *See* J.A. 55 n. 5 & n. 6 (providing examples of OCR enforcement actions to secure transgender students access to restrooms congruent with their gender identities). Finally, this interpretation cannot properly be considered a *post hoc* rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.[8] U.S. Br. 17 n. 5 & n. 6 (citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management). None of the *Christopher* grounds for withholding *Auer* deference are present in this case.

E.

We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.[9] We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that "sex" should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex. We agree that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed.[10] Post at 56. It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys' restroom pursuant to the Department's interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court's guidance in *Chevron*, *Auer*, and *Christopher* and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns[11]—fundamentally questions of policy—is a task committed to the agency, not to the courts.

The Supreme Court's admonition in *Chevron* points to the balance courts must strike:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

***9** *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Not only may a subsequent administration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our *Auer* analysis complete, we leave policy formulation to the political branches.

III.

[14] **[15]** **[16]** G.G. also asks us to reverse the district court's denial of the preliminary injunction he sought which would have allowed him to use the boys' restroom during the pendency of this lawsuit. "To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir.2014) (citation omitted). We review a district court's denial of a preliminary injunction for abuse of discretion. *Id.* at 235. "A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir.2006) (citation and quotations omitted). "We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter *de novo*." *Id.* (citation omitted). Instead, "we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (citations and quotations omitted).

The district court analyzed G.G.'s request only with reference to the third factor—the balance of hardships—and found that the balance of hardships did not weigh in G.G.'s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions." *G.G.*, 2015 WL 5560190, at *11.

[17] **[18]** The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." *Id.* at *9. Preliminary injunctions, however, are governed by less strict rules of evidence:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

***10** *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *see also Elrod v. Burns*, 427 U.S. 347, 350 n. 1, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (taking as true the "well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction"); *compare* Fed.R.Civ.P. 56 (requiring affidavits supporting summary judgment to be "made on personal knowledge, [and to] set out facts that would be admissible in evidence"), *with* Fed R. Civ. P. 65 (providing no such requirement in the preliminary injunction context). Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial.

[19] Additionally, the district court completely excluded some of G.G.'s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to "weight, not preclusion" and have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir.2010); *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir.2004); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir.1997); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir.1995)

("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." (citation and internal quotations omitted)); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir.1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir.1986); *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.1984). We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.'s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was "guided by erroneous legal principles." We therefore conclude that the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence. We vacate the district court's denial of G.G.'s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein.

IV.

***11** **[20]** **[21]** **[22]** Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir.1991) (citation and internal quotation marks omitted). In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Id.* (citation omitted).

G.G. argues that both the first and second *Guglielmi* factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." Appellant's Br. 53. For example, the court accepted the Board's "mating" concern by noting:

> There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teen-age years. All of that is accepted by all medical science, as far as I can determine in reading information.

J.A. 85–86.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. J.A. 111–12. The district court characterized gender dysphoria as a "mental disorder" and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. *See* J.A. 88–91; 101–02. The district court also seemed to reject G.G.'s representation of what it meant to be transgender, repeatedly noting that G.G. "wants" to be a boy and not a girl, but that "he is biologically a female." J.A. 103–04; *see also* J.A. 104 ("It's his mind. It's not physical that causes that, it's what he believes."). The district court's memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Further, although the district court has a distinct way of

proceeding in court, the hearing record and the district court's written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the *Guglielmi* standard. We deny G.G.'s request for reassignment to a different district judge on remand.

V.

***12** For the foregoing reasons, the judgment of the district court is

REVERSED IN PART, VACATED IN PART, AND REMANDED.

DAVIS, Senior Circuit Judge, concurring:

I concur in Judge Floyd's fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, *this Court* would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir.2013) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board's restroom policy discriminates against him "on the basis of sex" in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir.2011); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir.2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir.2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir.2000).

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse's office. *See* J.A. 32–33. His affidavit also indicates that he has "repeatedly developed painful urinary tract infections" as a result of holding his urine in order to avoid using the restroom at school. *Id.*

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.'s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is "inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child" and explains why access to a restroom appropriate to one's gender identity is important for transgender youth. J.A. 39. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board's restroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm." J.A. 41. In particular, Dr. Ettner opines that

> ***13** [a]s a result of the School Board's restroom policy, ... G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his 'otherness,' undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs

> to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

J.A. 42.

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.'s or Dr. Ettner's affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.'s presentation in support of his claim of irreparable harm, such as "evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s'] restroom," evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner "differentiating between the distress that G.G. may suffer by not using the boy[s'] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12." Br. Appellee 42–43. As to the alleged deficiency concerning Dr. Ettner's opinion, the Board's argument is belied by Dr. Ettner's affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing "[a]s a result of the School Board's restroom policy." J.A. 42. With respect to the other purported inadequacies, the absence of such evidence does nothing to undermine the uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board's policy or Dr. Ettner's unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.'s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.

C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students' constitutional right to privacy will be imperiled by G.G.'s presence in the boys' restroom.

As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students' unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school's restrooms already undertaken by the Board. To the extent that a student simply objects to using the restroom in the presence of a transgender student even where there is no possibility that either student's genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.'s presence in the communal restroom thus does not tip the scale in the Board's favor. The balance of hardships weighs heavily toward G.G.

D.

***14** Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest. *Cf. Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir.2002) (citation omitted) (observing that upholding constitutional rights is in the public interest).

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.

II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us. *See, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir.2014) (expressly observing that appellate courts have the power to vacate a denial of a preliminary injunction and direct entry of an injunction); *Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs.*, 197 F.3d 123, 134 (4th Cir.1999) (directing entry of injunction "because the record clearly establishes the plaintiff's right to an injunction and [an evidentiary] hearing would not have altered the result").

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year.

With these additional observations, I concur fully in Judge Floyd's thoughtful and thorough opinion for the panel.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court's opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G's motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.'s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority's decision on those issues.

***15** G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school's policy for assigning students to restrooms and locker rooms based on biological sex. The school's policy provides: (1) that the girls' restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys' restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school's three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls' restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates against him because it denies him, as one who identifies as male, the use of the boys' restrooms, and he seeks an injunction compelling the high school to allow him to use the boys' restrooms.

The district court dismissed G.G.'s Title IX claim, explaining that the school complied with Title IX and its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex," so long as the facilities are "comparable." 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

Strikingly, the majority now reverses the district court's ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute's and regulations' use of the term "sex" means a person's gender identity, not the person's biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education's Office for Civil Rights to G.G., in which the Office for Civil Rights stated, "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally *must treat transgender students consistent with their gender identity*." (Emphasis added). Accepting that new definition of the statutory term "sex," the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls' restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys' restrooms and locker rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And, unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the "severe psychological distress" it would inflict on him and because female students had "reacted negatively" to his presence

in girls' restrooms. Surely biological males who identify as females would encounter similar reactions in the girls' restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

***16** This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is *not* law but which is the only authority on which the majority relies, states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]." This appears to approve the course that G.G.'s school followed when it created unisex restrooms in addition to the boys' and girls' restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, provided that the facilities are "proportionate" and "comparable," 34 C.F.R. § 106.32(b), and to provide "separate toilet, locker room, and shower facilities on the basis of sex," again provided that the facilities are "comparable," 34 C.F.R. § 106.33. Because the school's policy that G.G. challenges in this action comports with Title IX and its regulations, I would affirm the district court's dismissal of G.G.'s Title IX claim.

I

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but "did not feel like a girl" from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one's biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of his requests. Officials changed school records to reflect G.G.'s new male name; the guidance counselor supported G.G.'s sending an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical education requirement through a home-bound program, as he preferred not to use the school's locker rooms; and the school allowed G.G. to use a restroom in the nurse's office "because [he] was unsure how other students would react to [his] transition." G.G. was grateful for the school's "welcoming environment." As he stated, "no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns." And he was "pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy."

***17** As the school year began, however, G.G. found it "stigmatizing" to continue using the nurse's restroom, and he requested to use the boys' restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving "numerous complaints from parents and students about [G.G.'s] use of the boys' restrooms." The School Board thus faced a dilemma. It recognized G.G.'s feelings, as he expressed them, that "[u]sing the girls' restroom[s][was] not possible" because of the "severe psychological distress" it would inflict on him and because female students had previously "reacted negatively" to his presence in the girls' restrooms. It now also had to recognize that boys had similar feelings caused by G.G.'s use of the boys' restrooms, although G.G. stated that he continued using the boys' restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education's Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board's policy was discriminatory, in violation of the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction "requiring the School Board to allow [him] to use the boys' restrooms at school."

***18** The district court dismissed G.G.'s Title IX claim because Title IX's implementing regulations permit schools to provide separate restrooms "on the basis of sex." The court also denied G.G.'s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it "will hear evidence" and "get a date set" for trial to better assess the claim.

From the district court's order denying G.G.'s motion for a preliminary injunction, G.G. filed this appeal, in which he also challenges the district court's Title IX ruling as inextricably intertwined with the district court's denial of the motion for a preliminary injunction.

II

G.G. recognizes that persons who are born biologically female "typically" identify psychologically as female, and likewise, that persons who are born biologically male "typically" identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for "different and unequal treatment," "discriminat[ing] against him based on sex [by denying him use of the boys' restrooms], in violation of Title IX." He argues, "discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account." He concludes that the School Board's policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is "prevent [ed] ... from using the same restrooms as other students and relegat[ed] ... to separate, single-stall facilities."

As noted, the School Board's policy designates the use of restrooms and locker rooms based on the student's biological sex—biological females are assigned to the girls' restrooms and unisex restrooms; biological males are assigned to the boys' restrooms and unisex restrooms. G.G. is thus assigned to the girls' restrooms and the unisex restrooms, but is denied the use of the boys' restrooms. He asserts, however, that because

neither he nor the girls would accept his use of the girls' restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

> The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

***19** While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

> No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

20 U.S.C. § 1681(a) (emphasis added). The Act, however, provides, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities *for the different sexes*." *Id.* § 1686 (emphasis added); *see also* 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing *on the basis of sex* " as long as the housing is "proportionate" and "comparable" (emphasis added)). Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

> A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33 (emphasis added). Thus, although Title IX and its regulations provide generally that a school receiving federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on "sex," a term that must be construed uniformly throughout Title IX and its implementing regulations. *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)); *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir.2013) ("Canons of construction ... require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning. This presumption of consistent usage ... ensure[s] that the statutory scheme is coherent and consistent" (alterations in original) (internal quotation marks and citations omitted)); *see also Kentuckians for Commonwealth Inc. v. Riverburgh*, 317 F.3d 425, 440 (4th

Cir.2003) ("[B]ecause a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well" (quoting John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L.Rev. 612, 627 n. 78 (1996))).

***20** Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. *See, e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir.2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir.2008) (explaining that "the constitutional right to privacy ... includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir.2005) ("Students of course have a significant privacy interest in their unclothed bodies"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir.1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir.1989) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating").

Moreover, we have explained that separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"). Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women," which, as the Supreme Court explained, are "enduring" and render "the two sexes ... not fungible," *id.* at 533 (distinguishing sex from race and national origin), not because of "one's sense of oneself as belonging to a particular gender," as G.G. and the government as amicus contend.

***21** Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote *the privacy and safety* of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an environment where children are still developing, both emotionally and physically."

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term "sex" were to encompass only a person's gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls' dorm or shower in a girls' shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower. G.G.'s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to "restroom access by transgender individuals." *Ante* at 26. But this effort to restrict the effect of G.G.'s argument hardly matters when the term "sex" would have to

be applied uniformly throughout the statute and regulations, as noted above and, indeed, as agreed to by the majority. *See ante* at 26.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of enactment. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (explaining that courts should not defer to an agency's interpretation of its own regulation if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent *at the time of the regulation's promulgation* " (emphasis added) (internal quotation marks and citation omitted)); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (discussing dictionary definitions of the regulation's "critical phrase" to help determine whether the agency's interpretation was "plainly erroneous or inconsistent with the regulation" (internal quotation marks and citation omitted)). Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions. *See, e.g., The Random House College Dictionary* 1206 (rev. ed.1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change ..."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished ..."). Indeed, although the contemporaneous meaning controls our analysis, it is notable that, *even today*, the term "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g., Webster's New World College Dictionary* 1331 (5th ed.2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam–Webster's Collegiate Dictionary* 1140 (11th ed.2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"). Any new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

***22** Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of "sex" as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term "sex" in Title IX and its regulations refers to a person's "gender identity" simply to accommodate G.G.'s wish to use the boys' restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term "sex" as used in Title IX and its regulations refers (1) to *both* biological sex *and* gender identity; (2) to *either* biological sex *or* gender identity; or (3) to *only* "gender identity." In his brief, G.G. seems to take the position that the term "sex" *at least* includes a reference to gender identity. This is the position taken in his complaint when he alleges, "Under Title IX, discrimination 'on the basis of sex' encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity." The government seems to be taking the same position, contending that the term "sex" "encompasses both sex—that is, the biological differences between men and women—*and* gender [identity]." (Emphasis in original). The majority, however, seems to suggest that the term "sex" refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights' letter of January 7, 2015, which said, "When a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally

must treat transgender students consistent with *their gender identity*." (Emphasis added). But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term "sex" as used in the statute and regulations refers to *both* biological sex *and* gender identity, then, while the School Board's policy is in compliance with respect to most students, whose biological sex aligns with their gender identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished consistent with the regulation because a transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools' ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms, a position that G.G. does not advocate.

***23** If the position of G.G., the government, and the majority is that the term "sex" means *either* biological sex *or* gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys' restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that "sex" as used in Title IX and its regulations means *only* gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a *separate* use "on the basis of sex," and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom.

Yet, by interpreting Title IX and the regulations as "requiring schools to treat students consistent with their gender identity," and by disallowing schools from treating students based on their biological sex, the government's position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls' restrooms, G.G. states that "it makes no sense to place a transgender boy in the girls' restroom in the name of protecting student privacy" because "girls objected to his presence in the girls' restrooms because they perceived him as male." But the same argument applies to his use of the boys' restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex" if "sex" means gender identity.

***24** The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools "generally must treat transgender students consistent with their gender identity," whatever that means, and in the next sentence, it encourages schools to provide "gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High School, to provide unisex single-stall restrooms for any

students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, *on the basis of sex*, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.'s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse's restroom. And, after both girls and boys objected to his using the girls' and boys' restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm the district court's decision dismissing G.G.'s Title IX claim and therefore dissent.

I also dissent from the majority's decision to vacate the district court's denial of G.G.'s motion for a preliminary injunction. As the Supreme Court has consistently explained, "[a] preliminary injunction is an extraordinary remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," and " '[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.' " *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22–24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quoting *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)). Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can "form a definite and firm conviction that the court below committed a clear error of judgment," *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir.2006) (quotation marks and citation omitted), particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

***25** As noted, however, I concur in Part IV of the court's opinion.

All Citations

--- F.3d ----, 2016 WL 1567467

Footnotes

1 The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association. *Id.* The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

2 G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case.

3 We decline the Board's invitation to preemptively dismiss G.G.'s equal protection claim before it has been fully considered by the district court. "[W]e are a court of review, not of first view." *Decker v. Nw. Envtl. Def. Ctr.*, —— U.S. ——, ——, 133 S.Ct. 1326, 1335, 185 L.Ed.2d 447 (2013) (citation and quotation marks omitted). We will not proceed to the merits of G.G.'s equal protection claim on appeal without the benefit of the district court's prior consideration.

4 The Board suggests that a restroom may not be educational in nature and thus is not an educational program covered by Title IX. Appellee's Br. 35 (quoting *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657, 682 (W.D.Pa.2015)). The Department's regulation pertaining to "Education programs or activities" provides:

> Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> ...

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). We have little difficulty concluding that access to a restroom at a school, under this regulation, can be considered either an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity," which, when offered by a recipient institution, falls within the meaning of "educational program" as used in Title IX and defined by the Department's implementing regulations.

5 The opinion letter cites to OCR's December 2014 "Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities." This document, denoted a "significant guidance document" per Office of Management and Budget regulations, states: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) *available at* http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

The dissent suggests that we ignore the part of OCR's opinion letter in which the agency "also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities," as the Board did here. Post at 66. However, because G.G. *does* want to use shared sex-segregated facilities, the agency's suggestion regarding students who *do not* want to use such shared sex-segregated facilities is immaterial to the resolution of G.G.'s claim. Nothing in today's opinion restricts any school's ability to provide individual-user facilities.

6 For example, § 106.32(b)(2) provides that "[h]ousing provided ... to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: proportionate in quantity ... and [c]omparable in quality and cost to the student"; § 106.37(a)(3) provides that an institution generally cannot "[a]pply any rule ... concerning eligibility [for financial assistance] which treats persons of one sex differently from persons of the other sex with regard to marital or parental status"; and § 106.41(b) provides that "where [an institution] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex ... members of the excluded sex must be allowed to try-out for the team offered ...."

7 Modern definitions of "sex" also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." *Black's Law Dictionary* 1583 (10th ed.2014). The American Heritage Dictionary includes in the definition of "sex" "[o]ne's identity as either female or male." *American Heritage Dictionary* 1605 (5th ed.2011).

8 We disagree with the dissent's suggestion that the result we reach today renders the enforcement of separate restroom facilities impossible because it "would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity." Post at 65. Accepting the Board's position would equally require the school to assume "biological sex" based on "appearances, social expectations, or explicit declarations of [biological sex]." Certainly, no one is suggesting mandatory verification of the "correct" genitalia before admittance to a restroom. The Department's vision of sex-segregated restrooms which takes account of gender identity presents no greater "impossibility of enforcement" problem than does the Board's "biological gender" vision of sex-segregated restrooms.

9 The Board urges us to reach a contrary conclusion regarding the validity of the Department's interpretation, citing *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F.Supp. 657 (W.D.Pa.2015). Although we recognize that the *Johnston* court confronted a case similar in most material facts to the one before us, that court did not consider the Department's interpretation of § 106.33. Because the *Johnston* court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in *Johnston* to be unpersuasive.

10 We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent. For example, G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present in *Brannum v. Overton Cty. Sch. Bd.,* 516 F.3d 489, 494 (6th Cir.2008) (involving the videotaping of students dressing and undressing in school locker rooms), *Beard v. Whitmore Lake Sch. Dist.,* 402 F.3d 598, 604 (6th Cir.2005) (involving the indiscriminate strip searching of twenty male and five female students), or *Supelveda v. Ramirez,* 967 F.2d 1413, 1416 (9th Cir.1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).

11 The dissent accepts the Board's invocation of amorphous safety concerns as a reason for refusing deference to the Department's interpretation. We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature

of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the existence of danger caused by "sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." Post at 58. The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent's formulation, present a safety risk because of the "sexual responses prompted" by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.

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