

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Equal Employment
Opportunity Commission,

Plaintiff,

v.

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

Defendant.

Civil Action No.
2:14-cv-13710
Hon. Sean F. Cox

**DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.’S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and Local Rule 7.1, and for the reasons set forth in the accompanying Memorandum of Law, Defendant R.G. & G.R. Harris Funeral Homes, Inc. (“R.G.”) hereby moves this Court for the entry of summary judgment in R.G.’s favor.

As set forth more fully in the accompanying Memorandum of Law, there is no genuine dispute as to any material fact. And R.G. is entitled to judgment as a matter of law for three reasons. First, the undisputed evidence demonstrates that Charging Party Stephens was not subject to unlawful discrimination based on sex. Second, the Religious Freedom Restoration Act (“RFRA”) prohibits Plaintiff Equal Opportunity Employment Commission (the “EEOC”) from punishing R.G. for its decision to

dismiss Stephens under these circumstances. Third, the EEOC lacks authority to raise its claim (on behalf of a class of unidentified female employees) that work clothes or clothing allowances were provided to male employees but not to female employees, and the undisputed evidence shows that R.G.'s provision of work clothes or clothing allowances did not discriminate between comparable male and female employees. Consequently, R.G. is entitled to summary judgment on all of the EEOC's claims.

This Motion is based on the accompanying Memorandum of Law, the exhibits filed with the Motion, R.G.'s Statement of Undisputed Material Facts, orders and documents previously filed in this case, and the oral argument of counsel.

Pursuant to Local Rule 7.1(a), R.G.'s counsel asked for the EEOC's position on this Motion and the relief sought herein, and the EEOC's counsel indicated that the EEOC opposes this Motion and the relief requested.

Dated: April 7, 2016

Respectfully submitted,

/s/ James A. Campbell

James A. Campbell (AZ Bar 026737)
Douglas G. Wardlow (AZ Bar 032028)
Joseph P. Infranco (NY Bar 1268739)
Bradley S. Abramson (AZ Bar 029470)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
jcampbell@ADFlegal.org
dwardlow@ADFlegal.org
jinfranco@ADFlegal.org
babramson@ADFlegal.org

Joel J. Kirkpatrick (P62851)
JOEL J. KIRKPATRICK, P.C.
843 Penniman Ave., Suite 201
Plymouth, MI 48170
(734) 404-5710
(866) 241-4152 Fax
joel@joelkirkpatrick.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2016, I electronically filed the foregoing Motion for Summary Judgment and all accompanying papers (which include the Memorandum of Law and the Exhibits in Support of the Motion) with the Clerk of the Court using the ECF system, which will send notification of this filing to all parties in the case.

/s/ James A. Campbell
James A. Campbell

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT R.G. & G.R.
HARRIS FUNERAL HOMES, INC.'S MOTION FOR SUMMARY
JUDGMENT**

James A. Campbell (AZ Bar 026737)
Douglas G. Wardlow (AZ Bar 032028)
Joseph P. Infranco (NY Bar 1268739)
Bradley S. Abramson (AZ Bar 029470)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
jcampbell@ADFlegal.org
dwardlow@ADFlegal.org
jinfranco@ADFlegal.org
babramson@ADFlegal.org

Joel J. Kirkpatrick (P62851)
JOEL J. KIRKPATRICK, P.C.
843 Penniman Ave., Suite 201
Plymouth, MI 48170
(734) 404-5710
(866) 241-4152 Fax
joel@joelkirkpatrick.com

Attorneys for Defendant

Statement of the Issues Presented

1. Whether the Court should grant summary judgment to Defendant R.G. & G.R. Funeral Homes, Inc. (“R.G.”) on Plaintiff Equal Opportunity Employment Commission’s (the “EEOC”) Title VII claim on behalf of Charging Party Stephens, when the undisputed evidence demonstrates that R.G. dismissed Stephens because of Stephens’s stated intent to violate a sex-specific dress code that imposes equal burdens on the sexes.

2. Whether the Religious Freedom Restoration Act (“RFRA”) requires the Court to grant summary judgment to R.G. on the EEOC’s Title VII claim on behalf of Stephens, when the undisputed evidence shows that the EEOC seeks to compel R.G. (a closely held corporation) to violate its owner’s sincerely held religious beliefs.

3. Whether the Court should grant summary judgment to R.G. on the EEOC’s Title VII claim (on behalf of an unidentified group of women) that challenges R.G.’s manner of providing work clothes and clothing allowances to its employees, when the EEOC lacks authority to bring a claim of discrimination that is unrelated to Stephens (a biological male when employed by R.G.) and that involves a kind of discrimination (discrimination in the terms and conditions of employment) different than that alleged by Stephens (discriminatory discharge), and when the undisputed evidence demonstrates that R.G. provides work clothes and clothing allowances that are equivalent for comparable male and female employees.

Authority for the Relief Sought

Issue No. 1

Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977)

Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc)

Issue No. 2

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, *et seq.*

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)

Issue No. 3

EEOC v. Bailey Co., 563 F.2d 439 (6th Cir. 1977)

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Introduction

Defendant R.G. & G.R. Harris Funeral Homes, Inc. (“R.G.”) and its owner Thomas Rost (“Rost”) walk alongside grieving family members and friends when their loved ones pass away. Rost is a devout Christian who believes that God has called him to minister to these grieving families, and his faith informs the way he operates his business and how he presents his business to the public.

Charging Party Stephens was employed by R.G. as a funeral director embalmer. In Stephens’s work as a funeral director, Stephens regularly interacted with the public, including grieving family members and friends. When Stephens, a biological male, informed Rost of an intention to begin wearing the female uniform for funeral directors, R.G. dismissed Stephens for refusing to comply with R.G.’s dress code.

Plaintiff Equal Employment Opportunity Commission (the “EEOC”) claims that R.G. violated Title VII’s prohibition on sex discrimination when R.G. dismissed Stephens. This Court’s previous rulings have established that the EEOC is confined to arguing that R.G. engaged in unlawful sex stereotyping when it dismissed Stephens. Yet the undisputed evidence demonstrates that R.G. dismissed Stephens because Stephens stated an intent to violate a sex-specific dress code that imposes equal burdens on men and women. That decision had nothing to do with pernicious or illegitimate sex-based stereotypes. Consequently, as a matter of law, Stephens’s termination does not violate Title VII.

In addition, R.G. is entitled to summary judgment because the Religious

Freedom Restoration Act (“RFRA”) forbids the EEOC from applying Title VII to punish R.G. under the facts of this case. RFRA applies here because R.G. is a closely held corporation entirely controlled and majority-owned by Rost and because Rost operates R.G. consistent with his Christian faith. Rost sincerely believes that a person’s sex (whether male or female) is an immutable God-given gift, and that he would be violating his faith if he were to pay for and otherwise permit his funeral directors to dress as members of the opposite sex while at work. Compelling R.G. to allow its male funeral directors to wear the uniform prescribed for females would thus substantially burden R.G.’s exercise of religion. Because the government cannot satisfy strict scrutiny here, RFRA bars Title VII’s application in this case.

Finally, the Court should reject the EEOC’s claim that R.G. violates Title VII by allegedly failing to provide female employees work clothes or clothing allowances equivalent to those given to males. This is because the EEOC lacks authority to raise that claim and because the work clothes and clothing allowances that R.G. provides to its employees do not discriminate between comparable male and female employees.

Standard of Review

Summary judgment must be granted when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Once the moving party carries its initial burden, the non-moving party may avoid summary judgment by “point[ing] to evidence in the record upon which a reasonable jury could find for it.” *Martin v. Ohio Turnpike Comm’n*,

968 F.2d 606, 608-09 (6th Cir. 1992) (citations omitted).

Argument

I. Stephens Was Not Unlawfully Dismissed Because of Sex in Violation of Title VII.

Title VII prohibits an employer from dismissing or otherwise taking adverse action against an employee “because of” the employee’s sex. 42 U.S.C. § 2000e-2(a)(1). Plaintiffs generally rely on the indirect method of proof for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that method, a plaintiff must establish the prima facie case by showing that “(1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees.” *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008); accord *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006). If the plaintiff establishes these elements, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Humenny v. Genex Corp.*, 390 F.3d 901, 906 (6th Cir. 2004). If the employer provides such a reason, the plaintiff’s claim fails unless the plaintiff produces evidence that the proffered reason is a pretext for discrimination. *Id.*

In Title VII sex-discrimination litigation, “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Oncale v. Sundowner*

Offshore Servs., Inc., 523 U.S. 75, 80 (1998). Even though Stephens stated an intent to begin wearing the female uniform for funeral directors, Stephens was at all relevant times—from the time of Stephens’s hiring through discharge—a biological male. Consequently, to establish a *prima facie* case for sex discrimination, Stephens must show that R.G. treated Stephens less favorably than a similarly situated female employee or that Stephens was replaced with a female employee. The EEOC cannot make this showing because R.G. was simply enforcing its legitimate dress code for funeral directors when it dismissed Stephens. Accordingly, the EEOC cannot prove intent to discriminate against Stephens based on sex.

A. Stephens Must Be Considered a Male for Purposes of Title VII.

Ruling on R.G.’s Motion to Dismiss, this Court held that “transgender status is not a protected class under Title VII.” *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015). This Court also “rejected the EEOC’s claim that R.G. violated Title VII by firing Stephens . . . because of Stephens’s transition from male to female.” Order Granting in Part and Denying in Part EEOC’s Motion for Protective Order at *2 (ECF No. 34). The EEOC is thus confined to arguing that R.G. discriminated against Stephens under the sex-stereotyping theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Legal analysis under that theory must begin by identifying the plaintiff’s sex, which forms the basis of the alleged stereotyping. Because transgender status is not a protected class, the baseline for a sex-stereotyping claim must be a person’s biological sex.

In this case, there is no dispute that during Stephens's employment at R.G., Stephens was a biological male. Indeed, this fact is conclusively established in this proceeding. In its response to R.G.'s Requests for Admissions, the EEOC *denied* that Stephens is "female *and not a male* for purposes of determining whether discrimination on the basis of 'sex' has occurred under 'Title VII.'" Pl.'s Resp. to Def.'s First Set of Discovery at Request for Admission No. 6 (Ex. 25) (emphasis added).

Thus, Stephens must be treated as a male for purposes of Stephens's Title VII claim. This conclusion has two consequences. First, any claim that Stephens was subjected to unlawful discrimination because Stephens is female must fail. Second, Stephens was subject to R.G.'s dress code for male funeral directors.

B. R.G.'s Enforcement of its Sex-Specific Dress Code Does Not Violate Title VII.

1. Sex-Specific Dress Codes That Impose Equal Burdens on Men and Women Do Not Violate Title VII.

Courts generally uphold sex-specific dress and grooming policies against Title VII challenges. *See, e.g., Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (stating that the Ninth Circuit has "long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits"); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) ("[R]easonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and

female employees, it is not usually thought that there is unlawful discrimination ‘because of sex.’”). This is particularly true when even though the challenged policy treats men and women differently, it does so without placing an unequal burden on one sex.

In *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977), for example, the Sixth Circuit held that a male employee who was discharged for failing to keep his hair short as required by his employer’s sex-specific grooming policy did not state a cause of action under Title VII for discrimination based on sex. The employer’s grooming policy “limited the manner in which the hair of the men could be cut and limited the manner in which the hair of women could be styled.” *Id.* In holding that the male plaintiff failed to make out a prima facie case of sex discrimination, the court observed that there was “no allegation that women employees who failed to comply with the code provisions relating to hair style were not discharged”; nor was there “any allegation that the employer refused to hire men who did not comply with the code, but did hire women who were not in compliance.” *Id.* In other words, the plaintiff did not state a claim for sex discrimination because he failed to allege that the employer’s grooming policy imposed an unequal burden on men.

Courts in other circuits have reached the same conclusion. In 2006, an en banc panel of the Ninth Circuit confronted a similar set of facts in *Jespersen*. There, the court considered whether Harrah’s Casino violated Title VII by requiring its bartenders to conform to a dress and grooming policy that required female bartenders

to wear makeup and nail polish and to tease, curl, or style their hair, while prohibiting male bartenders from wearing makeup or nail polish and requiring them to keep their hair cut above the collar. *Jespersen*, 444 F.3d at 1107. The court noted that it has “long recognized that companies may differentiate between men and women in appearance and grooming policies.” *Id.* at 1110. “The material issue under our settled law is not whether the policies [for men and women] are different, but whether the policy imposed on the plaintiff creates an unequal burden for the plaintiff’s gender.” *Id.* (citation and quotation marks omitted). Because the female plaintiff failed to show that requiring women to wear makeup (and prohibiting men from doing so) imposed an unequal burden on women, the Ninth Circuit held that she could not establish her claim of sex discrimination. *Id.* at 1112; *see also Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (upholding sex-specific grooming policy); EEOC Compliance Manual § 619.4(d) (June 2006) (stating that sex-specific dress codes that “are suitable and are equally enforced and . . . are equivalent for men and women with respect to the standard or burden that they impose” do not violate Title VII).

2. R.G.’s Sex-Specific Dress Code Does Not Impose Unequal Burdens on Males and Females.

Because R.G.’s dress code for funeral directors imposes equivalent burdens on men and women, the enforcement of the dress code against Stephens was not unlawful discrimination, and R.G. is entitled to judgment as a matter of law.

R.G.’s basic dress code is outlined in the company’s employee handbook. *See*

R.G. Employee Manual, EEOC002717-19 (Ex. 19). It is a sex-specific dress code that R.G. applies based on the biological sex of its employees. T. Rost Aff. ¶ 35 (Ex. 1). The dress code requires men who interact with the public to wear dark suits with nothing in the jacket pockets, white shirts, ties, dark socks, dark polished shoes, dark gloves, and only small pins. R.G. Employee Manual, EEOC002717-19 (Ex. 19). Women who interact with the public must wear “a suit or a plain conservative dress” in muted colors. *Id.* The employees of R.G. understand that this requires those male employees to wear suits and ties and those female employees to wear skirts and business jackets. *See* Peterson Dep. 30:24-31:25, 32:3-8 (Ex. 11); Kish Dep. 17:8-16, 58:5-11 (Ex. 5); Shaffer Dep. 52:12-22 (Ex. 12); Cash Dep. 23:1-4 (Ex. 8); Kowalewski Dep. 22:10-15 (Ex. 9); McKie Dep. 22:22-25 (Ex. 13); M. Rost Dep. 14:9-19 (Ex. 10).

When analyzing the EEOC’s claim on behalf of Stephens, the relevant requirements of the dress code are those that apply to R.G.’s funeral directors because that is the position held by Stephens. *See Jespersen*, 444 F.3d at 1106-07 (focusing only on the dress code for the plaintiff’s position). R.G. employees understand that the dress code requires funeral directors to wear company-provided suits. *See* Kish Dep. 17:8-22 (Ex. 5); Crawford Dep. 18:3-11 (Ex. 6). Although R.G. has not had an opportunity to employ a female funeral director since Rost’s grandmother stopped working for R.G. around 1950, *see* Stephens Dep. 102:4-14 (Ex. 14); T. Rost Aff. ¶ 52-53 (Ex. 1), there is no dispute that R.G. would provide female funeral directors with skirt suits in the same manner that it provides pant suits to male funeral directors, and

that those female employees would be required to wear those suits while on the job. *Id.* at ¶ 54. The burden on male funeral directors that must wear a company-issued suit is identical to the burden on female funeral directors that must wear company-issued suits for women.

Moreover, R.G. does not discriminate in its enforcement of the dress code. R.G. has in fact disciplined employees for failing to comply with the dress code, *see* Kish Dep. 54:1-16, 68:22-69:8 (Ex. 5); M. Rost Dep. 37:22-39:6 (Ex. 10), and no evidence indicates that R.G. has enforced it unevenly. Indeed, it is undisputed that if a female funeral director were to say that she planned to wear a men's suit at work, that employee would be discharged just like Stephens was. T. Rost Aff. ¶ 55 (Ex. 1). In addition, neither R.G.'s dress code nor any other R.G. policy requires any employee to act in a masculine or feminine manner. Nor has R.G. ever disciplined an employee for failing to act in a stereotypically masculine or feminine way.

The undisputed evidence thus demonstrates that R.G.'s dress code imposes equivalent burdens on male and female funeral directors. Consequently, the EEOC has failed to present an issue of triable fact, and R.G. is entitled to summary judgment.

3. Neither *Price Waterhouse* nor *Smith* Invalidate R.G.'s Sex-Specific Dress Code.

The Supreme Court's decision in *Price Waterhouse* and the Sixth Circuit's holding in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), do not alter the widely accepted rule acknowledged in *Barker* and *Jespersen* that sex-specific dress and grooming codes

are lawful under Title VII when they impose equivalent burdens on men and women. In *Smith*, the Sixth Circuit held that a male firefighter's Title VII complaint, which alleged that his employer took an adverse action against him because he "express[ed] less masculine, and more feminine mannerisms and appearance," stated a claim upon which relief could be granted. 378 F.3d at 572. In *Price Waterhouse*, the Supreme Court held that the plaintiff's employer violated Title VII by denying her a promotion because she was too "macho" and "aggressive" for a woman. 490 U.S. at 235-237, 250-51, 256. In neither case did the plaintiffs refuse to comply with (or challenge) a sex-specific dress code or grooming policy that imposed equal burdens on the sexes.

The absence of such a policy is critical. An important question when resolving sex-discrimination claims is whether the employer treats employees of one sex better than employees of the other sex. *White*, 533 F.3d at 391. And "the ultimate question" is whether the employee "has proven that the defendant intentionally discriminated against him because of his [sex]." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (quotation marks and alterations omitted). An employer's comments that a female employee is too "aggressive" or "macho" (as in *Price Waterhouse*, 490 U.S. at 235, 256) or that a male employee is engaging in "non-masculine behavior" (as in *Smith*, 378 F.3d at 570) show an intent to single out and discriminate against that employee because of his or her sex. But when an employer is simply enforcing a dress code that places equal burdens on the sexes and that applies to all employees in the same position, that does not demonstrate an intent to treat women worse than men

(or vice versa). See *Jespersen*, 444 F.3d at 1111-12 (“The [sex-specific dress and grooming] policy does not single out Jespersen. It applies to all of the [employees in her position], male and female.”). Indeed, unlike the employers in *Price Waterhouse* or *Smith*, R.G. never indicated that Stephens’s behavior was too feminine or not masculine enough. R.G. simply maintained that Stephens, like all other employees, whether male or female, must comply with the dress code. Thus, the EEOC (on behalf of Stephens) cannot show what the plaintiff in *Price Waterhouse* could (and what the plaintiff in *Smith* alleged)—that R.G. treated Stephens differently from other employees because of Stephens’s sex.

As the Ninth Circuit has noted, the plaintiff in *Price Waterhouse* established impermissible sex-based discrimination because “the very traits that [the female plaintiff] was asked to hide”—primarily her aggressiveness—“were the same traits *considered praiseworthy* in men.” *Jespersen*, 444 F.3d at 1111 (emphasis added). Indeed, the Court in *Price Waterhouse* explained that “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.” 490 U.S. at 251 In other words, by insisting that female employees conduct themselves in a stereotypically feminine fashion, Price Waterhouse impeded those employees’ ability to perform their jobs and advance their careers. That is why the sex stereotyping in *Price Waterhouse* established unlawful discrimination.

But this case is very different. It is instead like *Jespersen*, where the plaintiff tried

to use *Price Waterhouse* to invalidate a sex-specific dress and grooming policy that imposed equal burdens on the sexes. But the Ninth Circuit rejected the plaintiff's argument, concluding that "Jespersen's claim . . . materially differs from [the plaintiff's] claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender." 444 F.3d at 1113.

Similarly here, "[t]he record contains nothing to suggest [that R.G.'s dress] standards would objectively inhibit" one sex's "ability to do the job." *Id.* at 1112. R.G.'s dress code does not require Stephens to conform to a sex stereotype that would impede Stephens's ability to perform the duties of a funeral director. On the contrary, as discussed below, R.G. implemented its dress code to further its unique work as a funeral business catering to the needs of its customers. Thus, far from impeding Stephens's ability to perform the requirements of the job, R.G.'s dress code *enabled* Stephens to do the job well.

4. R.G.'s Dress Code Furthers Particular Business Needs in the Funeral Industry.

R.G.'s dress code is driven by the unique nature of the funeral industry, which requires utmost sensitivity to the needs of grieving families—including the need for an environment free from distraction. *See* T. Rost Aff. ¶ 34 (Ex. 1) ("Maintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process."); T. Rost 30(b)(6) Dep.

59:13-60:5 (Ex. 4) (explaining that R.G. instituted its dress code because grieving families and friends that come to R.G. deserve “an environment where they can begin the grieving process and the healing process,” and noting that clients “don’t need some type of a distraction . . . for them and their family”); Stephens Dep. 91:22-92:9 (Ex. 14) (testifying that professional attire is particularly important in the funeral industry given that “the funeral business is a somber one . . . because somebody has died, and people are . . . mourning the loss”). The dress code ensures that R.G.’s “staff is . . . dressed in a professional manner that’s acceptable to the families that [R.G.] serve[s].” T. Rost Dep. 49:22-50:15 (Ex. 3); *see also* T. Rost 30(b)(6) Dep. 57:20-58:6 (Ex. 4) (testifying that the “dress code conforms to what is acceptable attire in a professional manner for the services that [R.G.] provide[s]”).

The sex-specific nature of the dress code is also rooted in the business need for professionalism and the absence of distraction. The dress code forbids male funeral directors from wearing the female uniform because allowing them to do that would attract undue attention to themselves and disrupt the grieving process for the clients. T. Rost Aff. ¶ 37 (Ex. 1). Indeed, Stephens himself, while owner of a funeral business, required male employees to wear a coat and tie and required the only female employee to wear a ladies’ “business-type dress,” described as “[a] ladies’ blue jacket.” Stephens Dep. 36:1-23 (Ex. 14).

Professional dress takes on heightened significance for funeral directors like Stephens because they often deal directly with grieving family members. For example,

funeral directors regularly interact with families throughout the funeral process. Cash Dep. 27:13-28:9 (Ex. 8); Crawford Dep. 14:8-18 (Ex. 6); T. Rost Aff. ¶¶ 16-31 (Ex. 1). Funeral directors also perform sensitive duties like removing the body of the deceased from the family—a particularly distressing experience for family members. T. Rost Aff. ¶¶ 14-15 (Ex. 1). Rost believes that allowing a male funeral director to dress as a female would distract R.G.’s clients mourning the loss of their loved ones, disrupt their healing process, and harm R.G.’s clients and business. *Id.* at ¶¶ 36-40.

These uncontested facts demonstrate that R.G.’s dress code and its decision to dismiss Stephens were motivated by legitimate business needs and the interests of the grieving people that R.G. serves. Thus, neither R.G.’s dress code nor Stephens’s discharge violates Title VII’s prohibition on sex discrimination.

R.G. must emphasize one concluding point about the EEOC’s sex-stereotyping argument: accepting that argument would make it impossible for a company to enforce sex-specific dress or grooming requirements, even if they impose equal burdens on the sexes. Not only would this contravene the well-established Title VII case law that affirms those sorts of sex-specific policies, it would also override employers’ freedom to determine how their businesses will present themselves to the public and would jeopardize their success in the marketplace. As Judge Posner has observed, sex-stereotyping case law does not create “a federally protected right for male workers to wear nail polish and dresses . . . , or for female ditchdiggers to strip to the waist in hot weather.” *Hamm v. Weyauvega Milk Products, Inc.*, 332 F.3d 1058, 1067

(7th Cir. 2003) (Posner, J., concurring). If it did, Title VII would require employers with legitimate sex-specific dress and grooming policies to allow an employee to dress in a female uniform one day, switch to a male uniform the next day, and return to the female uniform whenever that employee chooses. Congress surely did not have this in mind when it added sex as a protected classification in Title VII.

II. RFRA Prohibits the EEOC from Compelling R.G. to Violate its Sincerely Held Religious Beliefs.

RFRA provides that the government “shall not substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(a). The only exception to this rule is if the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). The EEOC’s attempt to apply Title VII under these circumstances would substantially burden R.G.’s exercise of religion by, among other things, forcing R.G. to violate Rost’s religious belief that a person’s sex (whether male or female) is an immutable God-given gift and that R.G. cannot pay for or otherwise permit one of its male funeral directors to wear the female uniform at work. Because the EEOC cannot demonstrate that forcing R.G. to violate its faith in this way would satisfy strict scrutiny, RFRA prohibits the EEOC’s attempt to apply Title VII here.

A. RFRA Protects R.G.’s Exercise of Religion.

RFRA applies to “a person’s” exercise of religion. 42 U.S.C. §§ 2000bb-1(a), (b).

This includes closely held for-profit corporations like R.G., 94.5 percent of which is owned by Rost, its sole officer and chief executive, with the remaining 5.5 percent split between Rost's two children. *See* T. Rost 30(b)(6) Dep. 26:20-28:25, 78:2-9 (Ex. 4); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) (concluding that “persons” protected by RFRA include closely held for-profit corporations).

Moreover, R.G. exercises religion through the work that it performs. As the Supreme Court explained in *Hobby Lobby*: “[T]he exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition.” *Id.* at 2770 (quotation marks and citation omitted).

Rost has been a Christian for over sixty-five years. T. Rost 30(b)(6) Dep. 30:13-22 (Ex. 4). His faith informs the way he operates his business, *id.* at 86:20-22, 87:3-24, which includes hosting funeral services of deep spiritual significance to many, *see id.* at 32:3-13; T. Rost Aff. ¶¶ 10, 20, 26, 30 (Ex. 1). R.G.'s mission statement, which is posted on its website with a Scripture verse, reflects the business's religious purposes:

R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life.

R.G. Webpage (Ex. 15). Long-time employees and managers agree that R.G. is

operated according to Rost's religious convictions. Cash Dep. 8:25-9:25, 46:5-18 (Ex. 8) (testifying that he considers R.G. to be a Christian business); Kowalewski Dep. 29:8-10 (Ex. 9) (testifying that he considers R.G. to be a Christian business).

R.G. is a tangible expression of Rost's deeply felt religious calling to care for and minister to the grieving. *See* T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4) (testifying that he considers his business to be a ministry to grieving families); T. Rost Aff. ¶ 10 (Ex. 1). Rost describes the ministry of R.G. as one of healing and giving comfort—to help families on the “worst day of their lives” and “meet their emotional, relational and spiritual needs . . . in a religious way.” T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4). In addition to the spiritual and emotional care involved in his ministry, Rost ensures that all customers have access to spiritual guidance by placing throughout his funeral homes Christian devotional booklets entitled “Our Daily Bread” and small cards with Bible verses on them called “Jesus Cards,” and by making a Bible available to visitors at all his funeral homes. *Id.* at 39:23-40:17; Nemeth Dep. 27:13-28:2 (Ex. 7); Cash Dep. 47:17-24 (Ex. 8); Kowalewski Dep. 31:17-32:21, 33:5-22 (Ex. 9); M. Rost Dep. 28:20-29:19 (Ex. 10); Peterson Dep. 28:18-30:12 (Ex. 11).

Viewing all this evidence of R.G.'s religious exercise in the light of *Hobby Lobby*, this Court should conclude that RFRA's protections apply here. Indeed, just as the businesses in *Hobby Lobby* exercised religion by operating “in [a] manner that reflects [their] Christian heritage,” *Hobby Lobby*, 134 S. Ct. at 2770 n.23, R.G. exercises religion by, as its mission statement says, upholding as “its highest priority” the need “to

honor God in all that we do as a company.” R.G. Webpage (Ex. 15).

B. Applying Title VII in this Case Would Substantially Burden R.G.’s Exercise of Religion.

The EEOC’s attempt to apply Title VII here would substantially burden Rost’s exercise of religion. A substantial burden exists where the government requires a person “to engage in conduct that seriously violates [his] religious beliefs,” *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (quotation marks omitted), or where it “put[s] substantial pressure on an adherent . . . to violate his beliefs,” *Thomas v. Rev. Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981). Rost sincerely believes that a person’s sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex. T. Rost Aff. ¶¶ 41-42 (Ex. 1). He also sincerely believes that he would violate his faith if he were to pay for or otherwise allow one of his funeral directors to wear the uniform for members of the opposite sex while at work. T. Rost Aff. ¶¶ 43-46 (Ex. 1). Thus, compelling R.G. to allow Stephens to wear the uniform for female funeral directors at work would impose a substantial burden on R.G.’s free exercise of religion by compelling Rost to engage in conduct that “seriously violates [his] religious beliefs.” *Holt*, 135 S. Ct. at 862.

Moreover, requiring R.G. to permit a male funeral director to wear the uniform for female funeral directors would interfere with R.G.’s ability to carry out Rost’s religious mission to care for the grieving. See T. Rost 30(b)(6) Dep. 59:8-12, 69:25-70:6 (Ex. 4). This is because allowing a funeral director to wear the uniform for members

of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process. *Id.* at 54:8-17, 59:13-60:9; T. Rost Aff. ¶¶ 36-38 (Ex. 1). And by forcing R.G. to violate Rost's faith, this application of Title VII would significantly pressure Rost to leave the funeral industry and end his ministry. T. Rost Aff. ¶ 48 (Ex. 1). Thus, applying Title VII in this case would substantially burden R.G.'s and Rost's religious exercise of caring for the grieving.

C. The EEOC Cannot Demonstrate That Applying Title VII in this Case Would Satisfy Strict Scrutiny.

Having established a substantial burden on religious exercise, the burden shifts to the government to satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(b). RFRA requires that the EEOC “demonstrat[e] that application of [a substantial] burden to the person . . . is the least restrictive means of furthering” a compelling government interest. *Id.* This is an “exceptionally demanding” standard, requiring the government to “show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties.” *Hobby Lobby*, 134 S. Ct. at 2780. The EEOC cannot make the required showing.

To begin with, the EEOC cannot demonstrate a compelling interest here. RFRA's strict-scrutiny test “look[s] beyond broadly formulated interests justifying the general applicability of government mandates,” and instead scrutinizes the specific interest in applying the law to the party before the court and “the asserted harm of granting specific exemptions to [that party].” *Gonzales v. O Centro Espirita Beneficente*

Uniao do Vegetal, 546 U.S. 418, 430-31 (2006); *see also Hobby Lobby*, 134 S. Ct. at 2779. Thus, the relevant government interest is not a generic interest in opposing discrimination, but the specific interest in forcing R.G. to allow its male funeral directors to wear the uniform for female funeral directors while on the job. Yet the EEOC has no compelling interest in mandating that.

Notably, this case does not involve discriminatory animus against any person or class of persons. R.G. dismissed Stephens because Stephens would no longer comply with the dress code. R.G. was not motivated by animus against people who dress as members of the opposite sex. Indeed, it is undisputed that R.G. would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job. T. Rost Aff. ¶¶ 50-51 (Ex. 1); T. Rost 30(b)(6) Dep. 137:11-15 (Ex. 4). Moreover, the uncontested evidence demonstrates that R.G.'s dress code and its enforcement of the dress code against Stephens are based on R.G.'s legitimate interest in ensuring that mourners have a space free of disruptions to begin the healing process after the loss of a loved one. T. Rost 30(b)(6) Dep. 139:5-23 (Ex. 4); T. Rost Aff. ¶¶ 36-39 (Ex. 1). Consequently, applying Title VII here would not further a compelling government interest.

Nor can the EEOC satisfy RFRA's least-restrictive-means requirement. A number of available alternatives would allow the government to achieve its goals without violating R.G.'s free-exercise rights. For example, the government could continue to enforce Title VII in most situations, but permit businesses in industries

that serve distressed people in emotionally difficult situations to require that its public representatives comply with the dress code at work. Alternatively, the government could prohibit employers from discharging employees simply because they dress inconsistently with their biological sex outside of work, while allowing employers to dismiss employees who refuse to wear sex-specific uniforms on the job. Because these alternatives (and others) are available, the EEOC cannot meet RFRA's least-restrictive means requirement and thus cannot satisfy strict scrutiny.

III. The EEOC Cannot Prevail on its Clothing Allowance Claim on Behalf of a Class of Female Employees.

The EEOC's complaint seeks relief on behalf of "a class of female employees" that were supposedly deprived of work clothes or clothing allowances that R.G. allegedly provides to male employees. Am. Compl. ¶¶ 17-18 (ECF No. 21). R.G. is also entitled to summary judgment on this "clothing allowance" claim.

A. The EEOC Lacks Authority to Raise its Clothing Allowance Claim.

The EEOC may include in a Title VII suit only claims that fall within an "investigation reasonably expected to grow out of the [complainant's] charge of discrimination." *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The Sixth Circuit has held that a claim falls outside that scope if (1) the claim is "unrelated to [the charging] party" and (2) it involves discrimination "of a kind other than that raised by [the charging party]." *Id.* at 448. These two considerations show that the

EEOC's clothing allowance claim does not result from an investigation reasonably expected to grow out of Stephens's charge of discrimination, which alleged unlawful "discharge[] due to [Stephens's] sex and gender identity." Charge of Discrimination, EEOC002748 (Ex. 21).

First, the EEOC's clothing allowance claim on behalf of a class of women is unrelated to Stephens. As previously discussed, Stephens was a biological male while employed at R.G. *See* T. Rost Dep. 21:1-25 (Ex. 3); Def.'s Resp. to Charge at 4-5, EEOC002744-45 (Ex. 22); Kish Dep. 67:9-68:21 (Ex. 5). And there is no dispute that Stephens received, accepted, and wore the men's clothing provided by R.G. *See* Stephens Dep. 59:14-60:1 (Ex. 14); Pl.'s Resp. to Def.'s First Set of Discovery at Request for Admission No. 2 (Ex. 25). Thus, an allegation concerning work clothes or an allowance not provided to a class of females is simply not related to Stephens.

Second, the clothing allowance claim alleges discrimination of a kind other than that raised by Stephens. In the EEOC charge, Stephens alleged a discriminatory "discharge[]." Charge of Discrimination, EEOC002748 (Ex. 21). Stephens did not mention anything about inequality in the clothing or clothing allowance provided by R.G. *Id.* A claim that asserts "discriminat[ion] . . . with respect to . . . compensation, terms, conditions, or privileges of employment" (as the clothing allowance claim does) is of a different kind than a claim that alleges discriminatory "discharge." 42 U.S.C. § 2000e-2(a)(1); *see Bailey Co.*, 563 F.2d at 451 (rejecting "the belief that all forms of unlawful employment discrimination . . . whether involving hiring, discharge,

promotion, or compensation are like or related”); *Nelson v. Gen. Elec. Co.*, 2 F. App’x 425, 428 (6th Cir. 2001) (unpublished) (finding that “the scope of the investigation reasonably expected to grow out of [an] EEOC charge” that alleged unlawful discharge did not include failure to promote). Moreover, a claim of discrimination against a class of women (which the clothing allowance claim is) is separate and distinct from a claim of discrimination against a biological man (which is all Stephens could validly raise in an EEOC charge).

Nor could Stephens have included the clothing allowance claim in an EEOC charge because, as a biological male, Stephens was not “aggrieved” by a clothing policy that supposedly disfavors women. *See* 42 U.S.C. § 2000e-5(b) (noting that EEOC charges are filed by “person[s] claiming to be aggrieved”). While older case law called for a broad reading of what it means to be an “aggrieved” person under other federal statutes, *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), the Supreme Court has mandated a narrower reading of that language in Title VII, *see Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176-77 (2011) (rejecting *Trafficante* in the Title VII context). Therefore, just as Article III standing principles generally forbid a person from raising the “rights or interests of third parties,” *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013), so does Title VII’s aggrieved person standard, *see Thompson*, 562 U.S. at 177 (concluding that “the term ‘aggrieved’ [in Title VII] must be construed more narrowly than the outer boundaries of Article III”). Consequently, a

biological male could not raise the legal interests of a class of female employees at R.G.

B. The EEOC's Clothing Allowance Claim Lacks Merit Because R.G. Does Not Discriminate Between Comparable Male and Female Employees.

The EEOC's claim that work clothes or clothing allowances were provided to male employees but not to a class of female employees also fails on its merits. To the extent that the class of employees the EEOC references is R.G.'s funeral directors—the position that Stephens held—the EEOC has failed to show disparate treatment. Indeed, R.G. provides suits for all funeral directors. *See* T. Rost Dep. 13:4-14, 47:23-48:11 (Ex. 3); Kish Dep. 64:12-24 (Ex. 5); McKie Dep. 38:19-23 (Ex. 13); Def.'s Resp. to Pl.'s Second Set of Discovery at Interrogatory No. 14 (Ex. 28). Although R.G. has not employed a female funeral director since Rost became the owner (notably, a qualified woman has not applied for an open funeral-director position during that time, *see* T. Rost Aff ¶¶ 52-53 (Ex. 1)), it is undisputed that R.G. would provide female funeral directors with a women's suit of equal quality and value to the men's suit provided to male funeral directors. *Id.* at ¶ 54.

Nor can the EEOC establish sex discrimination with respect to the clothes and clothing allowances that R.G. provides to employees in positions other than funeral director. Male employees who interact with the public in positions other than funeral director (all of whom are part-time) receive one suit from R.G. that is replaced by R.G. when it is no longer serviceable. *See* T. Rost Aff. ¶ 57 (Ex. 1) And female employees

who interact with the public in positions other than funeral director receive an annual clothing allowance of \$150 for full-time employees and \$75 for part-time employees. T. Rost Dep. 15:16-16:4 (Ex. 3); Nemeth Dep. 13:5-23 (Ex. 7); Kish Dep. 20:16-25 (Ex. 5). This allowance is sufficient to purchase an outfit that conforms to R.G.'s dress code for those positions and to cover the cost of replacing those outfits when they wear out. *See* Kish Aff. ¶¶ 5-7 (Ex. 2). Accordingly, regardless of the sex of the employees in those positions, R.G. provides them with clothing or resources to purchase dress code-complying clothing. Finally, no clothes or clothing allowance is provided for employees, whether male or female, in positions that do not interact with the public. *See* Kish Dep. 56:14-58:4, 65:17-66:18 (Ex. 5). The EEOC thus cannot prevail on its clothing allowance claim because it is unable to show that R.G. discriminates between comparable male and female employees.

Conclusion

For the foregoing reasons, R.G. respectfully requests that the Court grant summary judgment in its favor.

Dated: April 7, 2016

Respectfully submitted,

/s/ James A. Campbell

James A. Campbell

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Equal Employment
Opportunity Commission,

Plaintiff,

v.

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

Defendant.

Civil Action No.
2:14-cv-13710
Hon. Sean F. Cox

**INDEX OF EXHIBITS IN SUPPORT OF DEFENDANT
R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S
MOTION FOR SUMMARY JUDGMENT**

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2	Affidavit of Shannon Kish
3	Excerpts from Deposition of Thomas Rost
4	Excerpts from Rule 30(b)(6) Deposition of Thomas Rost
5	Excerpts from Deposition of Shannon Kish
6	Excerpts from Deposition of George Crawford
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- 32 *Jespersen v. Harrab's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)
- 33 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
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EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment
Opportunity Commission,

Plaintiff,

v.

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

Defendant.

Civil Action No.
2:14-cv-14-13710
Hon. Sean F. Cox

**AFFIDAVIT OF THOMAS ROST IN SUPPORT OF DEFENDANT R.G. &
G.R. HARRIS FUNERAL HOMES, INC.'S MOTION FOR SUMMARY
JUDGMENT**

Comes Now Affiant Thomas Rost, and presents the following sworn testimony:

1. My name is Thomas Rost. I have been a resident of Bloomfield Hills, Michigan, for the past thirty (30) years. I have personal knowledge of the facts stated herein.
2. I have been working in the funeral home industry for fifty (50) years. I have been the majority owner of R.G. & G.R. Harris Funeral Homes, Inc. for the past thirty-five (35) years. I currently own 94.5% of R.G. & G.R. Harris Funeral Homes, Inc. R.G. & G.R. Harris Funeral Homes, Inc. operates three funeral home locations and the Cremation Society of Michigan. I have operated up to six different funeral homes at one time.

3. I have served thousands of grieving families, arranged thousands of funerals, and embalmed thousands of bodies.
4. I have previously served as the President of Preferred Funeral Directors International in 1992.
5. R.G. & G.R. Harris Funeral Homes, Inc. was recognized by Preferred Funeral Directors International in 2011 with the Parker award for demonstrating exemplary service.
6. R.G. & G.R. Harris Funeral Homes, Inc.'s Livonia location was recognized as best home town funeral home of the year in 2016 by Livonia residents in a survey by Friday musings newspaper.
7. I operate R.G. & G.R. Harris Funeral Homes, Inc. as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives.
8. R.G. & G.R. Harris Funeral Homes, Inc. strives to meet clients' emotional, relational, and spiritual needs by training staff in grief management and maintaining strict codes of conduct and decorum at all times so that grieving clients have a place free of distractions to grieve and heal.
9. R.G. & G.R. Harris Funeral Homes, Inc. attempts to create a transformational experience in order to help our clients, their families, and friends begin the healing process when they have lost a loved one.

10. I believe God has called me to serve grieving people. My purpose in life is to minister to grieving families, and my faith compels me to do that important work. I believe that I would be disobeying God if I were to stop doing this work.
11. I believe that grieving individuals need to move through the stages of the healing experience: (1) hearing of the death of their loved one, (2) sharing about the death, (3) seeing the deceased, (4) gathering with friends or family, (5) connecting with others who knew the deceased, (6) reflecting on the death of their loved one, and (7) celebrating the life of the deceased.
12. We tell families that we are a teaching funeral home, and we show them a wheel outlining the stages of the healing experience and explain to them what acute loss is.
13. Every step in the funeral process, beginning with the initial contact to R.G. & G.R. Harris Funeral Homes, Inc., after a loved one has passed is integral to creating the transformational experience that is important to the healing process.
14. The removal—the release of the decedent’s remains into the care of the funeral director—is one of the most emotionally distressing events in the experience for the grieving. This phase is often the family’s first face-to-face contact with the funeral director or funeral home staff. Having just experienced loss, the clients’ antennae are on high alert to assess if the funeral director cares and is

capable of guiding them through the experience. The removal phase sets the tone for the process and whether it will involve positive or negative surprise. Negative surprise is to be avoided as it will set a negative tone and may prevent our ability to create a healing transformational experience. Funeral staff can avoid negative surprise by, for example, informing the family about the process of removal, and announcing the staff's departure following removal. Conversely, positive surprise (anticipating and meeting unspoken needs) through simple gestures such as our practice of placing a rose on the bed when we remove the remains from a home can set the tone for a healing transformational experience.

15. Stephens, as a funeral director embalmer, was often tasked with removing the remains of a loved one from various facilities including hospitals, nursing homes, hospices, and private residences. When performing this function, he would often be the first member of R.G. & G.R. Harris Funeral Homes, Inc. to make face-to-face contact with the family.
16. The initial contact of the funeral director with the funeral family arranger—that is, the deceased's loved one who is responsible for making the funeral arrangement—is also critical and may occur at a different time and involve different individuals than those present at the removal. The arranger wants to know that the funeral director and staff care about their loss and that they are capable of leading the family through the funeral arranging process. In this

contact the arranger will determine if the funeral director is emotionally safe.

By engaging the family about their death experience, the funeral director helps prepare them to share about their loved one's life and establishes the funeral director as trustworthy and competent. Families can be subtly surprised (positively or negatively) even by what the funeral director talks about or does not talk about during this stage.

17. Stephens primarily worked an 8:30 am to 5:00 pm shift and therefore would frequently be the first member of R.G. & G.R. Harris Funeral Homes, Inc. to make contact with the funeral arranger.

18. The arrival of the family at the funeral home can be a difficult moment for them. They may be anxious about entering the facility because a funeral home is generally the last place they wanted or expected to be.

19. On many occasions, Stephens was the first member of R.G. & G.R. Harris Funeral Homes, Inc. to greet the family on arrival at the funeral home.

20. Funeral directors may facilitate the selection of clergy by the family. Funeral directors will also often facilitate the first meeting of clergy and family members. The funeral director can play a role in building the family's confidence about the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience. Funeral directors can give the family a voice by permitting them to speak freely about their unique emotional, relational, and spiritual concerns.

21. As a funeral director embalmer, Stephens facilitated both the selection of clergy and the initial contact of families with clergy members on limited occasions.
22. When dealing with the loss of a loved one, clients need to feel important and to know they matter. Additionally, clients will often seek to gain control of the process. By introducing as many members of the R.G. & G.R. Harris Funeral Homes, Inc. staff to our clients as possible, our families perceive that we place value and significance on their loss. This reduces stress and anxiety for our clients by creating a confidence in the process and the people involved.
23. As a funeral director embalmer, Stephens was introduced to most of our families and was tasked with introducing other staff members to our families.
24. A funeral director should coach the family through the first viewing of the deceased (for the family only) and check with them to see if anything needs to be changed (such as hair, makeup, clothing, or props) before the public viewing.
25. Stephens occasionally walked the family through the first viewing in his role as funeral director embalmer.
26. A funeral director facilitates any family viewing prior to the funeral service (which consists of the funeral or memorial service). Such family viewings may include gathering family around the casket to read or pray.
27. As a funeral director embalmer, Stephens facilitated family viewings prior to the funeral service on a few occasions.

28. Funeral directors are to make each arriving guest at the funeral service feel like a VIP. During that event, the funeral director may be involved in a welcome announcement, thanking those who attended and participated in the service, and creating a formal ritual for the closing of the funeral service.

29. As a funeral director embalmer, Stephens was involved in greeting guests. Indeed, he regularly served as a parking attendant for the guests. In addition, on rare occasions, Stephens facilitated the funeral service, and on those occasions he could have been involved in making opening and closing statements as described in the preceding paragraph.

30. The family's final farewell is a highly anticipated moment in the process and in many cases the most difficult moment in the funeral experience. The deceased is no longer the main attraction, the family's exit from the deceased is. The funeral director would be present at the casket, provide as private a place as possible, and gather family for a final prayer with clergy.

31. As a funeral director embalmer, Stephens was present for the final farewell on a few occasions, and when he was, he performed the activities described in the preceding paragraph.

32. R.G. & G.R. Harris Funeral Homes, Inc.'s funeral directors are our most prominent public representatives. They are the face that R.G. & G.R. Harris Funeral Homes, Inc. presents to the world.

33. The funeral director embalmer position is physically demanding. Funeral director embalmers must be able to move the deceased alone or with assistance, and they may be involved in carrying the casket and remains.
34. Maintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process.
35. R.G. & G.R. Harris Funeral Homes, Inc. administers its dress code based on our employees' biological sex, not based on their subjective gender identity.
36. It is important that a funeral home is an emotionally safe space for mourners beginning the healing process.
37. R.G. & G.R. Harris Funeral Homes, Inc.'s dress code forbids male funeral directors from wearing the female uniform because allowing them to do that would attract undue attention to themselves and disrupt the grieving process for the families.
38. A male funeral director dressing in a female uniform would disrupt our clients' healing process.
39. Having known Stephens for more than five years and having observed Stephens in the funeral home environment, I believe that Stephens wearing a female uniform in the role of funeral director would have been distracting to my clients mourning the loss of their loved ones, would have disrupted their grieving and healing process, and would have harmed my clients and my business and business relationships.

40. I believe that allowing one of my male funeral directors to wear the uniform for female funeral directors would have driven away many of my prospective clients because allowing that would have fallen short of those clients' basic expectations for their funeral experience.

41. I sincerely believe that the Bible teaches that God creates people male or female.

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.

43. I sincerely believe that I would be violating God's commands if I were to permit one of R.G. & G.R. Harris Funeral Homes, Inc.'s funeral directors to deny their sex while acting as a representative of my organization. This would violate God's commands because, among other reasons, I would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.

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.

45. I sincerely believe that I would be violating God's commands if I were to permit one of R.G. & G.R. Harris Funeral Homes, Inc.'s male funeral directors to wear the uniform for female funeral directors while at work, or if I were to permit one of our female funeral directors to wear the uniform for male funeral

directors while at work. This would violate God's commands because, among other reasons, I would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.

46. I sincerely believe that I would be violating God's commands if I were to pay for a male funeral director to wear the uniform for female funeral directors while at work, or if I were to pay for a female funeral director to wear the uniform for male funeral directors while at work. This would violate God's commands because, among other reasons, I would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.

47. Because R.G. & G.R. Harris Funeral Homes, Inc. provides suits for all our funeral directors, if I would have agreed that Stephens could continue to work at R.G. & G.R. Harris Funeral Homes, Inc. while dressing in the female uniform, I would have been paying for a male to wear the female uniform.

48. If I were forced as the owner of R.G. & G.R. Harris Funeral Homes, Inc. to violate my sincerely held religious beliefs by paying for or otherwise permitting one of my employees to dress inconsistent with his or her biological sex, I would feel significant pressure to sell my business and give up my life's calling of ministering to grieving people as a funeral home director and owner.

49. When Stephens provided me notice of his intention to refuse to comply with the male dress code for funeral directors, Stephens never suggested a modification of work duties.
50. I would not have dismissed Stephens if Stephens had expressed to me a belief that he is a woman and an intent to dress or otherwise present as a woman outside of work, so long as he would have continued to conform to the dress code for male funeral directors while at work. It was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in my employment decision.
51. I would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job.
52. R.G. & G.R. Harris Funeral Homes, Inc. has not employed a female funeral director since my grandmother was employed here. She stopped working as a funeral director around 1950. That was prior to R.G. & G.R. Harris Funeral Homes, Inc. beginning to pay for suits for its funeral directors. At the time she was employed, she wore a dress or a skirt suit.
53. Throughout all my years owning and operating R.G. & G.R. Harris Funeral Homes, Inc., I have never had a qualified female apply for an open funeral director position. During that time, I have had only one female applicant apply for an open funeral director position, but she was not qualified.

54. R.G. & G.R. Harris Funeral Homes, Inc. will provide female funeral directors with skirt suits in the same manner that it provides pant suits to male funeral directors. Also, those female employees will be required to wear those suits while on the job.

55. If a female funeral director were to tell me that she would not comply with the uniform requirement for female funeral directors while at work, I would discharge her for refusing to comply with R.G. & G.R. Harris Funeral Homes, Inc.'s dress code.

56. R.G. & G.R. Harris Funeral Homes, Inc. provides a suit similar to the funeral director suit for male employees who interact with the public in positions other than funeral director.

57. All current male employees, other than funeral directors, who interact with the public are part-time and receive one suit that is replaced by R.G. & G.R. Harris Funeral Homes, Inc. when it is no longer serviceable.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

FURTHER, AFFIANT SAYETH NAUGHT.

A handwritten signature in black ink, appearing to read 'Thomas Rost', written over a horizontal line.

Thomas Rost

SUBSCRIBED AND SWORN TO before me this 6 day of April, 2016, by

Thomas Rost.


Notary Public

My commission expires: 2-10-2022

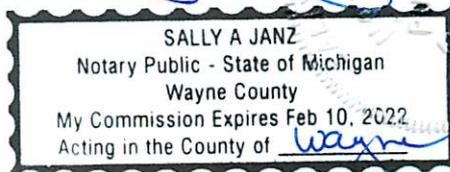


EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment
Opportunity Commission,

Plaintiff,

v.

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

Defendant.

Civil Action No.
2:14-cv-14-13710
Hon. Sean F. Cox

**AFFIDAVIT OF SHANNON KISH IN SUPPORT OF DEFENDANT R.G. &
G.R. HARRIS FUNERAL HOMES, INC.'S MOTION FOR SUMMARY
JUDGMENT**

Comes Now Affiant Shannon Kish, and presents the following sworn testimony:

1. My name is Shannon Kish. I have been a resident of Clinton Township, Michigan since 1991. I have personal knowledge of the facts stated herein.
2. I have been employed with R.G. & G.R. Harris Funeral Homes, Inc. since 1988. I currently serve as the Office Manager in the Detroit location, which is the business office for R.G. & G.R. Harris Funeral Homes, Inc.

My job responsibilities include, but are not limited to, (1) overseeing administrative employees in the business office, (2) handling human resources (such as maintaining employee files), (3) paying company bills (such as paying bills for company-issued clothing), (4) facilitating the administration of company insurance plans, (5) participating in management meetings on an as-needed basis, and (6) interacting with clients.

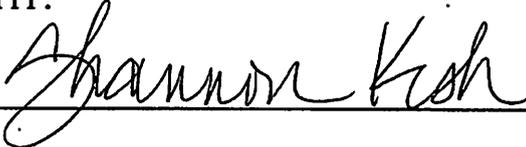
3. Throughout my employment at R.G. & G.R. Harris Funeral Homes, Inc., I have been employed in various positions (not including a funeral director position) that all have required interaction with the public.
4. Throughout my employment at R.G. & G.R. Harris Funeral Homes, Inc., the dress code has required professional dress, including a conservative skirt and jacket, for female employees who interact with the public in positions other than funeral director.
5. I believe that the annual allowance provided to female employees who interact with the public in positions other than funeral director is sufficient to purchase clothing that conforms to R.G. & G.R. Harris Funeral Homes, Inc.'s dress code for those positions. The \$150.00 that those full-time

employees receive is enough to purchase two skirts and two jackets that conform to R.G. & G.R. Harris Funeral Homes, Inc.'s dress code, and the \$75.00 that those part-time employees receive is sufficient to purchase one skirt and one jacket that conform to R.G. & G.R. Harris Funeral Homes, Inc.'s dress code.

6. I believe that an outfit that a female employee who interacts with the public in a position other than a funeral director purchases with the clothing allowance typically lasts at least one year. The employees in these positions generally perform administrative work that does not include physically demanding tasks that would cause clothes to wear quickly.
7. I have never received any complaints that the annual clothing allowance is insufficient to purchase one skirt and one jacket for a part-time employee or two skirts and two jackets for a full-time employee.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

FURTHER, AFFIANT SAYETH NAUGHT.



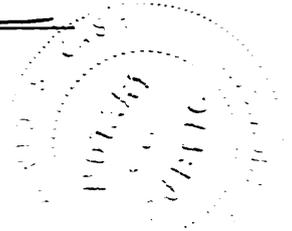
Shannon Kish

SUBSCRIBED AND SWORN TO before me this 6th day of April, 2016, by
Shannon Kish.



Notary Public

DAVID S. CASH
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Jul 19, 2017
ACTING IN COUNTY OF *Wayne*



My commission expires: _____

EXHIBIT 3

1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4
5 EQUAL EMPLOYMENT OPPORTUNITY)
6 COMMISSION,)
7 Plaintiff,)
8 vs.) Case No. 14-13710
9 R.G. & G.R. HARRIS FUNERAL) Hon. Sean F. Cox
10 HOMES, INC.,) United States
11 Defendants.) District Court Judge
12 _____)

13
14 DEPOSITION OF THOMAS ROST
15 PLYMOUTH, MICHIGAN
16 THURSDAY, NOVEMBER 12, 2015

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22
23
24 REPORTED BY: QUENTINA R. SNOWDEN, CSR NO. 5519
25 JOB NO.: 276003-B

Page 6

1 please feel free to ask me and I'll try to
 2 rephrase.
 3 If you need to take a break, please
 4 do so. I'm not trying to make this any more
 5 unpleasant than it has to be. If -- the only
 6 thing I'd ask is if you want to take a break,
 7 if there's a question still pending to the
 8 extent you can, please, you know, ask -- try to
 9 answer the question first before we go to
 10 break.
 11 Have you ever been deposed before?
 12 A No.
 13 Q Okay. Have you ever testified as a witness
 14 before in any kind of court proceeding?
 15 A No.
 16 Q Okay. Well, as with the 30(b)(6) deposition,
 17 I'm going to be asking you questions about what
 18 you do, and frankly maybe do not know about the
 19 case. I'm not -- because of the nature of it,
 20 I'm not going to go over through the
 21 discussions of the termination or anything like
 22 that, we've already pretty well covered that.
 23 And you were sworn and gave your testimony in
 24 that before. But, I will be asking you about
 25 things that we haven't addressed, and we'll go

Page 7

1 from there.
 2 Do you have any health or physical
 3 conditions that would affect your ability to
 4 testify today?
 5 A No.
 6 Q Okay. And same went for your previous
 7 deposition?
 8 A Yes.
 9 Q Okay. What is your highest level of education?
 10 A College.
 11 Q Okay. Did you go to Wayne State?
 12 A Actually, I did. I went to several other
 13 schools, but, yeah, I ended up at Wayne State.
 14 Q Okay. So it's a Bachelor of Science?
 15 A I have a mortuary science degree and I have a
 16 BS degree in business.
 17 Q Okay.
 18 A From Wayne State.
 19 Q And when did you get the mortuary science
 20 degree?
 21 A I believe that was '67. I believe.
 22 Q And how about the business degree?
 23 A I think that was '68.
 24 Q All right. Apart from your attorney, did you
 25 discuss -- we kind of broached this before, but

Page 8

1 I want to repeat -- did you discuss the
 2 deposition before coming here today?
 3 A No.
 4 Q Did you tell anyone you're going to be going to
 5 a deposition?
 6 A Just my wife.
 7 Q Okay. We've already kind of established that
 8 there's R.G. G.R. Harris Incorporated and that
 9 it owns the, I believe you said it was the
 10 Cremation Society of Michigan?
 11 A That's correct.
 12 Q Okay. Are there any other corporate ownership
 13 or affiliations for Harris?
 14 A No. No.
 15 Q Okay. We already talked about the stock, who
 16 owns that. Do you yourself have any ownership
 17 in responsibilities or ownership -- backtrack.
 18 Do you have any ownership interest
 19 in any other companies?
 20 A No.
 21 Q Do you sit on any kind of charitable boards or
 22 anything like that?
 23 A Salvation Army.
 24 Q Okay. What do you do for that?
 25 A Well, not very much.

Page 9

1 Q Okay. Is it like a board of --
 2 A It's an advisory. It's called an advisory
 3 board.
 4 Q Okay. Do you have any official officer title
 5 for that or no?
 6 A At one time I was chairperson of it, but that
 7 was years ago.
 8 Q And which Salvation Army post are we talking
 9 about?
 10 A Detroit. I think it's called Detroit
 11 Southeast. Just Detroit. It was it's the main
 12 Salvation Army Corps here.
 13 Q Okay. And how long have you sat on the
 14 advisory board?
 15 A 15 years.
 16 Q And how long were you chair?
 17 A Just one year.
 18 Q Any other charitable or similar memberships?
 19 A Not now, no.
 20 Q Okay. During the time that Stephens was
 21 employed, were you ever? No?
 22 A No.
 23 Q Are you a -- I'm trying to think if there's --
 24 do you have a governing position with either of
 25 the churches you attend?

THOMAS ROST - 11/12/2015

Page 10		Page 12	
1	A No.	1	A No.
2	Q Have you ever had any such position with the	2	Q Does R.G. G.R. have a policy with respect to
3	3 churches you attend?	3	workplace discrimination?
4	A I have.	4	A You mean a written type of --
5	Q Okay. Which church?	5	Q Yeah, a written type of policy?
6	A At Highland Park. I was on their deacon board,	6	A No.
7	7 what they call a deacon board.	7	Q So no written policy. Okay. Although you
8	Q That's the one in Southfield, correct?	8	8 indicated before that you do have training --
9	A That's the one in Southfield.	9	9 you have the -- at least have the posters up,
10	Q Okay. And when was this?	10	10 you believe?
11	A Oh, 15 years ago.	11	A Yeah.
12	Q Anything else, any kind of similar committees,	12	Q And those cover State and Federal law, you
13	13 church committees, anything like that?	13	think?
14	A No.	14	A They do, yeah.
15	Q Okay. How long were you on the deacon board?	15	Q All right. Do you recall who drafted the
16	A Probably four years.	16	16 employee handbook?
17	Q Okay. What did that involve?	17	A I have no idea.
18	A Just their church business.	18	Q Okay. Do you know of anybody who possibly
19	Q Okay. So your title would have been as a	19	19 could know who drafted it? Perhaps Ms. Kish?
20	20 deacon?	20	A No, it's been around so long. Probably Mr.
21	A Yes.	21	21 Harris, Tom Harris Senior, years ago.
22	Q All right. Business operations, financial	22	Q Then it's just updated periodically?
23	23 concerns, budgeting?	23	A Periodically. As you can see it hasn't been
24	A Yes. Uh-huh.	24	24 too updated.
25	Q Correct?	25	Q It's more intermittent it appears, yes.
Page 11		Page 13	
1	A Yes.	1	Do you know who updated it the last
2	Q Okay. Now, in the 30(b)(6) deposition you	2	2 time it was done?
3	3 indicated you had never heard of Title VII	3	A Do not know.
4	4 prior to the filing of the charge by Stephens,	4	Q Okay. Now, with respect to -- we talked about
5	5 correct?	5	5 a dress code and I'll get back to that in a
6	A Correct.	6	6 little bit, but there is a clothing allowance
7	Q Okay. At any point have you thought about	7	7 policy at R.G. G.R. Harris, correct?
8	8 having training on employment law,	8	A Well, not for men. No, because we give them
9	9 discrimination issues for Harris?	9	9 the suits.
10	A Say that again. I'm sorry?	10	Q Okay.
11	Q Have you considered having any kind of	11	11 A They don't buy -- we buy the suits. We tell
12	12 employment law, discrimination in the workplace	12	12 them what to wear.
13	13 training at Harris during the time you've owned	13	Q Okay. So the men are told what to wear?
14	14 it?	14	A And we give it to them, we provide it.
15	A Any training?	15	Q Okay. Where do you get this -- what are the
16	Q Yeah, training people on rights and	16	16 men given?
17	17 responsibilities in the workplace?	17	A This is what they're given right here.
18	A Just in casual conversation would be training,	18	Q So it's a blue --
19	19 but not in an official.	19	A It's a blue striped shirt and they get a tie.
20	Q Okay. Have you ever thought about having	20	Q Blue striped suit and tie?
21	21 training in specifically with respect to	21	A Yeah.
22	22 discrimination law?	22	Q Where do you get the suits from?
23	A No, I haven't.	23	A A place on 12 Mile and Middlebelt called Sam
24	Q Have you ever had to deal with an allegation of	24	24 Michael's.
25	25 discrimination in the workplace?	25	Q And how often are suits issued to the male

<p style="text-align: right;">Page 14</p> <p>1 employees?</p> <p>2 A Well, it's different for -- let's say -- I get</p> <p>3 suits, we'll say, like every three or four</p> <p>4 years because I'm not very hard, but I have</p> <p>5 some people that are -- they're like animals,</p> <p>6 you know, they're --</p> <p>7 Q They wear their suits out?</p> <p>8 A They wear their suits out, so they require --</p> <p>9 Q Okay. So you get -- how many suits are issued</p> <p>10 at hire?</p> <p>11 A Well, for a full-time person, he gets two. For</p> <p>12 a part-time person he gets one.</p> <p>13 Q So a full-time male employee gets one -- or two</p> <p>14 suits?</p> <p>15 A Right.</p> <p>16 Q And two ties?</p> <p>17 A And two ties.</p> <p>18 Q Okay. And the part-time gets one?</p> <p>19 A One, right.</p> <p>20 Q And then as they wear out they're replaced, is</p> <p>21 that correct?</p> <p>22 A Well, it's like every couple years normally.</p> <p>23 Q Every two years?</p> <p>24 A Yeah. But sometimes people have an emergency</p> <p>25 or something.</p>	<p style="text-align: right;">Page 16</p> <p>1 A A female gets 150 bucks -- dollars, and a</p> <p>2 part-time gets 75.</p> <p>3 Q So full-time gets 150 and part-time 75?</p> <p>4 A Right.</p> <p>5 Q And who -- how is that calculated; who sets how</p> <p>6 much the men and woman are going to be getting?</p> <p>7 Let's go back to the women. Who determines --</p> <p>8 how is it set that women would get 150 if</p> <p>9 they're full-time and 75 for part-time?</p> <p>10 A I guess I set it. Yeah.</p> <p>11 Q Okay. How long has that been the case?</p> <p>12 A A few years.</p> <p>13 Q Do you know how -- was it stretching back</p> <p>14 before Stephens was employed?</p> <p>15 A Just about the same time.</p> <p>16 (Mr. Schrameck entered the</p> <p>17 conference room at 2:28 p.m.)</p> <p>18 BY MR. PRICE:</p> <p>19 Q Okay. That's when women would get 150 and 75?</p> <p>20 A Yeah.</p> <p>21 Q All right. Was it different before then?</p> <p>22 A No, they -- they didn't get anything before.</p> <p>23 MR. PRICE: Okay. Now we were</p> <p>24 given -- have the following marked as Exhibit 8</p> <p>25 here. Am I correct on that?</p>
<p style="text-align: right;">Page 15</p> <p>1 Q But generally speaking every two years?</p> <p>2 A Two or three years, yeah.</p> <p>3 Q Okay. Now, how much does a suit cost you?</p> <p>4 A I'm going to say about 225.</p> <p>5 Q And how much does a tie cost?</p> <p>6 A Ten bucks.</p> <p>7 Q Do you get the ties from the same place?</p> <p>8 A Yep.</p> <p>9 Q Are they ordered all at once or just kind of --</p> <p>10 A No.</p> <p>11 Q Just periodically?</p> <p>12 A No. We used to do that, but we don't anymore,</p> <p>13 no.</p> <p>14 Q When did that cease to happen?</p> <p>15 A Oh, probably 20 years ago.</p> <p>16 Q Okay. With respect to female employees, what</p> <p>17 do they get?</p> <p>18 A They get a little allowance.</p> <p>19 Q Okay. And how is the allowance, how is it</p> <p>20 doled out?</p> <p>21 A They get a check.</p> <p>22 Q Annually?</p> <p>23 A They get it annually.</p> <p>24 Q Okay. How much -- how is it determined how</p> <p>25 much a female employee will get?</p>	<p style="text-align: right;">Page 17</p> <p>1 THE COURT REPORTER: Yes.</p> <p>2 MR. PRICE: Oh, good. Marked as</p> <p>3 Exhibit 8, please. Thank you.</p> <p>4 (Deposition Exhibit No. 8 was</p> <p>5 marked for identification.)</p> <p>6 THE WITNESS: (Reviewing.)</p> <p>7 BY MR. PRICE:</p> <p>8 Q Do you recognize this Exhibit?</p> <p>9 A Yes.</p> <p>10 Q Okay. Do you know how it was prepared?</p> <p>11 A I do not know. I have not seen this before.</p> <p>12 Q Okay. This was provided to us as part of a</p> <p>13 chart for how much was allocated to the various</p> <p>14 employees, either they're given suits and ties</p> <p>15 or they're given a stipend. Okay?</p> <p>16 A All right.</p> <p>17 Q Do you know what time frame this covers, is</p> <p>18 this like a couple year time frame?</p> <p>19 A I do not know.</p> <p>20 Q Do you have any idea who prepared this?</p> <p>21 A Probably Shannon Kish.</p> <p>22 Q Okay. But it's at least your understanding</p> <p>23 that women are getting -- full-time women get</p> <p>24 \$150?</p> <p>25 A That's my understanding, yes.</p>

Page 18	Page 20
<p>1 Q Okay. And part-time women get 75?</p> <p>2 A Yes.</p> <p>3 Q And then part-time men get 225 plus 10, and</p> <p>4 full-time men get --</p> <p>5 A You might say that.</p> <p>6 Q Okay. 450 plus 20?</p> <p>7 A You might say that, yeah.</p> <p>8 Q Okay. What do you mean by that?</p> <p>9 A I mean if you added it up, yeah.</p> <p>10 Q Okay, yeah. At least it looks like on what</p> <p>11 you've described to me the men are getting a</p> <p>12 little bit more monetary value. You know, a</p> <p>13 suit and tie for \$235 for part-time as opposed</p> <p>14 to \$75 for a part-time female employee. Do you</p> <p>15 have any understanding of the discrepancy</p> <p>16 there?</p> <p>17 A Well, because that man is going to keep that</p> <p>18 suit and wear it for three or four years.</p> <p>19 Q Okay.</p> <p>20 A Most part-time people I never have to replace</p> <p>21 the suit, so they may wear it for ten years.</p> <p>22 Q Okay.</p> <p>23 A So actually they're receiving more. Or the</p> <p>24 women are receiving more benefit.</p> <p>25 Q What about full-time men, do they tend to wear</p>	<p>1 A Maybe ten years.</p> <p>2 Q We talked a little bit before, but I'm going to</p> <p>3 touch on some related stuff. Before we</p> <p>4 discussed the fact that you became aware that</p> <p>5 my agency was investigating your company based</p> <p>6 on the charge filed by Aimee Stephens and that</p> <p>7 there was prepared as part of that, a response</p> <p>8 by the company filled out by Mr. Kirkpatrick, I</p> <p>9 believe it was --</p> <p>10 MR. KIRKPATRICK: I put them in</p> <p>11 order.</p> <p>12 MR. PRICE: Yeah, I have a problem</p> <p>13 keeping them there.</p> <p>14 BY MR. PRICE:</p> <p>15 Q Exhibit 3.</p> <p>16 A (Reviewing.)</p> <p>17 Q I believe I asked you if you -- do you</p> <p>18 recognize this, and --</p> <p>19 A Well, this is -- yeah. You're right, he wrote</p> <p>20 the response, yes, and I do recognize the</p> <p>21 response, yes.</p> <p>22 Q Okay. Did you see it before it went out, to</p> <p>23 your recollection?</p> <p>24 A I would assume I did, but I don't recall. But</p> <p>25 I'm sure I did.</p>
<p>1 them out faster?</p> <p>2 A Well, they're wearing them every day, but you</p> <p>3 know, they'll go three years.</p> <p>4 Q Or less if they're, like you said, something --</p> <p>5 A They might need a pair of pants.</p> <p>6 Q Okay.</p> <p>7 A You know, things like that. They might rip</p> <p>8 them.</p> <p>9 Q Do you have records on the replacement and</p> <p>10 stuff like that?</p> <p>11 A No.</p> <p>12 Q Would that be Ms. Kish would have it?</p> <p>13 A She might, yeah.</p> <p>14 Q And if a suit is damaged they can get that</p> <p>15 replaced too, suit coat?</p> <p>16 A They could or get it fixed. They'll repair</p> <p>17 them for them.</p> <p>18 Q Do they have to pay for the repairs?</p> <p>19 A No.</p> <p>20 Q You'll pay for the repairs?</p> <p>21 A Well, probably we don't pay for them at all. I</p> <p>22 mean they probably repair them at no charge.</p> <p>23 Q This is the Sam Michael people?</p> <p>24 A Yes, he would, yeah.</p> <p>25 Q How long have you done business with Michael's?</p>	<p>1 Q Okay. Now, there's some references in there</p> <p>2 to, you know, they don't know -- there's no</p> <p>3 awareness of who Aimee Stephens is, but there</p> <p>4 was an Anthony Stephens. Now, when Stephens</p> <p>5 presented you the letter, which was Exhibit --</p> <p>6 A Uh-huh.</p> <p>7 Q -- there was a reference to -- there was also</p> <p>8 signed not just Anthony Stephens, but Aimee</p> <p>9 Stephens, correct?</p> <p>10 A Uh-huh.</p> <p>11 Q Okay. "Yes"?</p> <p>12 A Yes.</p> <p>13 Q Okay. So, was there any confusion as to who</p> <p>14 was filing the charge in this case?</p> <p>15 A Well, yes, there's confusion because everything</p> <p>16 in our employment records is Anthony. And that</p> <p>17 was his name and employment, that's his</p> <p>18 driver's license, that's his insurance policy,</p> <p>19 that's his mortuary science license, that's</p> <p>20 everything is Anthony Stephens.</p> <p>21 There is no Aimee Stephens that's</p> <p>22 involved in our organization.</p> <p>23 Q Okay. But the letter that was presented to you</p> <p>24 did say Aimee Stephens, correct?</p> <p>25 A It probably did, yeah. Let's see.</p>

THOMAS ROST - 11/12/2015

Page 42	Page 44
<p>1 Q -- people like Mr. Stephens, the person you 2 knew as Mr. Stephens? 3 A No, I don't know anything about it. 4 Q Okay. So if they had attitudes that were more 5 accepting of persons like Stephens, you 6 wouldn't know about it one way or the other? 7 A No. 8 Q Okay. But if there were -- if that was the 9 case then they would be much less likely to 10 have a problem with a person like Mr. Stephens 11 working? 12 MR. KIRKPATRICK: Objection on 13 speculation on what these groups may or may not 14 do. Go ahead. 15 THE WITNESS: Yeah, I -- I don't 16 know. 17 BY MR. PRICE: 18 Q Okay. You don't know. But it's possible? 19 A Anything is possible. 20 Q How long has your salary been 175,000, can you 21 recall? 22 A 25 years. 23 MR. PRICE: Let me check through, I 24 might be about done. 25 (Off the record at 3:02 p.m.)</p>	<p>1 Q Have you ever said anything like that; you 2 believe that God supplies employees sometimes? 3 A Yeah, I have said that. 4 Q Okay. Would you say the same was in the case 5 of Stephens coming to work for you? 6 A Well, if I recall, he came to me just kind of 7 like out of the blue. I don't think there was 8 an advertisement. I think he walked in. 9 Q Okay. 10 A And it just seemed to be at the right time. He 11 was at the right place at the right time. 12 Q And performed well for you? 13 A He did. 14 Q Okay. So it would be another case, you would 15 think, at least at the time you thought that 16 that would be another case of, you know, God 17 supplying an employee for you? 18 A Yes. 19 Q You also mentioned something -- did you have an 20 understanding of whether Stephens was taking 21 chemicals or hormones? 22 A Not until he told me. 23 Q Okay. That was where you heard it from? 24 A Yes. 25 Q Was that as of the time of termination or was</p>
<p>1 (Back on the record at 3:03 p.m.) 2 BY MR. PRICE: 3 Q When you were interviewed by Mrs. Dickinson you 4 were asked about how many funerals you were 5 doing per month and how many cremations per 6 month on average, this was back in 2014. March 7 of that year you said on average you were doing 8 30 funerals a month and 60 cremations a month. 9 A Okay. 10 Q Does that sound about right to you? 11 A Sounds about right. 12 Q Is it the same now? 13 A It's about the same, yeah. 14 Q Okay. So about roughly per month 30 funerals 15 and 60 cremations? 16 A Right. 17 Q You also indicated during your discussions with 18 your interview with Mrs. Dickinson, that you 19 have a belief that God tends to supply 20 employees out of the blue when you need them 21 the most? 22 MR. KIRKPATRICK: I'm going to 23 object to foundation, you're assuming what was 24 said to Ms. Dickinson, but answer if you can. 25 BY MR. PRICE:</p>	<p>1 that when the letter was presented? 2 A I believe it was when the letter was presented. 3 Q Okay. Did you ever hear it from anybody else 4 that there might be chemicals or hormones 5 involved? 6 A From somebody else? 7 Q Yeah, somebody else at R.G. G.R. or no? 8 A That somebody else what? 9 Q Tell you that he was on -- they thought they 10 were on chemicals? 11 A No. No. 12 Q Okay. Now you said you talked to some people 13 about how you would set the allowance for 14 females. Did you talk to any of the females 15 employees about how far \$150 would go or what 16 it could be used for? 17 A No, just Shannon. 18 Q Okay. What do you recall Shannon saying? 19 A She thought it was fine. She thought it was 20 fair. 21 MR. PRICE: Okay. Why don't we 22 just take a break, and I might have one more 23 question or may be done. 24 (Off the record at 3:06 p.m.) 25 (Back on the record at 3:12 p.m.)</p>

<p style="text-align: right;">Page 46</p> <p>1 MR. PRICE: Okay. We do not have</p> <p>2 anything else.</p> <p>3 MR. KIRKPATRICK: All right. I</p> <p>4 guess we'll have a few questions here.</p> <p>5 EXAMINATION</p> <p>6 BY MR. KIRKPATRICK:</p> <p>7 Q Mr. Price asked you several questions using the</p> <p>8 chart here about allowances and suits and that</p> <p>9 kind of thing. I'm just going to ask you a</p> <p>10 question, why is there a difference with women</p> <p>11 getting an allowance and men having suits</p> <p>12 purchased for them?</p> <p>13 A We want men to look a certain way as</p> <p>14 professional funeral directors as people have</p> <p>15 come to know what they would look like, a dark</p> <p>16 suit, white shirt and a tie. The difference</p> <p>17 with women, if we had a woman funeral director</p> <p>18 she would look comparable to a man, but our</p> <p>19 other female employees dress in a professional</p> <p>20 manner, as we have talked about, in a skirt and</p> <p>21 usually in a jacket, and in an appropriate</p> <p>22 blouse --</p> <p>23 Q Okay. So -- oh, go ahead.</p> <p>24 A But the reason we haven't given them a uniform</p> <p>25 is because they can't come to an agreement on</p>	<p style="text-align: right;">Page 48</p> <p>1 MR. PRICE: Objection, speculation.</p> <p>2 But go ahead.</p> <p>3 THE WITNESS: She would have a dark</p> <p>4 jacket and a dark skirt, matching. Matching.</p> <p>5 BY MR. KIRKPATRICK:</p> <p>6 Q Okay. A skirt. So just like the male funeral</p> <p>7 director she would have a business suit, but a</p> <p>8 female business suit?</p> <p>9 A Yes.</p> <p>10 Q As a skirt?</p> <p>11 A Yes.</p> <p>12 Q Now, you were asked by Mr. Price about Exhibit</p> <p>13 3. This letter here. And I know you recognize</p> <p>14 that, right?</p> <p>15 A Yes.</p> <p>16 Q That was actually prepared by me, correct?</p> <p>17 A Yes, correct.</p> <p>18 Q I kind of touched on this the first time during</p> <p>19 the first deposition, but you have no legal</p> <p>20 training, right?</p> <p>21 A That's correct.</p> <p>22 Q Do you fully understand all of the legal</p> <p>23 concepts that were enumerated and set forth in</p> <p>24 that letter?</p> <p>25 A No.</p>
<p style="text-align: right;">Page 47</p> <p>1 what type of a uniform would be appropriate for</p> <p>2 them.</p> <p>3 Q So did you at one point consider having a</p> <p>4 uniform, so to speak, like the men have a suit</p> <p>5 uniform for the women?</p> <p>6 A Yes, absolutely.</p> <p>7 Q And it was going to be something specific, the</p> <p>8 same color, that kind of thing?</p> <p>9 A Yes.</p> <p>10 Q And why did that not materialize?</p> <p>11 A They couldn't come to an agreement on anything.</p> <p>12 Q And what do you mean by that?</p> <p>13 A One likes this color, one likes that color; one</p> <p>14 wants stripes that go this way, one wants</p> <p>15 stripes that go that way.</p> <p>16 Q Okay. So, you came up with a policy you have</p> <p>17 now in place for women as professional business</p> <p>18 attire?</p> <p>19 A Professional business attire, exactly.</p> <p>20 Q Now, do you currently have any female funeral</p> <p>21 directors?</p> <p>22 A I do not.</p> <p>23 Q If you did have a female funeral director, what</p> <p>24 would describe what her uniform would be or</p> <p>25 what she would be required to wear?</p>	<p style="text-align: right;">Page 49</p> <p>1 Q Okay. Thanks. Now, Mr. Price asked you about</p> <p>2 what would happen and the speculation of</p> <p>3 perhaps a customer may have seen Stephens after</p> <p>4 work, let's say, outside of the funeral home</p> <p>5 wearing a dress or presenting as a woman and</p> <p>6 they might be upset what you might do, correct,</p> <p>7 do you remember that?</p> <p>8 A Yes.</p> <p>9 Q I think you said you would be uncomfortable,</p> <p>10 right?</p> <p>11 A I would be uncomfortable.</p> <p>12 Q Would you fire him for that?</p> <p>13 A Probably not, but I would ask him some</p> <p>14 questions.</p> <p>15 Q Okay. How about if a customer maybe saw</p> <p>16 another employee outside of the funeral home on</p> <p>17 their own time carrying a -- several</p> <p>18 pornographic videotapes, would that make you</p> <p>19 uncomfortable?</p> <p>20 A Make me uncomfortable, but I wouldn't fire</p> <p>21 them.</p> <p>22 Q Okay. Why do you have a dress code?</p> <p>23 A Well, we have a dress code because it allows us</p> <p>24 to make sure that our staff is -- is dressed in</p> <p>25 a professional manner that's acceptable to the</p>

Page 50	<p>1 families that we serve, and that is understood</p> <p>2 by the community at-large what these</p> <p>3 individuals would look like.</p> <p>4 Q Is that based on the specific profession that</p> <p>5 you're in?</p> <p>6 A It is.</p> <p>7 Q And again, tell us why it fits into the</p> <p>8 specific profession that you're in that you</p> <p>9 have a dress code?</p> <p>10 A Well, it's just the funeral profession in</p> <p>11 general, if you went to all funeral homes,</p> <p>12 would have pretty much the same look. Men</p> <p>13 would be in a dark suit, white shirt and a tie</p> <p>14 and women would be appropriately attired in a</p> <p>15 professional manner.</p> <p>16 Q And why do you provide suits to your funeral</p> <p>17 directors?</p> <p>18 A Well, because we want them all dressed exactly</p> <p>19 the same. We want them to look the same.</p> <p>20 Q Is it to comply with the dress code?</p> <p>21 A It is to comply with the dress code, yes.</p> <p>22 MR. KIRKPATRICK: That's it, guys.</p> <p>23 MR. PRICE: Okay.</p> <p>24 RE-EXAMINATION</p> <p>25 BY MR. PRICE:</p>	Page 52	<p>1 Harris Funeral Homes what would you have done?</p> <p>2 A Don't know.</p> <p>3 Q Okay. But that would have been a factor to</p> <p>4 consider in how you addressed Stephens'</p> <p>5 situation in that case, correct?</p> <p>6 A It probably would have been.</p> <p>7 Q And it could have been reason to let Stephens</p> <p>8 go if --</p> <p>9 A Perhaps, yes.</p> <p>10 Q Okay. Now, you were asked about 3 and it's</p> <p>11 true this was -- letter was drafted by Mr.</p> <p>12 Kirkpatrick, but you hired him to represent</p> <p>13 you?</p> <p>14 A That is true.</p> <p>15 Q You hired him to represent Harris in defense</p> <p>16 against this charge?</p> <p>17 A Yes.</p> <p>18 Q Okay. And if you had any questions about what</p> <p>19 was in the letter, you certainly were</p> <p>20 encouraged to ask questions; is that the case?</p> <p>21 A Yes.</p> <p>22 Q Did you choose to ask any questions?</p> <p>23 A Do not know.</p> <p>24 Q You do not recall?</p> <p>25 A I do not recall.</p>
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Page 51	<p>1 Q It's not just the funeral directors that gets</p> <p>2 suits, though, it's the funeral director</p> <p>3 assistants, correct?</p> <p>4 A That's what -- yes, the men's, yes.</p> <p>5 Q Okay.</p> <p>6 A Yeah, because they're -- to the consumer they</p> <p>7 think they're funeral directors, I mean, any</p> <p>8 male person.</p> <p>9 Q Okay. Now, have you been to funeral homes</p> <p>10 where there have been women wearing</p> <p>11 businesslike pants before?</p> <p>12 A I believe I have.</p> <p>13 Q Okay. So, the fact that you require women to</p> <p>14 wear skirts is something that you prefer, it's</p> <p>15 not necessarily an industry requirement?</p> <p>16 A That's correct.</p> <p>17 Q Okay. But women could look businesslike and</p> <p>18 appropriate in pants, correct?</p> <p>19 A They could.</p> <p>20 Q Okay. Now you were asked about what if a</p> <p>21 customer had seen Stephens in this hypothetical</p> <p>22 about, you know, Stephens only presented as</p> <p>23 female outside of work, if that person had said</p> <p>24 that they were not going to come back -- they</p> <p>25 were not going to use the services of the</p>	Page 53	<p>1 Q You might have, you simply don't know?</p> <p>2 A That's right.</p> <p>3 MR. PRICE: I don't have any other</p> <p>4 questions.</p> <p>5 (The deposition of Thomas Rost</p> <p>6 concluded at or about the hour of 3:21 p.m.)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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1 CERTIFICATE OF REPORTER
2 STATE OF MICHIGAN)
3)SS:
4 COUNTY OF GENESEE)
5 I, Quentina R. Snowden, a duly
6 commissioned and licensed Court Reporter,
7 Genesee County, State of Michigan, do hereby
8 certify: That I reported the taking of the
9 deposition of the witness, THOMAS ROST,
10 commencing on Thursday, November 12, 2015, at
11 2:14 p.m.
12 That prior to being examined, the
13 witness was, by me, duly sworn to testify to
14 the truth. That I thereafter transcribed my
15 said shorthand notes into typewriting and that
16 the typewritten transcript of said deposition
17 is a complete, true and accurate transcription
18 of said shorthand notes.
19 I further certify that I am not a
20 relative or employee of an attorney or counsel
21 of any of the parties, nor a relative or
22 employee of an attorney or counsel involved in
23 said action, nor a person financially
24 interested in the action.
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IN WITNESS WHEREOF, I have hereunto
set my hand, in my office, in the County of
Genesee, State of Michigan, this 23rd day of
November, 2015.



QUENTINA R. SNOWDEN, CSR NO. 5519

EXHIBIT 4

1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4

5 EQUAL EMPLOYMENT OPPORTUNITY)
6 COMMISSION,)

7 Plaintiff,)

8 vs.) Case No. 14-13710

9 R.G. & G.R. HARRIS FUNERAL) Hon. Sean F. Cox

10 HOMES, INC.,) United States

11 Defendants.) District Court Judge

12 _____)
13

14 30(B)(6) DEPOSITION OF THOMAS ROST

15 PLYMOUTH, MICHIGAN

16 THURSDAY, NOVEMBER 12, 2015
17
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19
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23

24 REPORTED BY: QUENTINA R. SNOWDEN, CSR NO. 5519

25 JOB NO.: 276003-A

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<p>1 Q Do you have any -- speaking on behalf of 2 Harris, do you have any facts to speak on -- 3 supporting the claim that your Fifth and 4 Fourteenth Amendment due process rights have 5 been violated? 6 A No. 7 Q Okay. Did you have receive a copy of Stephens 8 charge of discrimination? 9 A Yes. 10 Q How did you receive that charge? 11 A Through Joel. Through the attorney. 12 MR. PRICE: Okay. Give me a second 13 here. I apologize. Can I have the following 14 marked as 2, please. 15 (Deposition Exhibit No. 2 was 16 marked for identification.) 17 MR. PRICE: Exhibit 2, here you go, 18 Joel. 19 MR. KIRKPATRICK: Thank you. 20 MR. PRICE: You're welcome. 21 THE WITNESS: Is that the same 22 thing you're looking at? 23 MR. KIRKPATRICK: Yes. 24 BY MR. PRICE: 25 Q Yeah, just to clarify, I'm going to try to give</p>	<p>1 Q Okay. And who was in charge of the business 2 office? 3 A A lady by the name of Shannon Kish. 4 Q Okay. And is it possible -- I mean, I know I'm 5 asking for speculation. Could Ms. Kish have 6 received Exhibit 2? 7 A It could have come through there. 8 Q Okay. 9 A And it could very well have, you know -- 10 Q Okay. Fair enough. But that would be anything 11 like that from a -- do you get any other 12 correspondence from government agencies that 13 you can think of, regulatory or anything like 14 that? 15 A Yeah, it comes in. Sure. 16 Q Would that come through your business office? 17 A Yes. 18 Q All right. It would not be sent to you 19 directly, it would come through that? 20 A That's right. 21 Q Okay. Where is the business office located? 22 A On the east side of Detroit. 23 Q So it's in the east side facility? 24 A It is. 25 Q Okay. And that's where Ms. Kish is located?</p>
<p>1 your Counsel what you have. I'm not trying 2 to -- 3 A Yeah, I know. I don't remember seeing this, 4 but I'm assuming I did. 5 Q Okay. You don't recall seeing this Charge of 6 Discrimination? 7 A No. No, not this particular form. 8 Q How did you become aware that the Commission -- 9 there was a charge filed against your company? 10 A I believe through Joel. 11 Q Have you ever had a charge filed against R.G. 12 G.R. or Cremation Society of America before? 13 A No. 14 Q No? Not by the EEOC? 15 A No. 16 Q What about the Michigan Department of Civil 17 Rights? 18 A No. 19 Q If you get a claim for unemployment insurance, 20 how do you get notice of that? 21 A I don't know how it works, but I'm assuming 22 they're mailed to us. 23 Q Okay. Who would receive that on behalf of the 24 company? 25 A The business office.</p>	<p>1 A Correct. 2 Q Okay. Leaving aside the fact that you don't 3 recall receiving this document, does it look 4 familiar at all to you? 5 A It really doesn't, to be honest. 6 Q Okay. Fair enough. Did you -- do you 7 recall -- but you do recall that the 8 Commission -- there was a Commission 9 investigation? 10 A Yes. Oh, yes. 11 Q Okay. You met with the investigator on one 12 occasion? 13 A Yes. 14 Q Okay. Did you have a chance to file a 15 statement of the funeral home's position with 16 respect to this charge? 17 A During the investigation part? 18 Q Yes. Yes. 19 A I guess we probably did file. 20 Q Okay. 21 A And I don't recall, but I'm assuming we 22 answered it. 23 MR. PRICE: Okay. Can I have the 24 following marked as Number 3. 25 MR. SHULTZ: I need to make a</p>

Page 26	Page 28
<p>1 you did not have any kind of -- you did not 2 have due process under the Fifth and Fourteenth 3 Amendments to the Constitution? 4 A I can't speak to that. 5 Q Okay. You don't have any facts to support that 6 claim on behalf of Harris? 7 A No. Right. 8 Q All right. All right. Moving ahead to, it 9 will be the Twelfth Affirmative Defense in the 10 Answer to the Complaint, document one, which 11 will be found on page 5 of the Answer. 12 A Okay. 13 Q Okay. Specifically that "The EEOC's claims 14 violate the Funeral Home's right to free 15 exercise of religion under the First Amendment 16 to the United States Constitution." 17 Okay. What are the facts 18 supporting that affirmative defense? 19 A I wouldn't be able to address that. 20 Q Okay. Do you claim that you -- let's try it 21 this way. Are you the -- if I read correctly, 22 and correct me if I'm wrong, do you own 94.5 23 percent of the shares of the company? 24 A That's correct. 25 Q Okay. And that's R.G. G.R. Harris, correct?</p>	<p>1 A Nicole. 2 Q And does she have any function within the R.G. 3 G.R.? 4 A No. 5 Q Okay. I'm sorry, what are their ages, 6 respectively? 7 A My son is 42 and she is 40. 8 Q Okay. No other children? 9 A No, no other children. 10 Q Okay. So is R.G. G.R. Harris is a closed 11 corporation? 12 A Yes. 13 Q And how long have you been the 94.5 percent 14 owner? 15 A 30 years. 16 Q 30 years. Okay. And the remainder have been 17 owned by your children from that time frame 18 too? 19 A No, no. 20 Q When did that occur? 21 A I'll just take a guess, maybe five years ago. 22 Q Okay. So the 5.5 percent remainder you 23 designated to them roughly -- roughly five 24 years ago? 25 A That's correct.</p>
<p>1 A Correct. 2 Q And I may ask you to make your responses 3 verbal. I apologize. 4 A That's fine. 5 Q I know what -- it's -- I know it's correct, but 6 we want to make sure the transcript is clear. 7 A I understand. 8 Q Who owns the remainder of the shares? 9 A My son and daughter. 10 Q Your son Matthew? 11 A Yes. 12 Q And how much does he own? If you know? 13 A He owns twice as much as my daughter. 14 Q Okay. Now, is he older? 15 A He is older. 16 Q And he works for R.G. G.R.? 17 A He does work there. 18 Q Okay. What -- in what capacity? 19 A He's a funeral director there. 20 Q Okay. Which location? 21 A On the east side. 22 Q Is he also in charge of the Cremation Society 23 functions? 24 A He is. He is. 25 Q And your daughter, what's her name?</p>	<p>1 Q All right. Let's try it this way. Are you 2 claiming that your rights to exercise religion 3 have been affected by this lawsuit? 4 A Repeat that again. 5 Q Sure. Sure. Okay. You're the 94.5 percent 6 owner -- 7 A Yes. 8 Q -- of R.G. G.R. So, any -- if the funeral 9 home's rights to free exercise of religion are 10 being impacted really it's your -- your rights, 11 religious rights that would be impacted because 12 you're the majority owner, correct? 13 A Okay. Okay. 14 Q Okay. Is it your belief -- is it your 15 allegation that the fact that we have filed 16 suit in this action has affected your rights to 17 free exercise of religion under the First 18 Amendment of the Constitution? 19 A No. 20 Q What is your religious affiliation? 21 A I'm a Christian. 22 Q A Christian. Okay. 23 A Uh-huh. 24 Q What church do you attend? 25 A I attend a couple churches, actually.</p>

Page 30	Page 32
<p>1 Q Okay.</p> <p>2 A I attend Highland Park Baptist Church, another</p> <p>3 church called Oak Pointe.</p> <p>4 Q And where are those churches located?</p> <p>5 A One is in Southfield, the Highland Park Baptist</p> <p>6 is in Southfield and the other one is in Novi.</p> <p>7 Q Are they -- either of those churches affiliated</p> <p>8 with, say like, the southern baptists or</p> <p>9 anything like that?</p> <p>10 A No.</p> <p>11 Q "No"?</p> <p>12 A No.</p> <p>13 Q Okay. All right. How long have you been a</p> <p>14 Christian?</p> <p>15 A 65 years.</p> <p>16 Q Just how old are you, sir?</p> <p>17 A 71.</p> <p>18 Q 71. Okay. Now, is -- now you said you became</p> <p>19 a Christian at roughly 6 years of age. Was</p> <p>20 that in Highland Park Baptist Church or was</p> <p>21 that somewhere else?</p> <p>22 A It was in my home at the time.</p> <p>23 Q Okay. Where was that?</p> <p>24 A In Highland Park.</p> <p>25 Q In Highland Park. Okay.</p>	<p>1 ads like that?</p> <p>2 A We don't take out ads like that.</p> <p>3 Q Okay.</p> <p>4 A We -- we do things like we have a memorial</p> <p>5 service here at Christmastime that we recognize</p> <p>6 the people that have passed away over the last</p> <p>7 year. I don't know how you would define that,</p> <p>8 but we have a memorial service like that.</p> <p>9 Obviously we're involved in a ministry with --</p> <p>10 what we do is involved, religious rights and</p> <p>11 customs and rituals for families.</p> <p>12 Q Okay.</p> <p>13 A There's a huge ministry aspect to what we do.</p> <p>14 Q Now, this memorial service is -- what happens</p> <p>15 during this service? This annual Christmas</p> <p>16 service?</p> <p>17 A Yes. Well, we make an ornament with the</p> <p>18 person's name on it, and the family members can</p> <p>19 come and we have a short service. We read the</p> <p>20 names and then they hang this on an outside</p> <p>21 tree.</p> <p>22 Q Okay. You said it's a short service, what's --</p> <p>23 A Because it's outside. We -- we purposefully do</p> <p>24 this outside so it can be a pretty nasty day.</p> <p>25 Q Sure.</p>
<p>1 A Uh-huh.</p> <p>2 Q Okay. Presumably baptized at that point?</p> <p>3 A Yes.</p> <p>4 Q Okay. Do you recall if there was any</p> <p>5 particular church that it was associated with</p> <p>6 or no?</p> <p>7 A That same church.</p> <p>8 Q Highland Park?</p> <p>9 A Yeah.</p> <p>10 Q Oh, it was Highland Park. Okay.</p> <p>11 A Yeah.</p> <p>12 Q All right. Now, R.G. G.R. Harris is not owned</p> <p>13 by any church, correct?</p> <p>14 A Correct.</p> <p>15 Q Okay. And it's not affiliated with a church,</p> <p>16 for instance it's not really the official</p> <p>17 funeral home of Highland Park Baptist or Oak</p> <p>18 Pointe, correct?</p> <p>19 A Correct.</p> <p>20 Q Okay. Does R.G. G.R. Harris sponsor any kind</p> <p>21 of religious activities?</p> <p>22 A I don't know what you mean by "Sponsor."</p> <p>23 Q Does it -- well, let's try this. Does it send</p> <p>24 out, like, newspaper ads wishing people a Merry</p> <p>25 Christmas or Happy Easter? Does it take out</p>	<p>1 A So we try and move things along. But we -- we</p> <p>2 have a couple people speak, we sing silent</p> <p>3 night, we read their names.</p> <p>4 Q Who speaks?</p> <p>5 A I speak, a lady now -- her name is Karen, I</p> <p>6 can't -- I forgot what her last name is. She's</p> <p>7 from New Hope. It's a support group.</p> <p>8 Q Okay.</p> <p>9 A She heads that up.</p> <p>10 Q Is that for grieving people?</p> <p>11 A Yes. Uh-huh. And she talks about things for</p> <p>12 the holidays, helps for the holidays.</p> <p>13 Q Getting through the new year without your loved</p> <p>14 one, that sort of thing?</p> <p>15 A Correct. Exactly.</p> <p>16 Q Is this New Hope support group, is it an</p> <p>17 explicitly Christian ministry?</p> <p>18 A No.</p> <p>19 Q Now, the people who come to the -- let's try it</p> <p>20 this way. I believe your web page indicates</p> <p>21 that you're -- or you will offer services to</p> <p>22 people of multiple religions?</p> <p>23 A Absolutely.</p> <p>24 Q Okay. Does that include people who are not</p> <p>25 Christians?</p>

<p style="text-align: right;">Page 38</p> <p>1 not the operational aspect, but does R.G. G.R. 2 advertise in like church bulletins, like 3 Catholic church bulletins? 4 A We don't. We have. We have, but we're not 5 doing that now. 6 Q When did you stop doing that? 7 A Oh, quite awhile ago. 20 years ago. 8 Q Okay. And why not? 9 A It's not cost-effective. 10 Q Okay. Where do you advertise or do you not 11 advertise at all? 12 A We are not advertising, no. 13 Q So not even in the Yellow Pages? 14 A Oh, well -- yep -- yes, Yellow Pages, yes, 15 you're right. Yes. 16 Q Okay. Now you'll sometimes see something like 17 the Christian Yellow Pages or something like 18 that? 19 A Yes. 20 Q Do you advertise in those? 21 A I think once I might have. I don't know if 22 those are still going. I haven't seen one of 23 those in years. 24 Q When do you believe you might have 25 advertised --</p>	<p style="text-align: right;">Page 40</p> <p>1 business? 2 A The only thing in a direct way is little things 3 that we leave out, we give away Daily Breads 4 which is a little daily devotional; it's a pick 5 up. We have a little card that people can pick 6 up. That would be the only thing. 7 Q Okay. And this is just -- as they walk out 8 they can grab something like that? 9 A Yes. It's a pick up item if they so desire. 10 Q What about, you say a little card, what's that? 11 A We call it a Jesus card. 12 Q Okay. 13 A I forgot what it says on the front. It's kind 14 of to grab your attention and then on the back 15 it just has references, verse references. 16 Q Scriptural references about Jesus? 17 A Yes, exactly. Yes. 18 Q You do employ people who -- to your knowledge, 19 do you employ people who are not of your faith? 20 A Yes. 21 Q Can you think of some of the people, the 22 religious or non-religious people that work for 23 you? 24 A Well, I have an Orthodox individual. 25 Q Eastern Orthodox or Greek Orthodox or --</p>
<p style="text-align: right;">Page 39</p> <p>1 A Probably 20 years ago. 2 Q Okay. Does R.G. G.R. help sponsor something 3 like a church festival? You know, sometimes 4 Catholic parishes will have a festival or there 5 are harvest parties at a baptist church, that 6 sort of thing? 7 A We'll -- we'll maybe put an ad in a booklet. 8 Q Okay. What do you mean by a booklet? 9 A Well, usually they'll have a booklet, and I'm 10 thinking of just one Catholic church that we do 11 this, I think, that's the only thing I can 12 think of. And we do it as just it's a gift, 13 it's not an advertisement. 14 Q Okay. 15 A You don't get anything from it, it's just as a 16 gift. 17 Q Okay. What parish would this be, if you can 18 recall? 19 A This one was called St. Raphael's in Garden 20 City. They've changed the name to St. Thomas 21 of the -- something, I think, but just St. 22 Raphael's. 23 Q Okay. Can you think of any ways in which you 24 express your faith through Harris, R.G. G.R. 25 Harris; you exercise your faith using your</p>	<p style="text-align: right;">Page 41</p> <p>1 A I'm going to say Greek Orthodox. 2 Q Okay. 3 A I have Catholics. That would pretty much be 4 it. 5 Q Okay. Any Episcopalians or anything like that 6 you can think of? 7 A Not at the present time that I'm aware of. 8 Q Lutherans, Evangelicals, others you can think 9 of? 10 A I would classify them under the -- you know, 11 under my -- under Christian faith, but now 12 you're asking about denominations. I don't 13 think I have any Lutherans right now. 14 Q Okay. And by Christians, do you have any kind 15 of other -- do you have a breakdown of what you 16 consider Christian, I mean just -- 17 A That they are a follower of Jesus. 18 Q Okay. 19 A Specifically that way, not just in word only. 20 Q Okay. And do you have people that you employ 21 who you believe are not Christian in that 22 sense? 23 A I don't believe so. 24 Q Now, if you're employing someone who is 25 Orthodox or Catholic it's certainly not the</p>

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<p>1 you've seen your cremation side of your 2 business going up over time? 3 A Yes, it's 50 percent of the market. 4 Q 50 percent. And what -- why do you see that; 5 do you have any insight as to why that's the 6 case? 7 A I do not know. 8 Q I believe at least at one point when you were 9 talking to our investigator you thought it 10 was -- you think it was kind of a cultural 11 shift; is that a possibility? 12 A Well, there's a lot of reasons people want to 13 save some money. 14 Q Okay. 15 A People don't have the same types of -- I want 16 to say family ties, cultural ties, religious 17 ties, they don't see the value the same as in 18 years ago. They don't see the need for a 19 traditional type of service. We live in a 20 disposable culture now, disposable society. 21 Q I believe, and correct me if I'm wrong, did you 22 believe that there was kind of like the 23 disvaluing of human life was an aspect, you 24 told our investigator? 25 A Yes, I would agree with that.</p>	<p>1 time people tend to choose cremation over a 2 full funeral; is that -- did I catch that 3 accurately? 4 A I don't know if I'd say it that way. Let's 5 just say the immediate disposal, because it 6 could be burial. 7 Q Okay. 8 A We'll do immediate burials also. 9 Q Okay. What's an immediate burial? 10 A With no -- no visitation, no embalming 11 preparation, just go into a cemetery. 12 Q And how much of that do you do? 13 A Oh, a couple a month. 14 Q Would you say that cremation services tend to 15 be demanded more by people who have less of a 16 religious outlook? 17 A I would say yes. In general. Yeah. If you 18 want to make a general statement. 19 Q In general, right. I mean it's not -- 20 obviously people could very well -- 21 A But it's changing. It is changing, yes. 22 Q In what way? 23 A It's becoming more recognized in all faiths 24 now. I mean, years ago Catholics didn't allow 25 it. Now, you know, it's very prevalent, you</p>
<p>1 Q You certainly -- is it safe to say you 2 certainly would rather be doing funeral, full 3 funeral services as opposed to cremations? 4 A Yes. 5 Q That aligns more with your personal religious 6 values? 7 A Yes, it does. 8 Q How so? 9 A I believe in the traditional funeral. I 10 believe in the traditions that go with it, yes. 11 Absolutely. 12 Q And for religious reasons as well you believe 13 you'd rather do full funerals? 14 A I'm talking about for myself and for my family. 15 What's your question? Because I thought that's 16 what you were asking me personally. 17 Q Yeah. Does it -- as a Christian would you 18 rather be doing funerals more often than 19 cremations? 20 A Traditional funerals, yes. 21 Q Traditional funerals. 22 A Yes, of course. 23 Q Now, is it the case that you -- you indicated 24 kind of before, I just want to clarify kind of 25 the way religious ties have been lessening over</p>	<p>1 can take the cremated remains to church now. 2 Q Okay. 3 A So things have changed. 4 Q And it's -- part of the reason you are doing 5 cremation services is to remain -- is because 6 the demand and just the way the funeral 7 industry has shifted? 8 A Exactly. 9 Q You need it to stay in business really? 10 A Exactly. 11 MR. PRICE: If we could take a 12 break here. 13 (Off the record at 10:37 a.m.) 14 MR. PRICE: Back on. 15 (Back on the record at 10:47 a.m.) 16 (Mr. Schrameck did not return to 17 the conference room.) 18 BY MR. PRICE: 19 Q Who handles the hiring for R.G. G.R.? 20 A Either myself or my managers. 21 Q Okay. Do either you or your managers, to your 22 understanding, ask about anybody's religion 23 when you're hiring them? 24 A No. 25 Q Going back to this affirmative defense that we</p>

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1 have been talking about today. Is it the case
 2 that continuing to employ Stephens would
 3 violate the free exercise rights of Harris
 4 under the Constitution?
 5 A Yes.
 6 Q Okay.
 7 A Yes. I believe so.
 8 Q Okay. How so?
 9 A Well, I do believe in my -- from my personal
 10 faith aspect as a follower of Jesus Christ that
 11 I have the right to minister to the families
 12 and the people that I serve in a way that is
 13 protective and safe for them, and meets their
 14 needs as they begin to heal in such a way that
 15 they're protected and safe, and having an
 16 individual that does not conform to our dress
 17 code is not appropriate.
 18 (Mr. Schrameck entered the
 19 conference room at 10:48 a.m.)
 20 BY MR. PRICE:
 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.

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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.
 15 Q And as a result you would not have to -- it
 16 would be within your rights to terminate them
 17 according to your religious belief, terminate
 18 Stephens from your religious belief?
 19 A Yes. Uh-huh.
 20 Q Have you ever terminated anybody else because
 21 of the belief that they were acting contrarily
 22 to your religious faith?
 23 A No.
 24 Q Are there any other circumstances you can think
 25 of where you would terminate somebody for

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1 violating your religious beliefs?
 2 A No, offhand I can't.
 3 Q Okay. Are your religious expectations
 4 communicated to your employees in any way?
 5 A I would say indirectly.
 6 Q Indirectly?
 7 A Yes.
 8 Q How so?
 9 A Well, number one, they know the material is
 10 around the funeral home.
 11 Q The material?
 12 A Yeah, I mean, we have little devotional books
 13 for people to pick up, they have these Jesus
 14 cards, they know where I attend church. They
 15 do know, yes.
 16 Q Okay. Would the continued employment of
 17 Stephens have interfered with your right to
 18 place the devotional booklets or Jesus cards
 19 around your facility?
 20 A No.
 21 Q Would it have been interfered in any way with
 22 your ability to continue to worship as you
 23 chose?
 24 A Go back to the question. You said just because
 25 he was there or if he was there dressed as a

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1 woman?
 2 Q After he made the announcement to you, okay?
 3 Would the continued presence of Stephens as an
 4 employee presenting as female have interfered
 5 with your ability to place devotional booklets
 6 or Jesus cards?
 7 A No, he wouldn't be an employee.
 8 Q Okay. I'm just speaking hypothetically.
 9 A Yes, that is hypothetical. Yeah.
 10 Q Okay. But you could have still placed Jesus
 11 cards and devotional booklets, right? There's
 12 nothing about Stephens presence that would
 13 affect that?
 14 A No, hypothetically.
 15 Q Okay. Likewise, hypothetically, there would
 16 have been nothing about Stephens presence that
 17 would have affected your ability to go to Oak
 18 Pointe or Highland Park, correct?
 19 A Yeah, hypothetically, yes.
 20 Q Okay. Would you say that your dress code for
 21 men and women also embodies your religious
 22 beliefs? As to how men and women are supposed
 23 to dress?
 24 A No, I would say our dress code conforms to what
 25 is acceptable attire in a professional manner

<p style="text-align: right;">Page 58</p> <p>1 for the services that we provide. In other 2 words, there's an expectation for people that 3 work in a funeral home how they're going to 4 dress and how they're going to look. 5 Q Okay. 6 A The culture dictates that. 7 Q So the culture dictates what you're supposed to 8 be wearing? 9 A To some extent, uh-huh. 10 Q But isn't it the case that the dress code does 11 align with the way you believe that men should 12 dress in the workplace and that women should 13 dress in a workplace? 14 A Yes, of course. 15 Q Okay. And that also aligns with your religious 16 beliefs on that point? 17 A I guess if you want to put it in that term, but 18 I don't know what it would have to do with 19 religious terms. 20 Q Okay. 21 A I mean, you're an attorney, you have a white 22 shirt and a tie like just about all attorneys 23 look. You have a certain dress. 24 Q Okay. You indicated earlier that God made men 25 as men and women as women. That was one of</p>	<p style="text-align: right;">Page 60</p> <p>1 family and friends in an environment that they 2 don't need some type of a distraction that is 3 not appropriate for them and their family that 4 they want to be involved in. And his continued 5 employment would negate that. 6 Q So it's your belief that continuing employment 7 would have posed that kind of distraction to 8 people who are coming to use your services? 9 A Absolutely. 10 Q Okay. You never saw Stephens in anything other 11 than a suit and tie, correct? 12 A That is correct. 13 Q Okay. So, you can't speak as to how Stephens 14 would have presented -- you never saw Stephens 15 present in female attire, correct? 16 A Correct. 17 Q Okay. So you don't know how they would have -- 18 how Stephens would have looked, correct? 19 A I don't know how he would have looked, no. 20 Q Okay. So, but nevertheless, despite that it 21 was your belief that it would have been a 22 distraction? 23 A Yes. 24 Q Why would it be distracting for Stephens to so 25 present?</p>
<p style="text-align: right;">Page 59</p> <p>1 your concerns about continuing to employ 2 Stephens. You have a deep belief in that -- 3 A Yes. 4 Q -- stemming presumably from Genesis, correct? 5 A Yes. 6 Q Male and female, he created them? 7 A Yes. 8 Q Okay. So, men and women should dress 9 accordingly in your opinion, right, men should 10 dress as men and women should dress as women; 11 is that one of your concerns with Stephens? 12 A For employment at the funeral home, yes. 13 Q Okay. Now, you indicated also that one of the 14 concerns you had was that people be protected 15 and safe in the grieving process, I believe so. 16 How would continuing to employ Stephens affect 17 that? 18 A Well, his employment there would be looked upon 19 as -- well, a -- let me back up. 20 Let's see. Families come to us 21 because they want an environment where they can 22 begin the grieving process and the healing 23 process and begin the experience of healing. 24 We're there to meet their emotional, relational 25 and spiritual needs. They're there with their</p>	<p style="text-align: right;">Page 61</p> <p>1 A If he was dressed as a woman? 2 Q Yes. 3 A Well, just because I think common sense is 4 going to tell you that most people identify men 5 dressed a certain way in a funeral home and 6 women as a certain way and I've yet to see a 7 man dressed up as a woman that I didn't know 8 was not a man dressed up as a woman, so that 9 it's very obvious. 10 Q So it's your belief that there is no way that 11 Anthony Stephens would be able to present -- 12 the person you knew as Anthony Stephens would 13 be able to present in such a way that it would 14 not be obvious that it was -- 15 A That is correct. 16 Q Okay. And that's based on your personal 17 experience? 18 A Yes. 19 Q What -- you said it would be kind of a 20 distraction, it would be disruptive for the 21 process. How would you know that someone who 22 is transgender and presenting would be a 23 distraction or interruption -- 24 MR. KIRKPATRICK: Objection, 25 foundation on what transgender is.</p>

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<p>1 Q Okay. How did they know about the lawsuit?</p> <p>2 A I have no idea.</p> <p>3 Q Okay. And you don't have any idea about their religious affiliation of the people?</p> <p>4 A I do not, no.</p> <p>5 Q Can you think of their names offhand or no?</p> <p>6 A No, I can't.</p> <p>7 Q Moving ahead to, and this is going to be somewhat related, Thirteenth Affirmative Defense also on page 5 of the Answer. If you could review that, please.</p> <p>8 A Number 13?</p> <p>9 Q Yes.</p> <p>10 A Okay. (Reviewing.)</p> <p>11 Q All right. Have you had a chance to review that?</p> <p>12 A Yes. This little paragraph here?</p> <p>13 Q Yes.</p> <p>14 A Yes.</p> <p>15 Q "The EEOC's claims violate the Funeral Home's rights under the Federal Religious Freedom Restoration Act."</p> <p>16 What is your understanding of what RFRA is; the Religious Freedom Restoration Act?</p> <p>17 A I don't know what the actual Act is.</p>	<p>1 Q To some extent. Okay. Even though these persons may not share exactly the same beliefs you do; is that correct?</p> <p>2 A They may not share the same beliefs, but people in my industry feel called, they look at it as ministry, the people that work for me look at this as a ministry. This is not just a job. They're there to help people, to come alongside of them to walk with them and assist them.</p> <p>3 Q Is there anything about your -- let's just bracket the whole point of the termination of Stephens. Was there anything about the performance of the person you knew as Anthony Stephens that showed a lack of belief that this was a ministry?</p> <p>4 A No, not in his -- not when he was employed there.</p> <p>5 Q So, as the -- basically Stephens upheld that aspect while employed?</p> <p>6 A Yeah. Yes.</p> <p>7 Q Okay. Presented himself --</p> <p>8 A Yes.</p> <p>9 Q -- as you saw that was appropriate?</p> <p>10 A Yes.</p> <p>11 Q Okay. Did not interfere with your right as a</p>
<p>1 Q Have you heard of it before?</p> <p>2 A I have heard of it.</p> <p>3 Q Okay. In what context?</p> <p>4 A Just I've heard the name.</p> <p>5 Q Okay.</p> <p>6 A That's all.</p> <p>7 Q Okay. It -- how -- speaking on behalf of Harris, how do you believe that the EEOC's claims on behalf of Stephens violate your rights under that act?</p> <p>8 A Well, I believe it violates my acts under there because I have the -- the free right as a -- as a follower of Jesus Christ, and as a believer to exercise my rights in sharing my faith and how my faith is going to be presented through the business that I have. And the employees that I have.</p> <p>9 Q Okay.</p> <p>10 A We have a ministry that we present. And being as such, we want to present that aspect of our business.</p> <p>11 Q Now, you -- it's your -- I believe you said that you're presenting your business through the people that you employ; is that correct?</p> <p>12 A To some extent, yes.</p>	<p>1 follower of Jesus to present that faith through your business?</p> <p>2 A That is true.</p> <p>3 Q However, when you were presented with the letter, that did interfere with --</p> <p>4 MR. KIRKPATRICK: Objection, what letter are you talking about?</p> <p>5 MR. PRICE: The letter Stephens gave you.</p> <p>6 MR. KIRKPATRICK: Okay.</p> <p>7 BY MR. PRICE:</p> <p>8 Q So when you were presented with that letter, at that point it was your belief that there was -- they could no longer serve that function, he could no longer serve that function?</p> <p>9 A That is true. He what not going to conform to the dress code that was required.</p> <p>10 Q The dress code is part of that ministry, correct?</p> <p>11 A Yes, it is.</p> <p>12 Q Okay. And it's part of the way you present your business through -- as a follower of Jesus Christ, correct?</p> <p>13 A Yes.</p> <p>14 Q And part of the way that you present your</p>

<p style="text-align: right;">Page 70</p> <p>1 business and your ministry and your exercise of</p> <p>2 your religious freedom is that men should be</p> <p>3 dressing in suits as part of this process and</p> <p>4 that women should be dressing conservatively in</p> <p>5 skirts, correct?</p> <p>6 A Yes.</p> <p>7 Q Now, with respect to this and also the previous</p> <p>8 affirmative defense, did you ever raise</p> <p>9 religious freedom or free exercise during the</p> <p>10 investigation as a basis for your</p> <p>11 decision-making?</p> <p>12 A When the young lady was there?</p> <p>13 Q Yeah. Or any other point?</p> <p>14 A I don't recall.</p> <p>15 Q Okay. If I tell you that there was no such</p> <p>16 mention in any of the filings that came through</p> <p>17 your attorney of religious freedom or free</p> <p>18 exercise, would you have any explanation for</p> <p>19 why that is?</p> <p>20 A No.</p> <p>21 Q Okay. Do you have any understanding why the</p> <p>22 religious freedom and free exercise were not</p> <p>23 mentioned in your first Answer to the Complaint</p> <p>24 that was filed starting this lawsuit?</p> <p>25 A No.</p>	<p style="text-align: right;">Page 72</p> <p>1 freedom rights?</p> <p>2 A Right.</p> <p>3 Q Age Discrimination Employment Act, that also</p> <p>4 does not affect your free exercise or religious</p> <p>5 freedom rights?</p> <p>6 A That's true.</p> <p>7 Q Okay. And Title VII, bracketing the dispute we</p> <p>8 have here, but Title VII provisions on race,</p> <p>9 color, national origin, religion and sex also</p> <p>10 don't violate your free exercise rights?</p> <p>11 A That's is true.</p> <p>12 Q Okay. Or religious freedom rights, correct?</p> <p>13 A Okay. Yes.</p> <p>14 Q Is that the case?</p> <p>15 A Yes.</p> <p>16 Q Okay. So, again, it sounds like it's going to</p> <p>17 be kind of repeated, but so the -- it is your</p> <p>18 argument that the continued employment of</p> <p>19 Stephens after Stephens had announced in the</p> <p>20 letter to you that he was going to present as</p> <p>21 female, violates your religious freedom?</p> <p>22 A Yes.</p> <p>23 Q Okay.</p> <p>24 A Absolutely.</p> <p>25 Q And there's no other way that the EEOC's claims</p>
<p style="text-align: right;">Page 71</p> <p>1 MR. KIRKPATRICK: Objection,</p> <p>2 relevance, but you already answered, so --</p> <p>3 BY MR. PRICE:</p> <p>4 Q Is it your belief that you at any point talked</p> <p>5 about religious freedom or free exercise during</p> <p>6 the investigation part of the case?</p> <p>7 A To the young lady?</p> <p>8 Q Yeah.</p> <p>9 A No.</p> <p>10 Q You did not do so?</p> <p>11 A I don't believe so.</p> <p>12 Q Do you believe that you did so at any point</p> <p>13 through stuff that was filed on your behalf?</p> <p>14 A I don't believe so.</p> <p>15 Q Okay. And you have no understanding of why you</p> <p>16 would not have done so?</p> <p>17 A No.</p> <p>18 Q Okay. Do you claim that any other statutes</p> <p>19 violate your religious freedom rights? We've</p> <p>20 talked about, like, Americans with Disabilities</p> <p>21 Act, you don't believe that that affects your</p> <p>22 free exercise or religious freedom, correct?</p> <p>23 A Right.</p> <p>24 Q Okay. Equal Pay Act, you don't believe that</p> <p>25 that affects your free exercise or religious</p>	<p style="text-align: right;">Page 73</p> <p>1 in this case violate your religious freedom?</p> <p>2 A Any other ways other than this?</p> <p>3 Q Other than this, yeah.</p> <p>4 A Yeah, I don't think there is any other way.</p> <p>5 Q Okay. So that's the sole -- that's the sole</p> <p>6 basis of your claim that your rights are being</p> <p>7 violated is that we brought suit on behalf</p> <p>8 of -- to keep Stephens employed or to --</p> <p>9 because you fired Stephens? That was badly</p> <p>10 stated. I'm sorry. Even I can recognize that.</p> <p>11 So the sole basis of your rights</p> <p>12 being violated is the fact you're being sued</p> <p>13 for terminating Stephens' employment; that's</p> <p>14 the sole basis of your religious freedom being</p> <p>15 violated here?</p> <p>16 A My religious freedom, yes.</p> <p>17 Q Religious freedom. Okay. Backing up slightly,</p> <p>18 you talked about people -- your clients feeling</p> <p>19 protected and safe as part of the grieving</p> <p>20 process. In what ways would Stephens</p> <p>21 presenting as female violate that?</p> <p>22 I mean, you already talked about</p> <p>23 you had other discussions, but with other</p> <p>24 people, you know, other families.</p> <p>25 Can you think of other ways that it</p>

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<p>1 would be -- in what ways is it really violating 2 people's sense of protection and safety? 3 A Well, I've -- don't forget that common sense 4 tells you that the people that come to the 5 funeral home, I have wives, I have daughters, I 6 have sisters, I have grandchildren, I have 7 great-grandchildren, granddaughters, I have all 8 of these ladies that are there. They -- not 9 only would they be seeing an individual like 10 this and have to participate with the person, 11 but you have also the bathroom situation where 12 they -- are they going to share a bathroom with 13 a man dressed up as a woman. 14 So, I have from older ladies to 15 children, granddaughters that we're dealing 16 with. 17 Q So, you were worried on their behalf that the 18 presence of Stephens would be -- violate the 19 safety of these people? 20 A Absolutely. 21 Q Was there anything about Stephens that 22 indicated he was a danger to others, his 23 behavior was -- did you ever have to write him 24 up for being -- you know, for being threatening 25 or anything like that?</p>	<p>1 Q It conformed with what your expectations -- 2 A Yes. 3 Q -- and hopes were for this what you call a 4 ministry? 5 A Yes. 6 Q All right. Now, you're talking about 7 granddaughters and sisters and that sort of 8 thing, are you talking about your family 9 members coming in -- 10 A No, I'm talking about families -- 11 Q Oh, extended family members coming in for 12 funerals? 13 A Yes. 14 Q Okay. 15 A Uh-huh. But specifically the female part. 16 Q But you never got around to even -- there was 17 no discussion of bathrooms with Stephens, 18 correct? 19 A No. 20 Q That never came up at all? 21 A No. 22 Q So the bathroom thing is really hypothetical, I 23 mean, because you never even got to that point? 24 A That's true. 25 Q Are there employee bathrooms as well as --</p>
<p>1 A No, but I don't think that has anything to do 2 with him being now dressed as a woman and 3 confronting families and being involved with 4 that. That sounds hypothetical to me too. 5 Q Certainly nothing about Stephens' manner of 6 dealing with families before you received this 7 letter raised any concern with you, correct? 8 A Correct. 9 Q Okay. Stephens had been solicitous of their 10 feelings. Stephens had blended in well. 11 Stephens had, you know, been courteous and 12 compassionate to the people, the clients who 13 came into your facility, correct? 14 A I would say so, yes. 15 Q Do you have any reason to believe that this 16 would have changed just because of the outward 17 presentation in female clothing? 18 A Don't know. 19 Q Okay. You don't know of anything that would 20 have -- you can't speculate as to whether 21 anything would have changed? 22 A I don't know. 23 Q Okay. But certainly before that, his manner 24 was completely appropriate and in -- 25 A It seemed to be, yes.</p>	<p>1 A There is not. 2 Q Just one set of bathrooms? 3 A That's it. Male and female. No unisex. 4 Q Is that the case in all of your facilities? 5 A It is not. 6 Q Okay. 7 A Just there, though. 8 Q Just Garden City? 9 A Uh-huh. 10 Q What about the other ones? What about Detroit? 11 A No, they're just male and female, there's 12 nothing unisex there. 13 Q What about Livonia? 14 A They do have unisex. 15 Q Moving ahead to -- excuse me -- would be 16 item -- it's not in the Complaint -- the 17 answer -- 18 A It's not one of these? 19 Q It's not one of those. Yeah. 20 A All right. 21 Q It is Item Number 6 on our Notice which was 22 "The creation and/or incorporation of Harris 23 including any articulated purposes or mission 24 statements and the identity of incorporating 25 officers and subsequent officers during Aimee</p>

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<p>1 Stephens' employment." 2 Now, what is your official officer 3 title for -- 4 A President. 5 Q President. How long has that been the case? 6 A 35 years. 7 Q What are the other officers in the corporation? 8 Are there any officer titles? 9 A No. 10 Q Okay. Who was president before yourself? 11 A Tom Harris. 12 Q Is he your father-in-law? 13 A No, it's my uncle. 14 Q Your uncle. Okay. All right. So during the 15 time that Stephens was employed, the only 16 officer for the company would have been 17 yourself? 18 A Correct. 19 Q Still the case now? 20 A Still the case now. 21 MR. PRICE: Now -- have the 22 following marked -- what are we up to? 23 THE COURT REPORTER: Number 4. 24 MR. PRICE: 4, please. 25 (Deposition Exhibit No. 4 was</p>	<p>1 Q Now it indicates the original filing -- date of 2 filing was March 17th, 1932. 3 A That's what it says, yes. 4 Q Okay. Is that -- has Harris been around for 5 that long? 6 A Since 1910. 7 Q 1910. Okay. Are there any more recent 8 Restated Articles of Incorporation? 9 A No. 10 Q Okay. Now, the purpose of the document here 11 under Article II is "To perform embalming, 12 funeral burial and related services as well as 13 all other purposes allowed under Michigan law"; 14 is that correct? 15 A I would say so, yes. 16 Q Okay. Are there any other documents which set 17 forth the purposes or mission statement of 18 Harris? 19 A No. 20 Q Okay. Is there anything like a statement of 21 values -- 22 A Well, there is that on our website, I believe. 23 Q Okay. So the one -- so the page on the website 24 talks about your mission statement? 25 A Yeah, mission statement. Yeah.</p>
<p>1 marked for identification.) 2 MR. PRICE: My apologies. That's 3 the only copy I have. I'm looking for another 4 one. It's the incorporation document. 5 MR. KIRKPATRICK: Let me take a 6 quick peek when you're done. 7 THE WITNESS: Yeah. Yeah. 8 (Reviewing.) 9 BY MR. PRICE: 10 Q Do you recognize that document? 11 A Well, I recognize it, yes. 12 Q Okay. It's identified as a restatement or 13 re -- I don't want to mis -- 14 MR. PRICE: Off the record. 15 (Off the record at 11:22 a.m.) 16 MR. PRICE: Back on. 17 (Back on the record at 11:24 a.m.) 18 BY MR. PRICE: 19 Q This is the Restated Articles of Incorporation 20 for profit for R.G. & G.R. Harris Funeral Home. 21 Do you recognize this? 22 A Yes. 23 Q What purpose does this document serve? 24 A Well, I'm assuming just what it says, to 25 reissue or restate Articles of Incorporation.</p>	<p>1 Q Apart from that, is there any other statement 2 you can think of? 3 A No. 4 Q Okay. Now, when you deeded -- when you passed 5 some of the stock onto your family, was there 6 any kind of restriction or statement of purpose 7 that they had to sign? 8 A No. 9 Q Okay. Is there anything other than this 10 Exhibit 4, and the mission statement on the web 11 page which sets forth the purposes of Harris? 12 A No. 13 Q Okay. Is there anything anyone has to sign 14 indicating one's going to uphold Harris' 15 principles before you get stock or anything 16 like that? 17 A No. 18 Q Okay. Is -- are employees of Harris expressly 19 asked if they were -- are going to be upholding 20 the religious values of the corporation? 21 A They're not asked that, no. 22 MR. PRICE: Okay. All right. I'm 23 going to mark this as 5, please. 24 (Deposition Exhibit No. 5 was 25 marked for identification.)</p>

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<p>1 MR. KIRKPATRICK: Thank you. 2 THE WITNESS: (Reviewing.) 3 BY MR. PRICE: 4 Q Please take as much time as you need to review 5 that. 6 A (Reviewing.) 7 Q Okay. Do you recognize this document? 8 A Yes. 9 Q Okay. Now it says at the bottom that it's a 10 web page capture as of May 15th, 2014. But, 11 does this look like an accurate depiction of 12 the Harris' mission statement? 13 A Yes. 14 Q Is there anything that has changed in this? 15 A No. 16 Q How long has this mission statement been 17 posted, as far as you know? 18 A Oh, probably 15 years. 19 Q And what is the purpose of the mission 20 statement? 21 A It was originally designed to just kind of put 22 some focus on and give some definition to who 23 we are and what we want to be about. 24 Q Is there anything like this given to employees 25 when they're hired? Are they directed to read</p>	<p>1 BY MR. PRICE: 2 Q Okay. Is there -- do people bring in objects 3 of their religion if it's -- 4 A They do. 5 Q Is the chapel decorated differently? 6 A Not from our perspective. 7 Q Okay. What's -- how is the chapel decorated? 8 What does it look like? 9 A It's like a living room. We don't have a 10 formal chapel. 11 Q Okay. 12 A So it's like a living room in your house. 13 Q Is there any kind of specifically Christian 14 decorations in the chapel? 15 A No. Not specific, no. 16 Q And that makes it easier for people of -- who 17 are not of the Christian faith to be able to 18 use it? 19 A That's true. Uh-huh. 20 Q Correct? 21 A Correct. 22 Q And you have to be sensitive to that. I mean, 23 you don't want to offend people of another 24 religion, correct, that are coming here to use 25 your facility?</p>
<p>1 it, for example? 2 A They're not directed to read it, but I think it 3 might be in their little employee manual. 4 Q Okay. And it's your understanding it's been up 5 for about 15 years? 6 A I would say so. 7 Q And it -- you say it's basically to let people 8 know who are and what you're about? 9 A Yes. 10 Q And the public too, obviously? 11 A Yeah, for the public, sure. 12 Q Sure. And it indicates that you provide 13 services to people of all cultural and 14 religious backgrounds. And you've already 15 testified about that before. 16 A Uh-huh. 17 Q Okay. Now, when you're hosting a service for 18 somebody who is not of the Christian religion, 19 what's involved with that? Is there anything 20 that people bring in, religious artifacts from 21 their religion or anything like that? Is there 22 anything done to prepare the chapel 23 differently? 24 MR. KIRKPATRICK: Can I object, 25 that's kind of a compound question.</p>	<p>1 A Well, it wouldn't be intent to. 2 Q Okay. 3 A Yeah. 4 Q So that's why it's kept as living room-like as 5 possible? 6 A Yes. 7 Q Okay. And at the bottom there is a quote from 8 the Gospel of Matthew, Chapter 6, Verse 33. 9 A Uh-huh. 10 Q Did you pick that verse? 11 A I did. 12 Q And how long has the verse been up there? 13 A Same, same amount of time. 14 Q About 15 years? 15 A Uh-huh. 16 Q And why did you pick that verse? 17 A Oh, I don't know, I just thought it was 18 appropriate. 19 Q Why? 20 A Because I believe in it and it would represent 21 my faith. 22 MR. PRICE: I hate to do this, but 23 I need to take another break. 24 (Off the record at 11:33 a.m.) 25 (Back on the record at 11:45 a.m.)</p>
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<p>1 BY MR. PRICE:</p> <p>2 Q Just to clarify, earlier, actually a couple</p> <p>3 times you described it as -- your business as a</p> <p>4 ministry. What do you mean by that?</p> <p>5 A Well, what I mean by that is, it's a ministry</p> <p>6 to people to serve them on the worst day of</p> <p>7 their lives for them and their family, and they</p> <p>8 come to us under the highest anxiety that they</p> <p>9 can possibly have, and they need help.</p> <p>10 They need help to make</p> <p>11 decisions and they need help to get their lives</p> <p>12 and their family's lives back together and</p> <p>13 that's why we say that we're there to help them</p> <p>14 begin healing and to help them meet their</p> <p>15 emotional, relational and spiritual needs. And</p> <p>16 in a sense so much of what we do is involved,</p> <p>17 in a religious way if you want to call it that,</p> <p>18 it is a ministry. And my faith calls me to do</p> <p>19 that.</p> <p>20 Q Your faith informs the way you operate the</p> <p>21 ministry?</p> <p>22 A Yes. Yes. Absolutely.</p> <p>23 Q Moving on to Number 7 in the Deposition Notice,</p> <p>24 it talks about "Non-privileged communications</p> <p>25 concerning or touching upon Harris' exercise of</p>	<p>1 calling people to faith in Jesus or anything</p> <p>2 like that?</p> <p>3 A No. No.</p> <p>4 Q Or like religious, you know, Happy Easter --</p> <p>5 A No.</p> <p>6 Q -- with reference to the Resurrection or</p> <p>7 anything like that; you're not publishing that</p> <p>8 sort of thing?</p> <p>9 A No.</p> <p>10 Q You're not even publishing that sort of thing</p> <p>11 on your website or your Facebook page, correct?</p> <p>12 A No.</p> <p>13 Q And as you've said before, you are open to</p> <p>14 people of all sorts of religions or none,</p> <p>15 correct?</p> <p>16 A That is true.</p> <p>17 Q And in terms of clients or even in terms of</p> <p>18 possibly hiring people, correct?</p> <p>19 A Yes.</p> <p>20 Q Now moving on to Number 8 out of 13. "Facts</p> <p>21 concerning Harris' exercise of religion in</p> <p>22 conducting its business operations or in its</p> <p>23 personnel practices."</p> <p>24 Again, we've kind of plowed this</p> <p>25 ground a little bit before, but you've -- we</p>
<p>1 religion through or in the course of operating</p> <p>2 its business."</p> <p>3 Now, this may be somewhat</p> <p>4 repetitive, but you've already kind of talked</p> <p>5 about how you put out the Daily Breads in</p> <p>6 your -- and pamphlets.</p> <p>7 A Uh-huh.</p> <p>8 Q And that's at all of the Harris locations?</p> <p>9 A Uh-huh.</p> <p>10 Q "Yes"? I'm sorry.</p> <p>11 A Yes.</p> <p>12 Q And you have the Jesus cards put out at all of</p> <p>13 the locations?</p> <p>14 A Yes.</p> <p>15 Q Okay. Can you think of any other ways that</p> <p>16 Harris communicates or exercises its religion</p> <p>17 through business operations?</p> <p>18 A Well, other than the way we practice our</p> <p>19 business and we practice our faith through our</p> <p>20 business. But not in a direct -- with things</p> <p>21 around or like you had referred to at Christmas</p> <p>22 and Easter, no, nothing.</p> <p>23 Q No direct evangelism or anything like that?</p> <p>24 A No, there's no direct, no.</p> <p>25 Q Okay. You're not putting out newspaper ads</p>	<p>1 have talked a bit about this, but with respect</p> <p>2 to when you're open, are you open 24/7, 365?</p> <p>3 A Yes.</p> <p>4 Q Okay. And that's all the locations?</p> <p>5 A Yes.</p> <p>6 Q And you do have paid holidays for the</p> <p>7 employees, correct?</p> <p>8 A Correct.</p> <p>9 Q All right. Christmas is one of them?</p> <p>10 A Yes.</p> <p>11 Q Okay. But if I read the employee manual</p> <p>12 correctly, Easter is not a paid holiday; is</p> <p>13 that correct?</p> <p>14 A That is correct.</p> <p>15 Q Okay. Why is that the case?</p> <p>16 A It's not a legal holiday.</p> <p>17 Q Okay. So paid holidays are the ones that are</p> <p>18 legal holidays?</p> <p>19 A Correct.</p> <p>20 Q And Harris is open on Easter, correct?</p> <p>21 A Oh, yes.</p> <p>22 Q Now when you have a holiday like Christmas or</p> <p>23 Easter, do all of the people show up?</p> <p>24 A No.</p> <p>25 Q Okay. What kind of staffing do you have?</p>

Page 106	Page 108
1 A Well, I'd be happy to do that, but, you know,	1 working as a funeral director and embalmer at
2 when you're as small as we are, we're talking	2 that time?
3 all the time, you don't need to have everything	3 A Don't know.
4 written down.	4 (Mr. Schrameck exited the
5 Q Okay. Are there any unwritten policies?	5 conference room at 12:19 p.m.)
6 A No.	6 BY MR. PRICE:
7 Q Okay. Any unwritten expectations of employees?	7 Q Okay. What location was this?
8 A No.	8 A This is at the Garden City location.
9 Q Are there any reviews conducted, evaluations,	9 (Jeffrey Schrameck entered the
10 that sort of thing?	10 conference room at 12:19 p.m.)
11 A Not -- not in a -- in a formal setting.	11 BY MR. PRICE:
12 Q Not like an annual review process or anything	12 Q All right. Do you recall whether or not
13 like that?	13 Stephens replaced somebody at that location?
14 A No. No.	14 A I don't recall. I don't know.
15 MR. PRICE: All right. I'm going	15 Q Is it possible?
16 to take a break before we finish the last	16 A Oh sure, it's possible.
17 section.	17 Q Okay. During your interview with Mrs.
18 (Off the record at 12:10 p.m.)	18 Dickinson, I believe you said that Stephens
19 MR. PRICE: Okay. We are back on.	19 could do the job, correct?
20 (Back on the record at 12:17 p.m.)	20 A Yes.
21 BY MR. PRICE:	21 Q All right. We've already talked earlier about,
22 Q Moving on to 30(b)(6) Deposition Notice, Number	22 you know, that Stephens showed sensitivity and
23 13, "The circumstances and reasons for Aimee	23 compassion to the clients who came in, correct?
24 Stephens' separation from employment -- of	24 A Yes.
25 employment from Harris and all policies Harris	25 Q Okay. And that there were no -- is it safe to
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1 relied upon in terminating Ms. Stephens."	1 say then that there were no performance-related
2 Basically we'll be talking about	2 reasons for termination of employment?
3 just that whole process, determining to end the	3 A Not at that time, but we did have some issues
4 employment of Aimee Stephens.	4 beforehand.
5 Now, were -- you were involved in	5 Q But they didn't motivate the decision to
6 the hiring of Stephens, correct?	6 terminate the employment, correct?
7 A I was.	7 A No. No.
8 Q What role did you play?	8 Q So performance was not the basis for discharge?
9 A I believe, if I remember, he -- he just came in	9 A That's right.
10 looking for a job. I don't think he came in	10 Q Did you have any kind of suspicion that --
11 from an advertisement. I don't remember the	11 prior to receiving the letter from Stephens
12 circumstances. But, I believe I was the	12 announcing this desire to present as female,
13 initial one that interviewed him.	13 did you have any suspicion or thought that
14 Q Okay. And what job was this for?	14 anything like that could be happening?
15 A For a funeral director/embalmer, I guess.	15 MR. KIRKPATRICK: Objection.
16 Q Did you check-out the resume and references?	16 THE WITNESS: No --
17 A Don't know.	17 MR. KIRKPATRICK: Objection based
18 Q Did you ever have any reason to believe that	18 on foundation. Go ahead.
19 Stephens did not have the certifications or	19 THE WITNESS: No.
20 background to do the job?	20 BY MR. PRICE:
21 A No.	21 Q Okay. How did you receive this letter?
22 Q In fact Stephens was able to perform the jobs	22 MR. PRICE: And let's have it
23 of a funeral director and embalmer, correct?	23 marked as 7, please.
24 A He was. Uh-huh.	24 (Deposition Exhibit No. 7 was
25 Q All right. Now, was there somebody already	25 marked for identification.)

Page 110	Page 112
<p>1 THE WITNESS: (Reviewing.)</p> <p>2 BY MR. PRICE:</p> <p>3 Q Have you had a chance to review the letter?</p> <p>4 A Well, I -- I know it from before.</p> <p>5 Q Okay. You recognize it then?</p> <p>6 A Yes.</p> <p>7 Q Okay. Is this the letter that Stephens gave to</p> <p>8 you?</p> <p>9 A Yes.</p> <p>10 Q Okay. How did you come to get it?</p> <p>11 A He handed it to me.</p> <p>12 Q Okay. Where was this?</p> <p>13 A I believe at the Garden City location.</p> <p>14 Q Now, do you visit all the facilities every day?</p> <p>15 A No.</p> <p>16 Q No. Okay. How often do you get out to each of</p> <p>17 them?</p> <p>18 A Oh, I'm -- couple times a week. Yeah.</p> <p>19 Q Okay. Do you recall time of day, whatever,</p> <p>20 like that?</p> <p>21 A I don't recall. I'm assuming he wanted -- he</p> <p>22 asked me to speak to him. I don't recall that</p> <p>23 though.</p> <p>24 Q Okay. Do you recall -- was it in an office</p> <p>25 there?</p>	<p>1 Q Stephens was going on vacation?</p> <p>2 A Yes.</p> <p>3 Q Okay. All right. Did Stephens say anything to</p> <p>4 you?</p> <p>5 A I think he just -- he explained to me how he</p> <p>6 had been taking medication, I don't know how</p> <p>7 long, but he had been involved in wanting to</p> <p>8 present himself as a female.</p> <p>9 Q Okay. Anything else?</p> <p>10 A I don't believe so.</p> <p>11 Q You indicated you were shocked at the letter.</p> <p>12 Did you have any other feelings about it?</p> <p>13 A No, I don't think so.</p> <p>14 Q Okay. You indicated that you would get back --</p> <p>15 you were going to decide what to do?</p> <p>16 A Yes.</p> <p>17 Q Okay. So what did you do next?</p> <p>18 A Contacted our corporate attorney.</p> <p>19 Q Okay. And I don't want to know anything about</p> <p>20 details or anything like that. But who is your</p> <p>21 corporate attorney?</p> <p>22 A David Thoms.</p> <p>23 Q Was that the same day?</p> <p>24 A I'm not sure.</p> <p>25 Q All right. Do you recall roughly when -- are</p>
<p>Page 111</p> <p>1 A I believe it was just in the chapel.</p> <p>2 Q Okay.</p> <p>3 A What we call a chapel.</p> <p>4 Q The living room facility?</p> <p>5 A The living room, yes. You probably wouldn't</p> <p>6 call it that.</p> <p>7 Q Okay. Was there anybody else present?</p> <p>8 A No.</p> <p>9 Q Do you recall the time of day?</p> <p>10 A I don't.</p> <p>11 Q Okay. So Stephens asked to meet with you or</p> <p>12 just approached you, what was the --</p> <p>13 A I'm not quite sure.</p> <p>14 Q Okay. Handed you the letter, though, correct?</p> <p>15 A Uh-huh.</p> <p>16 Q All right. You read the letter?</p> <p>17 A I read the letter.</p> <p>18 Q Okay. What was your reaction upon reading it?</p> <p>19 A Well, it was kind of a shocking letter. I</p> <p>20 believe I just said to him that I would get</p> <p>21 back to him. He was going to go away on</p> <p>22 vacation in a couple weeks and I would get back</p> <p>23 to him.</p> <p>24 Q He was going on vacation?</p> <p>25 A Yes.</p>	<p>Page 113</p> <p>1 we talking about the first week of August here,</p> <p>2 end of July, what's the time frame for this?</p> <p>3 A I'm going to say it was in August, because it</p> <p>4 seemed like he was going to go away in</p> <p>5 September and so I think it was two weeks</p> <p>6 before. So, I think it was probably certainly</p> <p>7 in August.</p> <p>8 Q Certainly in August. Okay. Now, who is David</p> <p>9 Thoms?</p> <p>10 A He's an attorney.</p> <p>11 Q From what firm?</p> <p>12 A Miller Canfield at the time.</p> <p>13 Q Where is Mr. Thoms now?</p> <p>14 A He's just moved to another law firm and I don't</p> <p>15 know the name offhand.</p> <p>16 Q Okay. Still your corporate attorney, though?</p> <p>17 A He is.</p> <p>18 Q How long has Mr. Thoms been your corporate</p> <p>19 attorney?</p> <p>20 A 40 years.</p> <p>21 Q What kind of work does Mr. Thoms do for you,</p> <p>22 what kind of --</p> <p>23 A Well, whatever corporate attorneys do. You</p> <p>24 know, they fill out our forms and --</p> <p>25 Q Okay. The corporate filings --</p>

Page 126	Page 128
<p>1 Q Okay. How did you fire Stephens; how did you 2 let Ms. Stephens know that she was being 3 released? 4 A Well, I said to him, just before he was -- it 5 was right before he was going to go on vacation 6 and I just -- I said -- I just said "Anthony, 7 this is not going to work out. And that your 8 services would no longer be needed here." 9 Q That's at the Garden City location? 10 A Yes. 11 Q What time of day was it? 12 A It was later in the afternoon. 13 Q Where did you meet Stephens? 14 A In the chapel. 15 Q Chapel again? 16 A Uh-huh. 17 Q Did you ask for the meeting or did he ask -- 18 A Yes. 19 Q All right. Did you present them with a 20 severance agreement? 21 A I did. 22 Q Okay. Apart from saying "Not going to work 23 out", do you recall anything else that you 24 said? 25 A No.</p>	<p>1 Q Is that e-mail or what? 2 A No, it's fax. 3 Q Okay. Do you still have a copy of that fax? 4 A No. 5 Q Do you recall what it said? 6 A I do not. 7 Q Would you have personally faxed it or would 8 that have been something that you would have 9 Shannon or -- 10 A She would have sent it, yes. 11 Q Okay. Now, when your -- did you tell Stephens 12 about any of your concerns regarding that 13 you've talked about today, your religious 14 freedom rights, you know, the affect on the 15 ministry or anything like that? 16 A Did not talk to him about anything. 17 Q Just said "This is not going to work out"? 18 A That's exactly right. 19 Q And "Here's a severance agreement"? 20 A Yes. 21 Q And that's it? 22 A That's it. 23 Q Have you ever fired anyone else at Harris 24 because of a -- what you believe to be a 25 conflict with your religious concerns?</p>
<p>1 Q How long did this conversation take? 2 A Not very long. Couple minutes. 3 Q Couple minutes total? 4 A Uh-huh. 5 Q What did Stephens say? 6 A He was sorry that it wasn't going to work out. 7 And said that he might have to contact his 8 attorney or an attorney. And I said, "Well, 9 you do whatever you feel you have to do." And 10 that was the end of the conversation. 11 Q Did Stephens leave the facility at that point? 12 A He did. 13 Q Did you ever talk to anybody else about -- 14 apart from your management team, did you ever 15 talk to anybody else about Stephens and the 16 letter that you received? 17 A No. Obviously everybody became aware of it in 18 the staff pretty quickly, but no. 19 Q Did you let people know that you fired 20 Stephens? 21 A After the -- sure. Afterwards, sure. 22 Q Okay. Who did you contact? 23 A I probably sent it out in a little notice of 24 some kind, that's usually what we would do, 25 just to --</p>	<p>1 MR. KIRKPATRICK: Objection, 2 relevance. Go ahead and answer. 3 THE WITNESS: No. 4 BY MR. PRICE: 5 Q Okay. Never fired anybody for adultery or sex 6 out of marriage or anything like that, no? 7 A No. 8 Q Okay. No other kind of moral objection, any 9 objection you would have that would have a 10 religious objection, you've never fired anybody 11 for? 12 A No. 13 Q Moving on to Number 14 in the last item on the 14 Notice 30(b)(6), "The identity of the 15 individuals or individual or individuals who 16 decided to terminate Aimee Stephens and who 17 played any role in making, reviewing or 18 supporting that decision." 19 This was your decision, correct? 20 A Correct. 21 Q Okay. You did not ask for the input of anybody 22 else at R.G. G.R.? 23 A No. 24 Q Okay. And it was -- the only documents that 25 you reviewed in making the decision would have</p>

	Page 134		Page 136
<p>1 which is the answer to the Complaint. Turn to 2 page 3.</p> <p>3 Now, you were asked by Mr. Price 4 about the affirmative defenses; do you recall 5 that?</p> <p>6 A Yes. 7 Q Just so we understand, are you an attorney? 8 A No. 9 Q Do you have any legal training, per se? 10 A No. 11 Q Do you understand, perhaps conceptually, what 12 affirmative defenses are in the context of a 13 Federal lawsuit?</p> <p>14 A No. 15 Q Okay. So, can you speak to perhaps what may be 16 an appropriate affirmative defense or what 17 might not be an appropriate affirmative defense 18 in the context of answering a lawsuit? 19 A No. 20 Q Okay. You just relied on Counsel's advice? 21 A Yes. 22 Q All right. I'm going to ask you to review 23 Exhibit 2. Can you tell me the date of that 24 Exhibit at the bottom, what it's dated? 25 A It looks like 9, September, '13.</p>		<p>1 A Well, because he -- he was no longer going to 2 represent himself as a man. He wanted to dress 3 as a woman. 4 Q Okay. So he presented you this letter, which I 5 think is Exhibit -- I forgot what Exhibit 6 Number it was -- might have been the last one. 7 Is it 7? 8 A Number 7, yes. 9 Q Yeah, Exhibit 7. So just for a little 10 background and pursuant to the question of Mr. 11 Price, you were presented that letter from 12 Stephens? 13 A Correct. 14 Q Okay. And did anywhere in that letter indicate 15 that Stephens would continue to dress under 16 your dress code as a man in the workplace? 17 A No. 18 Q Did he ever tell you during your meeting when 19 he handed you that letter that he would 20 continue to dress as a man? 21 A No. 22 Q Did he indicate that he would dress as a woman? 23 A Yes. Yes. 24 Q Okay. Is it -- the reason you fired him, was 25 it because he claimed that he was really a</p>	
<p>1 Q 2013? 2 A Yes. 3 Q Would it be fair to say that that date is 4 shortly after Stephens was terminated from 5 employment? 6 A Yes. 7 Q Was there a Federal lawsuit filed against your 8 company at the time, Harris Funeral Homes at 9 the time that that thing was filled out? 10 A No. I -- no. 11 Q Okay. And so, would it be fair to say that you 12 received that document at some point; was it 13 mailed to your location? 14 A Yes. 15 Q Okay. I think there was testimony you didn't 16 recall and that it might have gotten to 17 somebody else, but is it possible that you 18 received that? 19 A Yes, we would have received it, yes. 20 Q Now, you had given some testimony pursuant to 21 Mr. Price's questioning about why you 22 terminated Stephens. Do you recall that? 23 A Yes. 24 Q Okay. Why did you -- what was the specific 25 reason that you terminated Stephens?</p>	Page 135	<p>1 woman; is that why you fired him or was it 2 because he claimed -- or that he would no 3 longer dress as a man? 4 A That he would no longer dress as a man. 5 Q And why was that a problem? 6 A Well, because we -- we have a dress code that 7 is very specific that men will dress as men; in 8 appropriate manner, in a suit and tie that we 9 provide and that women will conform to their 10 dress code that we specify. 11 Q So hypothetically speaking, if Stephens had 12 told you that he believed that he was a woman, 13 but would only present as a woman outside of 14 work, would you have terminated him? 15 A No. 16 Q Would you have hired and terminated somebody 17 for being gay? 18 A No. 19 MR. PRICE: Objection, speculation. 20 MR. KIRKPATRICK: Okay. Okay. 21 Speculation. 22 BY MR. KIRKPATRICK: 23 Q You had some questions about your moral beliefs 24 and whether or not you fired somebody for being 25 an adulterer; do you recall that?</p>	Page 137

<p style="text-align: right;">Page 138</p> <p>1 A Yes.</p> <p>2 Q Would you fire someone just for being an adulterer?</p> <p>3 A No.</p> <p>4 Q As long as they followed the rules would they stay?</p> <p>5 A Yes.</p> <p>6 Q Including the dress code?</p> <p>7 A Yes.</p> <p>8 Q Okay. Or a woman who claimed that she had an abortion, as long as she followed the rules, would you have fired her?</p> <p>9 A Yeah -- no, I wouldn't have fired her.</p> <p>10 Q Okay. As long as she followed the rules, she could stay?</p> <p>11 A Yes.</p> <p>12 Q All right. Have you ever hired any gay people?</p> <p>13 A Yes.</p> <p>14 Q Or I should say, have you ever had any gay people work for you?</p> <p>15 A Yes.</p> <p>16 Q Have you ever fired them for that reason?</p> <p>17 A No.</p> <p>18 Q Okay. Now, there was questions about issues after Stephens was fired and things that you</p>	<p style="text-align: right;">Page 140</p> <p>1 EEOC investigator. Do you recall that?</p> <p>2 A Yes. Yes.</p> <p>3 Q Now, you were interviewed by this EEOC investigator prior to this lawsuit being filed against you?</p> <p>4 A That's correct.</p> <p>5 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?</p> <p>6 A Yes.</p> <p>7 Q And we just made it clear that there was no lawsuit filed at the time?</p> <p>8 A That's right.</p> <p>9 Q And you just answered her questions, correct?</p> <p>10 A That's right.</p> <p>11 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?</p> <p>12 A No.</p> <p>13 MR. KIRKPATRICK: Okay. All right. That's it for me.</p> <p>14 RE-EXAMINATION</p> <p>15 BY MR. PRICE:</p> <p>16 Q You were just asked about the investigator, you</p>
<p style="text-align: right;">Page 139</p> <p>1 were thinking of when Mr. Price was questioning you and there was an issue of safety using restrooms; do you recall that?</p> <p>2 A Yes.</p> <p>3 Q That word "Safety", was it -- what, you believed that he was going the be physically dangerous to people?</p> <p>4 A No. No.</p> <p>5 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?</p> <p>6 A Well, just presenting in a funeral home an environment that is suitable for them to begin the healing process.</p> <p>7 Q Okay. Would it be uncomfortable?</p> <p>8 A Yeah, that it's a comfortable situation, yeah.</p> <p>9 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?</p> <p>10 A No.</p> <p>11 Q Okay. There was some questions that Mr. Price asked you about your interview you had with the</p>	<p style="text-align: right;">Page 141</p> <p>1 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?</p> <p>2 A I don't understand.</p> <p>3 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?</p> <p>4 A No. But it wasn't up in a discussion, so it wouldn't be something that I would bring up.</p> <p>5 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?</p> <p>6 A Yes.</p> <p>7 Q Okay. Now you're dealing with a Federal agency that's asking you your position on a charge, correct?</p> <p>8 A Yes.</p> <p>9 Q Okay. Wouldn't you feel the need to be as forthright and complete as possible in setting forth your justifications?</p> <p>10 A Yes, but she didn't ask me specific questions about my religious beliefs, or beliefs at the</p>

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1 funeral home.

2 Q Why would she have to if you don't mention that

3 in any of your earlier responses?

4 A I don't know why I would have to necessarily

5 bring it up.

6 Q So, how was the government supposed to

7 understand that you have a religious objection

8 or religious concerns if you don't raise them?

9 A That's why they're raised now.

10 Q Okay. But you didn't feel -- you felt like you

11 didn't need to bother to bring that up during

12 the investigation part?

13 A I just thought that was just an investigation,

14 she presented herself and said she's there just

15 to investigate this, and make it as simple and

16 as clean as possible.

17 Q You were asked about the mission statement.

18 Talking about, yes, at the first paragraph.

19 A Uh-huh.

20 Q My apology, I did miss that. Talks about

21 honoring God in all you do as a company and

22 individuals.

23 Do you believe that it would -- you

24 would not have been honoring God if you

25 continued to employ Aimee Stephens?

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1 A Yes.

2 Q You would not have been honoring God to keep

3 that person in place?

4 A Yes.

5 Q And why not?

6 A Because it would be, I believe, a huge

7 disservice to the families that have called

8 upon me, and expect certain criteria and

9 certain services to be offered them. I think I

10 would be doing them a huge disservice to them

11 and to my -- to my staff, people that work for

12 me, everybody that's involved.

13 Q And to your own personal faith?

14 A Absolutely.

15 Q Okay. Because as you said before, God made men

16 as men and women as women?

17 A Exactly.

18 Q Your -- it was mentioned before that you don't

19 honor all of the legal holidays, obviously like

20 Veteran's Day. Why are those six picked and no

21 others?

22 A Well, I didn't have anything to do with picking

23 those, but they go back way before my time. I

24 guess those were the original six considered

25 legal holidays.

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1 Q Okay.

2 A And I guess just out of tradition we've never

3 changed.

4 Q Has there been any discussion of having Easter

5 as a --

6 A It has been discussed.

7 Q Okay. What was the -- what was the thought?

8 Why not?

9 MR. KIRKPATRICK: Objection to

10 relevance. Go ahead and answer if you can.

11 THE WITNESS: It would require, you

12 know, additional pay for one thing.

13 BY MR. PRICE:

14 Q There's an expense to it?

15 A Yeah, there's an expense to it, of course.

16 Q Okay. Because I believe the holiday pay works

17 you get -- you get an extra paid day, like paid

18 for six days even though you're working five?

19 A Exactly. Even when you're -- yeah, when you're

20 not working so you're getting paid, yeah.

21 Q Okay. You said -- you've been told -- or

22 mentioned that you've had gay people work for

23 you. Do you recall when most recently that

24 was?

25 A It's been awhile. It's been quite a number of

Page 145

1 years since I've had a gay person, that I'm

2 aware of, there.

3 Q Okay. And what position was that?

4 A I've had some part-time people. I think I did

5 years ago there was a funeral director that

6 was.

7 Q Okay. How long are we talking ago?

8 A Over 40 years ago.

9 Q So this is back before the time you were even

10 president? They were hired before you were

11 president?

12 A Yeah. But the part-time person wasn't.

13 Q Okay, when was that?

14 A I'd say about 20 years ago.

15 Q Did you know the person was gay when you hired

16 them or did you find out after?

17 A After.

18 Q Okay. Have both those persons retired?

19 A I have no idea.

20 Q Okay. It's been over 20 years since the last

21 one worked for you then?

22 A Yes.

23 Q How did that person leave?

24 A He just -- he just left.

25 Q Okay.

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1 A He had another job.
 2 Q All right.
 3 A And -- yeah.
 4 Q What about the funeral director, how did that
 5 person leave?
 6 A He left, he went in business for himself and I
 7 don't know. Whatever happened.
 8 MR. PRICE: Okay. All right. I
 9 don't have any other questions.
 10 MR. KIRKPATRICK: I think we're
 11 good.
 12 (The 30(b)(6) deposition of Thomas
 13 Rost concluded at or about the hour of 1:10
 14 p.m.)
 15
 16
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 25

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1 CERTIFICATE OF REPORTER
 2 STATE OF MICHIGAN)
)SS:
 3 COUNTY OF GENESEE)
 4 I, Quentina R. Snowden, a duly
 commissioned and licensed Court Reporter,
 5 Genesee County, State of Michigan, do hereby
 certify: That I reported the taking of the
 6 deposition of the witness, THOMAS ROST,
 commencing on Thursday, November 12, 2015, at
 7 9:30 a.m.
 8 That prior to being examined, the
 witness was, by me, duly sworn to testify to
 9 the truth. That I thereafter transcribed my
 said shorthand notes into typewriting and that
 10 the typewritten transcript of said deposition
 is a complete, true and accurate transcription
 11 of said shorthand notes.
 12 I further certify that I am not a
 relative or employee of an attorney or counsel
 13 of any of the parties, nor a relative or
 employee of an attorney or counsel involved in
 14 said action, nor a person financially
 interested in the action.
 15
 16 IN WITNESS WHEREOF, I have hereunto
 set my hand, in my office, in the County of
 Genesee, State of Michigan, this 23rd day of
 17 November, 2015.
 18
 19 
 20 _____
 QUENTINA R. SNOWDEN, CSR NO. 5519
 21
 22
 23
 24
 25

Errata Sheet to the Deposition of Thomas Rost, Nov. 12, 2015 Deposition

Pg. 14, Line 5: Change "No I can't." to: No, I can't speak to facts on the authority of the Commission legal issue.

Pg. Pg. 16, Line 10: Change "No." to: No, I don't have facts because I don't know how they apply to the legal theory.

Pg. 18, Line 6: Change "No." to: No, because I don't understand the legal issues in the Fifth and Fourteenth Amendments.

Pg. 26, Line 4: Change "I can't speak to that." To: I can't speak to that. I can't speak to what the Fifth and Fourteenth Amendments mean.

Pg. 26, Line 7: Change "No. Right." To: No. Right. I don't know what facts apply to the Fifth and Fourteenth Amendments.

Pg. 26, Line 19: Change: "I won't be able to address that." To: I won't be able to address that because I don't know how facts apply to the First Amendment.

Pg. 29, Line 19: Change "No." to: No, I can't speak to what the First Amendment means and how it applies to facts I know.

Pg. 32, Line 10: Change "rights" to "rites."

Pg. 33, Lines 2-3: Change "'we sing silent night" to "we sing the song, Silent Night"

Pg. 33, Line 18: Change "No." to "No, but it sometimes uses religious themes."

Pg. 36, Line 16: Change "No, they have Jewish funeral homes. Yes." To: Yes, I am open to it, but no, it doesn't happen very often because they have Jewish funeral homes.

Pg. 40, line 4: Change "a little daily devotional;" to: a little daily Christian devotional.

Pg. 41, Line 19: Change "Specifically that way, not just in word only." To: Specifically in the way they act and conduct themselves, and not just in word only.

Pg. 42, Line 18: Change "Not in – not in terms of religion." To: "Not in terms of religion that I can tell apply to the First Amendment. It does violate my personal religious beliefs.

Pg. 43, Line 21: Change "Correct." To: Correct. Title VII categories you mentioned do not interfere with my religious beliefs. The charges in this case do interfere.

Pg. 54, Line 25: Change "Absolutely." To: Absolutely, because not following the dress code would distract the people in grief we are serving.

Page 55, Line 19: Change "Yes. Uh-huh." To: Yes, for my personal beliefs on how I serve people in grief.

Page 68, Line 7: Change "this as a ministry." To: this as a ministry to grieving people.

Pg. 69, Line 17, Change: "the dress code that was required." To: the dress code that was required, which would distract grieving people.

Pg. 70, Line 6: Change "Yes." To: Yes, conservatively and in a way that does not distract mourners.

Pg. 73, Line 4: Change: "Yeah, I don't think there is any other way." To: Yeah, I don't think there is any other way, but I am not a lawyer and don't know how the law applies.

Pg. 74, Line 20: Change "Absolutely." To: Absolutely, that visitors would be concerned about that possibility.

Pg. 83, Line 16: Change "Uh-huh" to: Yes.

Pg. 85, Line 1: Change ""Well, it wouldn't be intent to." To: Well, it wouldn't be our intent to do so.

Pg. 85, Lines 9,15: Change "Uh-huh" to" Yes.

Pg. 87, Lines 18-20: Change: "Well, other than the way we practice our business and we practice our faith through our business." To: The way we practice our business is that we practice our faith through our business.

Pg. 98, Line 7: Change “Yeah, there’s no other –yeah.” to: Yes, there is no other, to the degree I understand Title VII.

Pg. 106, Lines 6, 9: Change “No” in both lines to: No, but there are routines and ways we expect things to be done.

Pg. 132, Line 7: Change “uh-huh” to: yes.

Pg. 142, Line 19: Change “uh-huh” to: yes.



Thomas Rost, individually



**Thomas Rost,
President of R.G. G.R. Funeral Homes, Inc**

EXHIBIT 5

1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4

5 EQUAL EMPLOYMENT OPPORTUNITY)
6 COMMISSION,)

7 Plaintiff,)

8 vs.) Case No. 14-13710

9 R.G. & G.R. HARRIS FUNERAL) Hon. Sean F. Cox

10 HOMES, INC.,) United States

11 Defendants.) District Court Judge

12 _____)

13
14 DEPOSITION OF SHANNON KISH

15 PLYMOUTH, MICHIGAN

16 FRIDAY, NOVEMBER 13, 2015
17
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19
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22
23

24 REPORTED BY: QUENTINA R. SNOWDEN, CSR NO. 5519

25 JOB NO.: 276004-B

<p style="text-align: right;">Page 14</p> <p>1 of discrimination --</p> <p>2 A Oh, no, no.</p> <p>3 Q With the Department of Labor for a wage hour --</p> <p>4 A No.</p> <p>5 Q So no administrative claims?</p> <p>6 A Myself personally?</p> <p>7 Q Yeah, have you --</p> <p>8 A No. No.</p> <p>9 Q And how did you prepare for this deposition?</p> <p>10 A I'm not sure what you --</p> <p>11 Q Did you meet with your attorney, Mr.</p> <p>12 Kirkpatrick?</p> <p>13 A Yes.</p> <p>14 Q Or R.G. G.R.'s attorney, Mr. Kirkpatrick.</p> <p>15 A Yes.</p> <p>16 Q I want to caution you, the substance of any</p> <p>17 communications you have with him are protected</p> <p>18 by attorney/client privilege, so I'm not</p> <p>19 entitled to know what you discussed with him.</p> <p>20 But, that you met, where you met, how long you</p> <p>21 met, those sort of things are not protected by</p> <p>22 the privilege. But please don't testify to any</p> <p>23 of the substance of the communication by you</p> <p>24 and Mr. Kirkpatrick, okay?</p> <p>25 A I understand.</p>	<p style="text-align: right;">Page 16</p> <p>1 Q Okay. Then you assisted with preparing</p> <p>2 documents to respond to the EEOC's questions</p> <p>3 during the investigation, you think?</p> <p>4 A Yes.</p> <p>5 Q And I believe you in fact have prepared some</p> <p>6 documents in response to some of the EEOC's</p> <p>7 discovery requests in this lawsuit; is that</p> <p>8 correct?</p> <p>9 A That is correct.</p> <p>10 Q Okay. It's my understanding that R.G. G.R. has</p> <p>11 a dress code; is that correct?</p> <p>12 A Yes.</p> <p>13 Q Could you describe what the dress code is?</p> <p>14 A The dress code for men, women, both.</p> <p>15 Q Let's start with women.</p> <p>16 A We are to dress professionally.</p> <p>17 Q Are there any other requirements to the dress</p> <p>18 code?</p> <p>19 A Muted colors. Not too flashy jewelry, not</p> <p>20 crazy nails, you know, per se. A jacket. Not</p> <p>21 crazy shoes, not crazy high heels.</p> <p>22 Q By "Crazy", you mean flashy, I assume?</p> <p>23 A Correct. It's very muted, is the word I would</p> <p>24 use. Blouses or -- you know, that are simple,</p> <p>25 you know, going with the muted color schemes.</p>
<p style="text-align: right;">Page 15</p> <p>1 Q When did you meet with him?</p> <p>2 A Yesterday -- no, Wednesday.</p> <p>3 Q Okay.</p> <p>4 A Wednesday.</p> <p>5 Q And how long did the meeting last?</p> <p>6 A Ten minutes.</p> <p>7 Q Did you review any documents?</p> <p>8 A No.</p> <p>9 Q This lawsuit arises out of a charge of</p> <p>10 discrimination that Aimee Stephens filed with</p> <p>11 the EEOC. Were you aware of that charge?</p> <p>12 A Yes.</p> <p>13 Q What was your role in dealing with the EEOC</p> <p>14 during the investigation of that charge?</p> <p>15 A What was my role in dealing with --</p> <p>16 Q The EEOC.</p> <p>17 A I didn't really have a specific role. I did</p> <p>18 prepare some documents, gave them to Tom or --</p> <p>19 you know, received some documents, gave them to</p> <p>20 Tom.</p> <p>21 Q Okay. Do you remember what sort of documents</p> <p>22 you prepared or received?</p> <p>23 A I believe the actual Complaint came to my</p> <p>24 office to the actual Detroit location. I took</p> <p>25 that in and gave it to Tom.</p>	<p style="text-align: right;">Page 17</p> <p>1 That kind of thing.</p> <p>2 Q And only skirts, no pant suits?</p> <p>3 A Skirts are preferred, the preferred method of</p> <p>4 dress, yes.</p> <p>5 Q Okay. And is that it for the female dress</p> <p>6 code?</p> <p>7 A That's pretty much, yeah. Yeah.</p> <p>8 Q Okay. And the male dress code?</p> <p>9 A The men wear a suit and pants. There's a</p> <p>10 matching tie, so that it's very uniformed. A</p> <p>11 white dress shirt. I believe there is a</p> <p>12 requirement about shoes that they're not boots</p> <p>13 or they're more dress shoes. There's certain</p> <p>14 lapel pins that they can wear, and what they</p> <p>15 can keep in their pocket. So that it's not</p> <p>16 overly bulging, and that's about it.</p> <p>17 Q Okay. And the dress code is by gender and not</p> <p>18 by position type, correct?</p> <p>19 A I wouldn't exactly say that, because I believe</p> <p>20 that the funeral directors wear the same</p> <p>21 matching suits, opposed to like a non-funeral</p> <p>22 director.</p> <p>23 Q So what would a non-funeral director wear?</p> <p>24 A A dark jacket, a shirt and a tie, dark pants.</p> <p>25 Q It's my understanding that R.G. G.R. provides</p>

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<p style="text-align: right;">Page 18</p> <p>1 suits to its male employees? 2 A That -- that is correct. 3 Q To both funeral directors and non-funeral 4 directors? 5 A That's correct, yeah. 6 Q Okay. 7 A Yeah. 8 Q You look a little hesitant. 9 A Well, sometimes if they're -- like sometimes if 10 it's a part-time person, very part-time what I 11 just described, suit or the jacket and pants 12 are acceptable. 13 Q Okay. I believe Mr. Rost testified that 14 full-time male employees get two suits provided 15 by the company, plus two ties, and part-time 16 employees get one suit, but there are -- are 17 you testifying that there are certain part-time 18 employees that may not get a suit at all? 19 A Well, there are part-time male employees that 20 are not funeral directors and are not runners 21 that generally just dress in what I'm saying. 22 Q Okay. 23 A You know. That they're not funeral directors 24 or runners for us. 25 Q What is a runner?</p>	<p style="text-align: right;">Page 20</p> <p>1 information on it? 2 A Correct. 3 Q Okay. Do you know how often R.G. G.R. provides 4 suits to its male employees? 5 A They're pretty much as if -- wear and tear. 6 Q As needed? 7 A Uh-huh. 8 Q So upon hire, full-time employees are given two 9 suits, part-time employees one, and then 10 they're replaced as needed? 11 A That's fair to say, yeah. 12 Q So we have two suits and two ties or one suit 13 and one tie. Any other clothing that's 14 provided by R.G. G.R.? 15 A No. 16 Q And it's my understanding that R.G. G.R. now 17 has a dress allowance for its female employees; 18 is that correct? 19 A Clothing allowance. 20 Q Clothing allowance. Could you describe what 21 the clothing allowance is? 22 A \$150 for a full-time person and \$75 for the 23 part-time. 24 Q And this is per year? 25 A That's correct.</p>
<p style="text-align: right;">Page 19</p> <p>1 A A runner would be someone who goes and obtains 2 a doctor's signature on a death certificate. 3 Sometimes they'll make a removal from where the 4 death has occurred. But generally they are all 5 wearing the matching suit. 6 Q Okay. And do you know where R.G. G.R. obtains 7 the suits that it provides for its male 8 employees? 9 A Yes. I think it's called Sam's -- I don't 10 recall the exact name. But it's -- 11 Q Okay. 12 A It's called Sam's, I believe. 13 Q And are you responsible for paying invoices 14 from that -- from Sam's? 15 A That is correct. They're usually set up on a 16 charge that is sent to us. 17 Q And you maintain those records for those 18 invoices? 19 A I do. 20 Q Okay. Do you have any knowledge of how much 21 R.G. G.R. pays for a suit from Sam's? 22 A For each suit individually? I want to say it 23 might be like 200. Depends on the tailoring. 24 So sometimes they'll vary a little bit. 25 Q But the charge records would have that</p>	<p style="text-align: right;">Page 21</p> <p>1 Q Do you know when the clothing allowance was 2 implemented? 3 A 2014. 4 Q 2014. Do you know why the clothing allowance 5 was implemented? 6 A At one time, they tried to do the womens (sic) 7 -- to all have the same suit. And I've been 8 there so long, I can tell you it was a fiasco. 9 We have younger females. We have older 10 females. We have tall and skinny, short and 11 full-figured. No one could agree on anything. 12 So, it -- and that's just simply 13 the truth. And we were then given the option 14 to wear, you know, the skirt that you were -- 15 you know, whatever you were comfortable in, the 16 colors had to comply; and so they re-brought 17 that in to give us some help to get jackets or 18 blouses or skirts or -- 19 Q Do you remember when those -- that discussion 20 regarding the -- whether R.G. G.R. would 21 provide clothing to its female employees, when 22 that was? 23 A It was several times over the course of the 24 time that I was there. 25 Q Okay. So from 1986, '89?</p>

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<p>1 of our content is a deceased obituary 2 information that we provide that free of charge 3 to them, picture, if there's a video, and then 4 the content of the obituary. 5 Q So it's a FuneralNet does some sort of 6 modifications to the Facebook page to keep it 7 updated? 8 A Correct. 9 Q Then your clients can use it to communicate -- 10 A A death. 11 Q -- a death? Funeral information and obituary? 12 A Uh-huh. Uh-huh. 13 Q And do you have to get Tom's approval to post 14 anything on Facebook or is it within your 15 discretion to maintain -- 16 A Within my discretion. 17 Q And do you have any -- FuneralNet, I take it, 18 also -- scratch that. Sorry. 19 This is Exhibit 5 which is R.G. 20 G.R.'s website. FuneralNet is also responsible 21 for creating that website? 22 A This is our website, yes. 23 Q And FuneralNet is responsible for providing 24 that and the Facebook page? 25 A They provide -- we pay them to build the</p>		<p>1 general. This mission statement was actually 2 obtained from another -- like another funeral 3 home based on that. 4 Q Oh, okay. Do you know which funeral home? 5 A No, I don't. 6 Q And do you know when this mission statement was 7 created? 8 A It's been probably possibly 10 years ago, 15, 9 20 years ago. 10 Q Okay. Does it pre-date the web page? 11 A Yes. 12 Q Prior to the creation of the web page, where 13 would this mission statement appear? 14 A It was on a sheet mostly possibly in the family 15 folders that we give the families. 16 Q Okay. 17 A I don't recall that far back. 18 Q Okay. I take it it's still in the family 19 folders that you provide? 20 A No, it's not. 21 Q Do you still provide family folders? 22 A Yes, we do. 23 Q What's in a family folder? 24 A Veteran's information on how to get benefits, 25 Social Security information on how to get</p>	
<p>1 website and then we pay them to set up the 2 Facebook page to optimize -- there's 3 optimization that you can do that I'm not aware 4 of and they offered to do that, and what's they 5 did. 6 Q Are you responsible for any of the content on 7 R.G. G.R.'s website? 8 A I gave them the content to put on our website. 9 Q And did you draft that content or were you 10 given that content? 11 A I was given the content. 12 Q Okay. Who gave you the content? 13 A Tom gave me the mission statement content. 14 Q Did you have any input in the mission statement 15 at all? 16 A No. 17 Q And do you know if there's any -- going -- back 18 tracking to Facebook, are you aware of any 19 religious postings from R.G. G.R. on this 20 Facebook page? 21 A No. No. 22 Q Okay. And are you aware of any religious 23 postings of R.G. G.R. on its website? 24 A No. I believe there's a quote at the bottom of 25 the mission statement. But that was just in</p>	Page 31	<p>1 benefits and what to do at the time of death, 2 what's called a checklist for the estate which 3 is a -- we put together everything that you 4 need to do when a death occurs and you're not 5 thinking clearly, to take care of it all. 6 There's some after-care information. There's a 7 card with the manager's name. And there's 8 maybe some marker information if you want a 9 marker after. Just things to follow up with. 10 Q Okay. Do you remember when R.G. G.R. stopped 11 including the mission statement in those 12 folders? 13 A No, and like I said, I don't -- I should have 14 said I guess they were in there. 15 Q Okay. 16 A I -- that would have been the only place that 17 we would have put them. 18 Q I got you. Who is responsible for compiling 19 the folders? 20 A The girls in the office. When there's down 21 time any -- 22 Q In the Detroit office? 23 A It could be any one of the offices. 24 Q Okay. Let's -- just so I can get a better 25 understanding of the structure of R.G. G.R., so</p>	Page 33

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<p>1 there's the Detroit location. What other 2 locations are there? 3 A We have a location in Livonia and Garden City. 4 Q And what sort of staffing are in Livonia and 5 Garden City? 6 A There would be a manager, there's the admin 7 girls, which, you know, are also greeters at 8 the door. There would be a maintenance person, 9 a licensed embalmer, generally, and that really 10 about covers it. 11 Q Okay. Are managers also known as funeral 12 directors? 13 A Yes. 14 Q Are licensed embalmers also known as funeral 15 directors? 16 A Yes. 17 Q What's the distinction then between a manager 18 and a licensed embalmer, how do their duties 19 overlap and how do they -- how are they 20 different? 21 A A funeral director is a person who has a 22 license with the State of Michigan. 23 Q Okay. 24 A They all -- if you're licensed, then you can 25 embalm. You can run a funeral. You can also</p>	<p>1 Detroit though? 2 A No. 3 Q In Livonia you do? 4 A Yes. Yes. 5 Q Do you remember his name? 6 A Derek H-A-M-E-R. 7 Q And how about in Garden City? 8 A Yes. 9 Q His name? 10 A Troy, S-H-A-F-ER. 11 Q And do you know any of the admin people in 12 Garden City or Livonia? 13 A I do. 14 Q Who are the admin people in Garden City? 15 A Dolly Nemeth, Sharon Hasset. They just hired a 16 new girl Laura. I don't remember her last 17 name. It's very recent. Michelle. There's 18 one more. Paula Rike (ph), she's new. 19 Q And David Kowalewski is responsible for making 20 those hiring decisions? 21 A At Garden City? 22 Q Yes. 23 A Yes. 24 Q So he doesn't need to get your approval or Tom 25 Rost's approval?</p>
<p>1 sign certain documents like a death certificate 2 or cremation permit. A -- really what 3 distinguishes ours is we have three licensed 4 funeral directors that are managers of each 5 location. The difference in their job duties 6 is they're managing the whole entire location, 7 opposed to someone who's just there to embalm 8 and possibly direct a funeral. 9 Q I see. I see. So who is the manager at the 10 Detroit location? 11 A Matthew Rost. 12 Q Is he any relation to Tom Rost? 13 A Son. 14 Q And the manager at the Livonia? 15 A David Cash. 16 Q And how about at Garden City? 17 A David -- do you want me to spell the last name? 18 It's K-O-W-A-L-E-W-S-K-I. 19 Q And who is the embalmer in Detroit? 20 A We don't have an embalmer just set at Detroit. 21 Matthew Rost can also embalm. 22 Q Okay. 23 A Any funeral director, licensed funeral 24 director, can embalm. 25 Q So you don't have a specific embalmer in</p>	<p>1 A No. They -- he can hire. 2 Q Okay. Does he need to get approval not for the 3 specific person to hire, but to hire a position 4 to get a new position? 5 A I don't know what you mean like a new position. 6 Q So he is given a budget from which he 7 determines how many personnel he wants; or -- 8 A There's no budget given to anybody -- 9 Q Okay. 10 A -- for hiring. 11 Q So let's say Garden City had three full-time 12 admin people and David determines that they 13 need another admin person, would he have to ask 14 permission from Tom to get that new -- 15 A He would talk to Tom. 16 Q Okay. And the admin people in Livonia? 17 A Sue Harrison. Let's see, who else is there? 18 Pamela Ploski. They just hired a new girl, 19 Terry -- I don't remember her last name. 20 Q Okay. 21 A She's new. Denise Coleman. And I think that 22 covers them all. 23 Q And outside of the admin personnel that you 24 supervise and the accounting personnel that you 25 supervise, who else is at the Detroit location?</p>

<p style="text-align: right;">Page 54</p> <p>1 Q Has any other employee been disciplined or 2 terminated for dress code violations? 3 A Yes. 4 Q Do you remember when? 5 A It was an employee who's no longer with us, he 6 wore a jacket into a nursing home for removal, 7 and the nursing home called because they didn't 8 care for the content of the jacket and he was 9 talked to and told not to wear the jacket 10 anymore, and he didn't. 11 Q It wasn't a suit jacket -- 12 A It was a regular jacket. 13 Q Regular jacket that had some writing on it? 14 A Yes. 15 Q Do you remember what the writing was? 16 A It said "body snatcher." 17 Q So Mr. Rost counseled him verbally? 18 A The manager, David Kowalewski, talked to him. 19 The other managers talked to him and said no 20 more jacket. 21 Q Okay. And then he stopped wearing it? 22 A And never wore it again. 23 Q So he wasn't -- the reason he no longer works 24 for R.G. G.R. isn't because he was terminated 25 for wearing the jacket?</p>	<p style="text-align: right;">Page 56</p> <p>1 MR. SHULTZ: I think if you give me 2 a couple minutes. 3 MR. PRICE: Take a break? 4 (Off the record at 11:16 a.m.) 5 (Back on the record at 11:26 a.m.) 6 MR. SHULTZ: Just a few followup 7 questions to tidy up the record, then Joel will 8 have some limited questions, I assume, and then 9 we're almost done. So moving fast, thanks. 10 THE WITNESS: Okay. 11 BY MR. SHULTZ: 12 Q I'd like to go back to the chart. 13 A This chart? 14 Q Yeah. I believe you said your son works at the 15 Detroit office, right? 16 A Correct. 17 Q David? 18 A Ryan. 19 Q Ryan. I don't see him -- 20 A He just started with us -- 21 Q Oh, okay. 22 A -- not too long ago. 23 Q So he received the two suits when he started? 24 A No. He works in the accounting department with 25 me.</p>
<p style="text-align: right;">Page 55</p> <p>1 A No, he was not terminated for that. 2 Q Okay. Any other dress code violations that you 3 can remember? 4 A No. If somebody is not wearing the appropriate 5 clothing, it's brought up to them and they are 6 to wear what we are supposed to wear. 7 Q Okay. What is your perception or understanding 8 of the religious environment at R.G. G.R.? 9 A I'm sorry, one more time. 10 Q What is your perception or understanding of the 11 religious environment at R.G. G.R.? I can be 12 more specific. 13 A Please. 14 Q Are there employee Bible studies? 15 A No. 16 Q Prayer groups? 17 A No. 18 Q Any sort of religious activities that R.G. G.R. 19 sponsors or conducts for its employees? 20 A No. 21 Q Mr. Rost or another R.G. G.R. employee -- 22 scratch that. 23 Has Mr. Rost ever discussed his 24 religious beliefs with you? 25 A No.</p>	<p style="text-align: right;">Page 57</p> <p>1 Q Okay. So he doesn't get a suit? 2 A No. 3 Q Okay. Will he get a clothing allowance, do you 4 know? 5 A No. 6 Q How about the other accounting employees, do 7 they receive any allowance or -- 8 A The -- Pam is now a full-time employee. She 9 now gets it. She's the only other. 10 Q Okay. Is Ryan a part-time employee? 11 A He's just a very part-time employee for us. 12 Q Okay. That's a good segue into -- I wanted to 13 follow up. At the beginning of the deposition 14 we were talking about the R.G. G.R. providing 15 the suits to full-time male employees, 16 part-time male employees, and then you said but 17 there are some employees who are part-time who 18 don't get suits. 19 Could you provide some definition 20 to what subset of part-time employees don't 21 get -- 22 A The maintenance men don't get suits. That's 23 pretty much it. 24 Q And then Ryan? 25 A And then Ryan. But like I said, he's a very</p>

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<p style="text-align: right;">Page 58</p> <p>1 part-time -- like I have him moving boxes 2 around at times, so -- 3 Q Okay. He doesn't have any client contact? 4 A None. 5 Q Okay. And you also said I believe that skirts 6 are preferred. Are skirts preferred or are 7 they required, do you know? 8 A Basically required. I don't think there would 9 be any objection if you were in a pant suit, as 10 long as there was a professional suit coat 11 worn. 12 Q Okay. 13 A Not just slacks and a blouse. 14 Q Regarding the Facebook line of questions, does 15 R.G. G.R. post any content to its Facebook 16 page? 17 A No. 18 Q So it's all just the -- whatever that website 19 company was -- 20 A FuneralNet. 21 Q -- changing pictures and whatnot? 22 A Correct. 23 Q Then clients posting? 24 A Yes. 25 Q So R.G. G.R. doesn't post anything?</p>	<p style="text-align: right;">Page 60</p> <p>1 antidiscrimination laws. You said you haven't 2 had any training. Are you aware that there are 3 antidiscrimination laws? 4 A Yes. 5 Q And you know that generally through the culture 6 or have you had any specific communications 7 with anyone regarding the antidiscrimination 8 laws? 9 A Through the culture you're saying? 10 Q Just general knowledge -- 11 A General knowledge. 12 Q That Congress passed a law that says you can't 13 fire somebody because they're black? 14 A That is correct. 15 Q Okay. And we had touched a little bit on the 16 religious environment at R.G. G.R. Do you know 17 if Mr. Rost is religious? 18 A I believe he is religious, yes. 19 Q Okay. Do you know if he attends church? 20 A I believe he attends church. 21 Q Okay. And why -- has he ever communicated this 22 with you -- 23 A I've attended his daughter's wedding at his 24 church. 25 Q Where was that wedding at?</p>
<p style="text-align: right;">Page 59</p> <p>1 A Generally, no. No. 2 Q So you said -- 3 A The pictures, I don't know if you're 4 considering the pictures being posting, but 5 that's done through FuneralNet for us -- 6 Q Okay. 7 A -- on the holidays. But do I put content on 8 there? Verbal content, no. 9 Q And no one at R.G. G.R. does? 10 A No. 11 Q No one at R.G. G.R. has ever asked you to? 12 A No. 13 Q Okay. And do you know -- do you have any 14 understanding for how often you pay an invoice 15 for the Sam's store? 16 A As I mentioned before, when someone gets a 17 suit, it would be put onto our -- they have our 18 credit card. So it will come in the credit 19 card statement. 20 Q So it's really just -- then you just pay it 21 with the normal credit card charges at the end 22 of the month? 23 A That is correct. 24 Q And I had asked you earlier about any training 25 you may have had regarding Title VII or</p>	<p style="text-align: right;">Page 61</p> <p>1 A I want to say it's Highland -- Highland Park 2 Baptist. 3 Q Okay. And do you remember when that wedding 4 was? 5 A It was in -- just -- it was the year before 6 9/11. 7 Q Okay. 8 A On 9/11. 9 Q Did Mr. Rost take part in any of the ceremonies 10 at the wedding? 11 A Aside from walking his daughter down the aisle? 12 Q Yes. 13 A No. 14 Q Do you know if Mr. Rost regards R.G. G.R. as an 15 exercise of his religion? 16 A Do I know if he regards it as a what? 17 Q As an exercise of his religion? 18 A He does not. 19 Q He's never discussed it with you? 20 A No. 21 Q Why do you say he does not? 22 A I -- I might be misunderstanding. You're 23 asking me if he uses it as an -- a source of 24 his religion? 25 Q As like -- not a source, but as an exercise of</p>

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<p style="text-align: right;">Page 62</p> <p>1 his religious beliefs, as a practice of his 2 religious beliefs?</p> <p>3 A Does he -- I'm confused, what you're asking me. 4 Does he --</p> <p>5 Q Just a second.</p> <p>6 A Okay.</p> <p>7 Q As an expression of his religious beliefs?</p> <p>8 A As an expression? I believe he treats people 9 with a great deal of respect. I don't believe 10 that religion is ever shoved down anybody's 11 throat, if that's what you're asking me. And 12 he treats other people as he expects to be 13 treated and he treats his business the same 14 way.</p> <p>15 Q And that's consistent with your previous 16 testimony that he's never discussed his 17 religious views with you?</p> <p>18 A Never. It's never been -- we've never sat down 19 and had a Bible study never, nothing like that, 20 ever.</p> <p>21 Q Okay. Do you know if Mr. Rost is pro-choice?</p> <p>22 A I do not know.</p> <p>23 MR. KIRKPATRICK: Objection. 24 Objection, relevance. 25 THE WITNESS: I do not know.</p>	<p style="text-align: right;">Page 64</p> <p>1 out, not to be flashy. They are part of the 2 background of the service. They are -- the 3 deceased is the reason that people are there, 4 so it needs to be in uniform. It needs to be 5 in taste. And it needs to be, for lack of a 6 better word, blended, not jumping out as the 7 person of the day.</p> <p>8 Q Okay. And I think you said Mr. Rost provides 9 these uniforms or suits to the funeral 10 directors. Is that what you testified to?</p> <p>11 A That is correct.</p> <p>12 Q Are there currently any female funeral 13 directors?</p> <p>14 A At Harris Funeral Home, no.</p> <p>15 Q Okay. If there were female funeral directors, 16 what would they be required to wear?</p> <p>17 A I believe they would go to the same place that 18 the suits are provided from, and it would be 19 determined that there could possibly be a -- 20 you know, a woman's version of the same suit, 21 because, again, they should -- they would all 22 be looking the same.</p> <p>23 Q With the skirt?</p> <p>24 A With a skirt, I believe, yes.</p> <p>25 Q Okay. And would those funeral directors get</p>
<p style="text-align: right;">Page 63</p> <p>1 BY MR. SHULTZ: 2 Q Do you know his position on gay marriage? 3 MR. KIRKPATRICK: Objection, same 4 reason. 5 THE WITNESS: I don't know.</p> <p>6 BY MR. SHULTZ: 7 Q Because he's never discussed these things with 8 you?</p> <p>9 A Never.</p> <p>10 MR. SHULTZ: Okay. I think I have 11 nothing further.</p> <p>12 MR. KIRKPATRICK: I just have a few 13 questions here.</p> <p>14 EXAMINATION</p> <p>15 BY MR. KIRKPATRICK: 16 Q Mr. Shultz asked you a few questions about the 17 dress code. Do you recall that?</p> <p>18 A Yes.</p> <p>19 Q There was some discussion about funeral 20 directors and non-funeral directors. I want to 21 ask you, if you know, in your position as a 22 business manager, why do funeral directors have 23 a uniform?</p> <p>24 A Because when they go into a church or a place 25 for service, they are to blend in, not to stand</p>	<p style="text-align: right;">Page 65</p> <p>1 two suits provided them upon their hiring?</p> <p>2 A For a full-time, yes.</p> <p>3 Q One if they were part-time?</p> <p>4 A One if they were part-time.</p> <p>5 Q All right. And you were asked a great deal of 6 questions about this exhibit, Exhibit 8.</p> <p>7 A Okay. All right.</p> <p>8 Q This outlines who got what money, and who got 9 suits, et cetera, right; do you recall that?</p> <p>10 A That is correct.</p> <p>11 Q Now, are any of the females on here that got 12 money are they funeral directors?</p> <p>13 A No.</p> <p>14 Q Oh, okay. So, they wouldn't be provided a 15 suit, correct?</p> <p>16 A Not the funeral director suit, no.</p> <p>17 Q Now, I think you testified about your son Ryan 18 working there?</p> <p>19 A Right. Correct.</p> <p>20 Q He doesn't receive an employee stipend for 21 clothes, does he?</p> <p>22 A No, nor do the maintenance people.</p> <p>23 Q Are the maintenance people females or males or 24 both?</p> <p>25 A It could be both. I think there's both, one</p>

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<p>1 at -- there's a female at one of the branches.</p> <p>2 Q All right.</p> <p>3 A Can I clarify something about this?</p> <p>4 Q Sure.</p> <p>5 A It was my -- if I'm not mistaken, it was my</p> <p>6 understanding that I was to put the employees</p> <p>7 who received any clothing allowance or</p> <p>8 suits and ties were to be on this list.</p> <p>9 Q Right.</p> <p>10 A Is that correct?</p> <p>11 Q Yeah.</p> <p>12 A Okay. Because I do not have the maintenance</p> <p>13 people on here.</p> <p>14 Q Right. Because they don't receive any.</p> <p>15 A Correct. I just wanted to clarify that that's</p> <p>16 why like possibly my -- I don't remember the</p> <p>17 dates that this was -- that my son wasn't on</p> <p>18 there and the maintenance people.</p> <p>19 Q So, I think you had discussed earlier too about</p> <p>20 there was some ideas kicked around early on</p> <p>21 about having the female employees, not</p> <p>22 necessarily funeral directors, but the female</p> <p>23 employees at locations to have some sort of</p> <p>24 uniform; do you recall that?</p> <p>25 A That is correct.</p>	<p>1 Q Okay.</p> <p>2 A Only.</p> <p>3 Q Was that something you learned through your</p> <p>4 position as the business manager, handling his</p> <p>5 employee file and -- and employee documents, et</p> <p>6 cetera?</p> <p>7 A Documents. One thing that stands out is that</p> <p>8 he did not take our health insurance because it</p> <p>9 was provided through his wife Donna, I think</p> <p>10 her name was, Donna. And also I saw in his</p> <p>11 file that I had to put in his file and I made</p> <p>12 the workman's comp claim when he was hurt on</p> <p>13 the job, and it showed that Anthony was a male.</p> <p>14 His -- you know, his driver's license, things</p> <p>15 like that were male. That's why I refer to him</p> <p>16 as "Anthony."</p> <p>17 Q So you've never seen anything in your position,</p> <p>18 document-wise, other than perhaps this letter</p> <p>19 that was furnished to Tom Rost at the end, that</p> <p>20 Anthony was anything other than a male?</p> <p>21 A That's all I knew him as, was a male.</p> <p>22 Q Okay. Mr. Shultz asked you questions about</p> <p>23 anybody being punished for dress code</p> <p>24 violations or issues. Do you recall that?</p> <p>25 A I do.</p>	
<p>1 Q But apparently there was no consensus that</p> <p>2 could be reached?</p> <p>3 A None whatsoever.</p> <p>4 Q So there was just a general social concept of</p> <p>5 conservative business attire for women?</p> <p>6 A That is correct.</p> <p>7 Q Just so I understand that.</p> <p>8 A That is correct.</p> <p>9 Q Now, you are the business manager there, so</p> <p>10 you're pretty familiar with the employee files</p> <p>11 and the employees that work there and --</p> <p>12 A I am.</p> <p>13 Q Okay. And you were asked questions about</p> <p>14 Stephens. I know we refer to "Stephens." Who</p> <p>15 do you understand Stephens to be?</p> <p>16 A Anthony Stephens.</p> <p>17 Q Okay. All right.</p> <p>18 A Exactly.</p> <p>19 Q I know you were asked questions of Aimee</p> <p>20 Stephens, and I think we're talking about the</p> <p>21 same person, just for clarification sake. As</p> <p>22 your position as business manager, did you have</p> <p>23 an understanding of who Stephens was; was</p> <p>24 Stephens a male or female?</p> <p>25 A I knew Anthony Stephens as a male.</p>	<p>1 Q And there was apparently somebody who did a</p> <p>2 removal that had a jacket that had writing on</p> <p>3 it "body snatcher"?</p> <p>4 A Correct.</p> <p>5 Q Okay. And that person was talked to; do you</p> <p>6 recall that?</p> <p>7 A Talked to and told never to wear that jacket,</p> <p>8 as small as it was.</p> <p>9 Q And your understanding of how the dress code is</p> <p>10 effected in your position, if that person</p> <p>11 continued to wear that body snatcher jacket,</p> <p>12 would they have been potentially --</p> <p>13 A He would have been fired instantly. We</p> <p>14 can't -- we can't take the chance of things</p> <p>15 like that.</p> <p>16 Q Now, I think you also testified Mr. Shultz</p> <p>17 asked you any knowledge you had about Stephens'</p> <p>18 removal or termination from the company. Do</p> <p>19 you recall that?</p> <p>20 A I do.</p> <p>21 Q And just to be clear, why was Stephens removed</p> <p>22 or terminated from the company?</p> <p>23 A Because he would not conform to the dress code,</p> <p>24 the uniform. That was the bottom line.</p> <p>25 Q What was the uniform that he was to conform to?</p>	

1 CERTIFICATE OF REPORTER
2 STATE OF MICHIGAN)
3)SS:
4 COUNTY OF GENESEE)
5 I, Quentina R. Snowden, a duly
6 commissioned and licensed Court Reporter,
7 Genesee County, State of Michigan, do hereby
8 certify: That I reported the taking of the
9 deposition of the witness, SHANNON KISH,
10 commencing on Friday, November 13, 2015, at
11 10:14 a.m.
12 That prior to being examined, the
13 witness was, by me, duly sworn to testify to
14 the truth. That I thereafter transcribed my
15 said shorthand notes into typewriting and that
16 the typewritten transcript of said deposition
17 is a complete, true and accurate transcription
18 of said shorthand notes.
19 I further certify that I am not a
20 relative or employee of an attorney or counsel
21 of any of the parties, nor a relative or
22 employee of an attorney or counsel involved in
23 said action, nor a person financially
24 interested in the action.
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IN WITNESS WHEREOF, I have hereunto
set my hand, in my office, in the County of
Genesee, State of Michigan, this 23rd day of
November, 2015.



QUENTINA R. SNOWDEN, CSR NO. 5519

EXHIBIT 6

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

4
5 EQUAL EMPLOYMENT OPPORTUNITY
6 COMMISSION,

7 Plaintiff,

Case No. 2:14-cv-13710

8 vs.

Hon. Sean F. Cox

9 R.G. & G.R. HARRIS FUNERAL

Mag. David Grand

10 HOMES, INC.,

11 Defendant.

12 -----
13 VIDEOTAPED DEPOSITION

14
15 DEPONENT: GEORGE J. CRAWFORD

16 DATE: Thursday, December 17, 2015

17 TIME: 10:25 A.M.

18 LOCATION: Regus - Grand Rapids

19 250 Monroe Avenue, N.W.

20 Suite 400

21 Grand Rapids, Michigan

22 REPORTER: Dawn M. Spaeth, CSR-1458

23 VIDEOGRAPHER: Todd Young

24 Job no. 280991

25

GEORGE J. CRAWFORD - 12/17/2015

Page 10	Page 12
<p>1 Dardenne? 2 A. Correct. 3 Q. Okay. How did you come to be employed at R.G. & G.R.? 4 A. Actually, I received a call from Tom. He was looking 5 for a manager for the Garden City location. 6 Q. And approximately what year was this? It was eight 7 years ago, 2006? 8 A. About 2006, 2007 I believe. 9 Q. 2007. 10 A. 2007. 11 Q. Sorry about that. Lawyers and math, all right. So he 12 called you and were there any interviews or anything 13 like that? 14 A. Yes. 15 Q. Okay. Whom did you interview with? 16 A. I interviewed with Tom. 17 Q. And do you know roughly what time of year the 18 interviews and hiring were? 19 A. Yes, it was in the fall. I would predict about 20 October. 21 Q. Do you recall your starting date? 22 A. I believe it was about two months after the interview. 23 Q. Okay. So you started in -- you were hired to run the 24 Garden City funeral outlet for R.G. & G.R.? 25 A. Correct.</p>	<p>1 A. I had and I had actually interviewed with Tom. 2 Q. When was that? 3 A. It was prior to my taking employment in Ohio. 4 Q. How long were you at -- you said 10 to 12 years, so it 5 would have been roughly 1995 or 1997 up to 2007? 6 A. Correct. 7 Q. All right. So you interviewed sometime in '95 or '97 8 with Tom? 9 A. That is correct. 10 Q. Were you given an offer? 11 A. Not at that point, not at the initial one. 12 Q. Okay. 13 A. And when Tom and I met and discussed things, my wife 14 had taken a job in Ohio and we just felt it was too far 15 to commute. 16 Q. But he did make an offer, but it just wouldn't work for 17 you; is that safe to say? 18 A. No, I don't believe there was an offer. 19 Q. At that point -- 20 A. At the first meeting there never was a meeting of the 21 minds. 22 Q. All right. So did you know him socially at this point? 23 A. No, I did not. 24 Q. Okay. Did you know him socially as of 2007 when you 25 got the job call?</p>
<p>1 Q. Now, what were your job duties there? 2 A. My job duties were to meet with families, make funeral 3 arrangements. I was responsible for actually managing 4 the facility. 5 Q. When you say managing the facility, what does that 6 mean? 7 A. Hiring of the staff, administrative staff, making sure 8 that maintenance was done properly, scheduling. 9 Q. Anything else you can think of? 10 A. That's about all. 11 Q. You said you hired the administrative staff. Do you do 12 any kind of reviewing or disciplining of that? Were 13 you in charge of those sorts of things? 14 A. Yes. 15 Q. All right. With respect to funeral directors and 16 embalmers, were you responsible for their discipline -- 17 A. No. 18 Q. -- process? No? 19 A. No. 20 Q. Who would that have been? 21 A. Tom. 22 Q. Tom Rost? 23 A. Tom Rost. 24 Q. Now, you say he gave you a call kind of out of the 25 blue. Did you know Tom prior to this?</p>	<p>1 A. When you say socially, I'm not quite sure I understand 2 the question. 3 Q. Did you and your wife go out to dinner with Tom and his 4 wife, that sort of thing? 5 A. Never. 6 Q. Okay. How did you know him outside of work? 7 A. Just on a professional basis. 8 Q. Okay. Meetings or seminars or conferences, that sort 9 of thing? 10 A. Exactly. Funeral services is kind of a closed or small 11 group of individuals and I knew of Tom through the 12 funeral directors. 13 Q. It's kind of a close-knit industry basically; is that 14 kind of the idea? 15 A. It is. 16 Q. All right. Now, when you were -- just to back up a 17 little bit, I apologize for jumping around some -- did 18 you discuss your deposition with anyone today? 19 A. My deposition -- today's deposition? 20 Q. Yes. 21 A. I did not really discuss it. Joel and I had met but -- 22 Q. And I don't want to know what you talked about. 23 A. Okay, no. 24 Q. When did you meet Joel? 25 A. This morning.</p>

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1 Q. This morning? How long did that take?
 2 A. Time-wise?
 3 Q. Yes.
 4 A. 15 minutes.
 5 Q. Did you review any documents?
 6 A. The only document that I reviewed was my subpoena and
 7 my original interview notes.
 8 Q. Okay. Fair enough. We'll probably get to those in a
 9 bit. Jumping back to your hiring, so you began working
 10 at operating the Garden City facility. You mentioned
 11 funeral arrangements as one of your job duties. What's
 12 involved in that?
 13 A. The funeral arrangements involved meeting with the
 14 family, gathering information necessary for death
 15 certificates, newspaper notices, making arrangements
 16 for services, be it in the funeral home or the church
 17 of the family's choice, arranging for visitations if
 18 that's something the family has chosen.
 19 Q. And for the actual funeral itself, the funeral either
 20 occurring at R.G. & G.R. or at a church or other
 21 location, what would you do?
 22 A. If it's at the church we would contact the church,
 23 arrange for a day and time of the service. If it's at
 24 the funeral home, we would either arrange with a
 25 clergyman to come to the funeral home or the family

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1 would make those arrangements.
 2 Q. And you would be the point person on behalf of
 3 R.G. & G.R. to do that?
 4 A. Exactly.
 5 Q. Now, did you have any responsibilities with respect
 6 to -- let me do this first, have you ever heard the
 7 phrase downstairs work?
 8 A. Yes.
 9 Q. Okay. What does that refer to?
 10 A. That refers to the actual preparation of the bodies.
 11 Q. That would be the embalming?
 12 A. That would be embalming, dressing, casketing,
 13 cosmetics, those types of things.
 14 Q. Now, did you do any of that aspect of the job?
 15 A. I did.
 16 Q. Okay. How much of your time -- can you give me kind of
 17 a percentage breakdown of how much time you spent doing
 18 the job duties you described, meeting with the
 19 families, making the arrangements and doing the
 20 so-called downstairs preparation work?
 21 A. Meeting with families 98 percent; preparation,
 22 embalming, 2 percent.
 23 Q. And who would be more -- at the time you were hired,
 24 who would have been more responsible for the downstairs
 25 preparatory work?

Page 16

1 A. Anthony Stevens.
 2 Q. Okay. What was his job title as you understood it?
 3 A. Funeral director, funeral director/embalmer.
 4 Q. Now, would you describe your job duties, did that stay
 5 constant during your entire tenure at R.G. & G.R.?
 6 A. It did.
 7 Q. Did you ever help out at other locations?
 8 A. Yes.
 9 Q. Would you say it was the same kind of balance of work,
 10 98 percent/2 percent?
 11 A. Yes.
 12 Q. How often did you go to either the Harper or the
 13 Livonia locations?
 14 A. It was on an at need basis. It was usually done when
 15 one of the other managers had a day off and they were
 16 busy. I would say on an average in a week, maybe three
 17 to four times in a week.
 18 Q. You'd go to either Harper or to Livonia?
 19 A. Exactly.
 20 MR. PRICE: All right. This was previously
 21 marked as Exhibit 6, I believe in Mr. Rost's
 22 deposition. Am I correct in that, Joel?
 23 MR. KIRKPATRICK: I'll take your word for it.
 24 MR. PRICE: Okay. I don't know any other
 25 case that got up to 6, so if you could take a minute to

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

Page 18

1 Q. It also would come with a tie, correct?
 2 A. Correct.
 3 Q. Now, who would be responsible -- who would be required
 4 to wear the suits?
 5 A. All of the funeral directors.
 6 Q. What about assistant funeral directors?
 7 A. Assistant funeral directors, yes, they were.
 8 Q. All right. All the embalmers?
 9 A. Yes.
 10 Q. All the managers?
 11 A. Correct.
 12 Q. Anybody else that you can think of who would have to
 13 wear a suit?
 14 A. Anyone that was employed by the company.
 15 Q. Any of the male employees?
 16 A. All of the male employees were.
 17 Q. Okay. Now, how did you get the suits?
 18 A. They were actually furnished, there was a tailor in
 19 Farmington Hills. You would go there, you would get
 20 measured, and in about two weeks they'd call and they'd
 21 be ready.
 22 Q. Now, my understanding is -- and correct me if I'm
 23 wrong -- that these suits would be gradually replaced
 24 as they wore out?
 25 A. That is correct.

Page 19

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

Page 20

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

Page 21

1 2014 was your last --
 2 A. 2014, I would believe so.
 3 MR. KIRKPATRICK: Retirement has been good.
 4 THE WITNESS: It's been really good.
 5 Q. (By Mr. Price) Fair enough. So it was July of 2014?
 6 A. Yes, excuse me.
 7 Q. No problem. No. I just wanted to clarify.
 8 So what was Dolly's last name?
 9 A. Nemeth, N-e-m-e-t-h.
 10 Q. And Sharon?
 11 A. I believe it was Hassett, H-a-s-s-e-t-t.
 12 Q. And you've already mentioned Stevens and I'm sorry, I
 13 didn't catch the last, my follow-up question. Anybody
 14 else?
 15 A. Michelle.
 16 Q. Peterson?
 17 A. Peterson, yes.
 18 Q. Anybody else?
 19 A. Not on a regular basis.
 20 Q. Did you ever work with a person named Troy Shafer?
 21 A. Yes, I did.
 22 Q. That was Stevens' replacement?
 23 A. Yes.
 24 Q. Now, Ms. Nemeth, Ms. Hassett, and Ms. Peterson were all
 25 administrative personnel?

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1 Q. Did you know him to be anything other than a man?
 2 A. Never.
 3 Q. Did he ever express to you that he was not a man?
 4 A. Never.
 5 Q. I think Mr. Price asked you questions about did anyone
 6 have any concerns, the female staff, did you talk to
 7 them about it. Did you ever have any conversations
 8 with any of your female staff about bathroom use?
 9 A. After we had discovered that, I asked them if they
 10 would feel comfortable using the restroom with Anthony.
 11 Q. Was there a separate ladies' room and a separate men's
 12 room?
 13 A. There was, yes.
 14 Q. And they said they would feel uncomfortable?
 15 A. Yes.
 16 Q. I think you testified that 98 percent of your job was
 17 meeting with families, making arrangements, and maybe 2
 18 percent --
 19 A. Yes.
 20 Q. -- was doing embalmings, right?
 21 A. Yes.
 22 Q. Or downstairs work I guess is what we refer to.
 23 A. Correct.
 24 Q. Has that always been the way it has been for you since
 25 you started in the funeral business?

Page 43

1 A. Not at all.
 2 Q. And can you kind of tell us --
 3 A. When I -- other locations I would do everything, meet
 4 with families. I would do the embalming removals.
 5 When I was hired at R.G. & G.R. Harris, Tom
 6 specifically said my primary duties would be meeting
 7 with families. The 2 percent that I did embalming
 8 generally were when we had an embalmer that was off and
 9 we didn't have anyone to do it, then I would do that.
 10 Q. And you were the manager, right?
 11 A. Yes, that's correct.
 12 Q. So you had additional duties than a general funeral
 13 director?
 14 A. That is correct.
 15 Q. Can you estimate while you were there at R.G. & G.R.
 16 Funeral Home, how many embalmings per month that might
 17 be done?
 18 A. Are you talking about a specific location or company?
 19 Q. Let's do Garden City.
 20 A. Garden City. Garden City we would probably do, I would
 21 say 125 services a year. Out of that maybe 90 to 100
 22 embalmings.
 23 Q. So in an average -- math is bad as I'm a lawyer too --
 24 but would probably be around seven or eight a month;
 25 does that sound about right?

Page 44

1 A. I would say that would be correct.
 2 Q. Obviously it fluctuates depending?
 3 A. Yes.
 4 Q. How long does it take to do an average embalming?
 5 A. From an average case, anywhere from an hour to two
 6 hours.
 7 Q. Okay. So maybe up to 16 hours a month?
 8 A. I would say, yes.
 9 Q. Okay. In your experience as a funeral director, can a
 10 funeral director/embalmer just do 100 percent of their
 11 time downstairs work and not have any contact with the
 12 public?
 13 A. Not at that location, not in Harris funeral home.
 14 MR. KIRKPATRICK: No further questions.
 15 REEXAMINATION
 16 BY MR. PRICE:
 17 Q. You mentioned that you had this discussion about
 18 bathroom use. Whom did you have the discussion with?
 19 A. With Dolly and Sharon.
 20 Q. Okay. And when did this come up?
 21 A. After we discovered that Anthony had --
 22 Q. Had been fired?
 23 A. -- been let go, yes.
 24 Q. All right. Why did it come up?
 25 A. Just in topical conversation. When I had asked them if

Page 45

1 they had any knowledge of that and I said would you
 2 have felt comfortable with that.
 3 Q. Did you ever relay this to Mr. Rost?
 4 A. No, I did not.
 5 Q. Okay. And obviously since you had no role in the
 6 firing, to your knowledge that couldn't have played a
 7 role in the decision making?
 8 A. It could not have.
 9 Q. Okay. You also mentioned that employees are given the
 10 employee manual. Do you hand out the manual yourself
 11 to employees?
 12 A. If I'm the one that has hired them, yes.
 13 Q. But you don't hire funeral directors?
 14 A. In the case of Mr. Stevens, he was working there prior
 15 to me.
 16 Q. So you don't have any understanding if or how he got
 17 it?
 18 A. I don't have any knowledge of that.
 19 MR. PRICE: All right. Nothing else.
 20 MR. KIRKPATRICK: We're good.
 21 VIDEOGRAPHER: This concludes the deposition
 22 of George Crawford. We're going off the record and
 23 concluding the deposition at 11:26.
 24 (Deposition concluded at 11:26 a.m.)
 25 *****

1 CERTIFICATE OF NOTARY
2
3 STATE OF MICHIGAN)
4) SS
5 COUNTY OF KENT)
6 I certify that this transcript is a complete,
7 true, and correct record of the testimony of the
8 witness held in this case.
9 I also certify that prior to taking this
10 deposition, the witness was duly sworn or affirmed to
11 tell the truth.
12 I further certify that I am not a relative or an
13 employee of or an attorney for a party; and that I am
14 not financially interested, directly or indirectly, in
15 the matter.
16
17 December 23, 2015
18
19
20 *Dawn m Spaeth*
21 _____
22 Dawn M. Spaeth, CSR-1458
23 Notary Public Kent County, Michigan
24 My Commission Expires: 02/08/2020
25

EXHIBIT 7

1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4

5 EQUAL EMPLOYMENT OPPORTUNITY)
6 COMMISSION,)

7 Plaintiff,)

8 vs.) Case No. 14-13710

9 R.G. & G.R. HARRIS FUNERAL) Hon. Sean F. Cox

10 HOMES, INC.,) United States

11 Defendants.) District Court Judge

12 _____)
13

14 DEPOSITION OF DELORES NEMETH
15 PLYMOUTH, MICHIGAN
16 FRIDAY, NOVEMBER 13, 2015
17
18
19
20
21
22
23

24 REPORTED BY: QUENTINA R. SNOWDEN, CSR NO. 5519

25 JOB NO.: 276004-A

DELORES NEMETH - 11/13/2015

Page 10	Page 12
<p>1 there.</p> <p>2 Q Okay. Okay. What's Sharon's last name?</p> <p>3 A Hasset, H-A-S-S-E-T.</p> <p>4 Q Anybody else who works at the Garden City location?</p> <p>5 A We have Troy, our embalmer.</p> <p>6 Q Troy Shaffer?</p> <p>7 A Yes.</p> <p>8 Q Does David Kowalewski work at the Garden City location or does he supervise you from a --</p> <p>9 A No, he works.</p> <p>10 Q He works there as well?</p> <p>11 A (Shook head in an affirmative manner.)</p> <p>12 Q What's David Kowalewski's title?</p> <p>13 A Manager.</p> <p>14 Q Do you work anywhere else?</p> <p>15 A No.</p> <p>16 Q Just R.G. G.R.</p> <p>17 Okay. How many hours a week do you</p> <p>18 work?</p> <p>19 A Oh, probably around 30.</p> <p>20 Q 30. Okay.</p> <p>21 A Some days less, you know. I mean, some weeks.</p> <p>22 I'm sorry.</p> <p>23 Q Describe some of your job duties for me.</p>	<p>1 Q How long did it take?</p> <p>2 A Not long.</p> <p>3 Q Did you review any documents?</p> <p>4 A No.</p> <p>5 Q Okay. Also I just want to throw out, Mr. Kirkpatrick sat up in his chair when I asked about that. I want to put on the record I don't want to know any substance of the communication between you and Mr. Kirkpatrick. That's attorney/client privilege. That you met --</p> <p>6 A I just met him.</p> <p>7 Q That sort of thing, that's not -- I'm entitled to that.</p> <p>8 A No.</p> <p>9 Q Any substantive communications, please don't answer -- testify to any of that.</p> <p>10 You said you didn't look at any</p> <p>11 documents, right?</p> <p>12 A (Shook head in a negative fashion.)</p> <p>13 Q Okay. I understand that R.G. G.R. has a dress code?</p> <p>14 A What do you mean by "a dress code"?</p> <p>15 Q A requirement for how you should present?</p> <p>16 A The way I'm dressed now.</p>
<p>1 A I do a lot of the office work, type death</p> <p>2 certificates, and I also do visitation when we</p> <p>3 have it and work with families. Most of it is</p> <p>4 office work.</p> <p>5 Q Okay. Have you ever been a witness or a party</p> <p>6 to a lawsuit?</p> <p>7 A No.</p> <p>8 Q Okay. Have you ever been deposed before?</p> <p>9 A Yes.</p> <p>10 Q When?</p> <p>11 A Oh, that was years ago, many years ago.</p> <p>12 Probably in the '60s.</p> <p>13 Q Okay. And just that one time?</p> <p>14 A Uh-huh.</p> <p>15 Q Okay. Have you ever filed an administrative</p> <p>16 claim with a local, state or Federal agency?</p> <p>17 A No.</p> <p>18 Q No. How did you prepare for this deposition?</p> <p>19 A I don't understand what you mean.</p> <p>20 Q Did you meet with Mr. Kirkpatrick at all?</p> <p>21 A Oh, yes.</p> <p>22 Q And when did you meet with him?</p> <p>23 A A couple days ago. Just --</p> <p>24 Q Okay.</p> <p>25 A -- to meet him.</p>	<p>1 Q Could you describe to your understanding what</p> <p>2 the dress code is?</p> <p>3 A A skirt, I wear flat shoes, you can wear heels</p> <p>4 or flat shoes like I'm dressed now, a jacket.</p> <p>5 Q Okay. And do you receive any sort of allowance</p> <p>6 for your dress?</p> <p>7 A Yeah.</p> <p>8 Q Could you describe how much do you receive and</p> <p>9 when?</p> <p>10 A Geez. What do you mean by "When"?</p> <p>11 Q How often -- how frequently do you receive an</p> <p>12 allowance?</p> <p>13 A Like once a year.</p> <p>14 Q Once a year?</p> <p>15 A Uh-huh.</p> <p>16 Q And how much do you receive?</p> <p>17 A I'm trying to think now. I think it was a</p> <p>18 check for \$75.</p> <p>19 Q So it comes as a separate check, not as part of</p> <p>20 your paycheck?</p> <p>21 A Right.</p> <p>22 Q Do you remember when that began?</p> <p>23 A Oh, probably a couple years.</p> <p>24 Q So, for the 13 years that you've worked at R.G.</p> <p>25 G.R. you didn't always receive an allowance?</p>

<p style="text-align: right;">Page 26</p> <p>1 Q There aren't any religious ornaments in that 2 chapel? 3 A Like what do you mean by "religious"? 4 Q There isn't a crucifix or a cross? 5 A No. Those are put in for whichever 6 religious -- like they have -- 7 Q So there are no permanent religious -- 8 A No. 9 Q -- fixtures in the chapel? 10 A No. 11 Q Beyond the Daily Bread, can you think of any 12 other -- 13 A We have a Bible. I'm trying to think now. I 14 know there's a Bible there. There's different 15 pamphlets. Not -- I mean, different pamphlets 16 for -- they're on display. 17 Q Different pamphlets on grief? 18 A Grief counseling and different -- 19 Q Do you remember any specific pamphlets 20 regarding Christianity or -- 21 A Not -- not right now I can't -- 22 Q And is the Bible for employees' use or -- 23 A Whoever. 24 Q For client's use? 25 A For whoever is out there.</p>	<p style="text-align: right;">Page 28</p> <p>1 Q So right by the main entrance? 2 A Yes. 3 MR. SHULTZ: I don't have anything 4 further. 5 THE WITNESS: Thank you. 6 MR. KIRKPATRICK: I think we're 7 good. 8 (The deposition of Delores Nemeth 9 concluded at or about the hour of 9:57 a.m.) 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 27</p> <p>1 Q Has Mr. Rost ever led a discussion regarding 2 the Bible? 3 A I have not talked to him about it. 4 Q Has Mr. Rost ever encouraged you to read the 5 Daily Bread? 6 A Well, he brings them in and he knows we read 7 them. A lot of people read them. 8 Q So he brings them in, drops them off? 9 A Uh-huh. We always have them. 10 Q Has he ever led a discussion on the contents of 11 the Daily Bread? 12 A No. No. 13 Q And where is the Bible located? 14 A It's on a table in the middle of the -- like 15 not when you walk in, but another section where 16 people can go and sit, there's a couple chairs 17 there. 18 Q It's like a client conference room? 19 A Not a conference room. It's just part of the 20 chapel. 21 Q Okay. But in a public area? 22 A Oh, yes. 23 Q And where are the pamphlets located? 24 A On the credenza right in the front of -- where 25 you walk in.</p>	<p style="text-align: right;">Page 29</p> <p>1 CERTIFICATE OF REPORTER 2 STATE OF MICHIGAN) 3)SS: 4 COUNTY OF GENESEE) 5 I, Quentina R. Snowden, a duly 6 commissioned and licensed Court Reporter, 7 Genesee County, State of Michigan, do hereby 8 certify: That I reported the taking of the 9 deposition of the witness, DELORES NEMETH, 10 commencing on Friday, November 13, 2015, at 11 9:30 a.m. 12 That prior to being examined, the 13 witness was, by me, duly sworn to testify to 14 the truth. That I thereafter transcribed my 15 said shorthand notes into typewriting and that 16 the typewritten transcript of said deposition 17 is a complete, true and accurate transcription 18 of said shorthand notes. 19 I further certify that I am not a 20 relative or employee of an attorney or counsel 21 of any of the parties, nor a relative or 22 employee of an attorney or counsel involved in 23 said action, nor a person financially 24 interested in the action. 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 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EXHIBIT 8

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

4 -----
5 EQUAL EMPLOYMENT OPPORTUNITY
6 COMMISSION,

7 Plaintiff,

8 -vs-

9 No. 2:14-cv-13740

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

12 Defendants.
13 -----

14 D E P O S I T I O N O F

15 WITNESS: DAVID CASH

16 LOCATION: Joel Kirkpatrick, PC
17 843 Penniman Avenue, Suite 201
18 Plymouth, Michigan 48170

19 DATE: Friday, January 22, 2016
20 9:29 a.m.

21 APPEARANCES:
22 FOR PLAINTIFF: EQUAL EMPLOYMENT OPPORTUNITY
23 COMMISSION
24 477 Michigan Avenue, Room 865
25 Detroit, Michigan 48226
313.226.7808
dale.price@eeoc.gov
miles.shultz@eeoc.gov
BY: DALE R. PRICE, JR. (P55578)
MILES E. SHULTZ (P73555)
KATIE LINEHAN (P77974)

FOR DEFENDANT: JOEL J. KIRKPATRICK, PC
843 Penniman Avenue, Suite 201
Plymouth, Michigan 48170
734.404.5170
joel@joelkirkpatrick.com
BY: JOEL J. KIRKPATRICK (P62851)

REPORTED BY: Laurel A. Jacoby, CSR-5059, RPR
Job no. 285887-A

Page 6

1 something like that, please feel free to check or
 2 correct your answer. You can do that.
 3 A. Thank you.
 4 Q. Please do that. We want to make this as correct
 5 as possible.
 6 A. Thank you.
 7 Q. Are you currently married?
 8 A. Yes.
 9 Q. Do you have any dependents living with you?
 10 A. Yes.
 11 Q. How many?
 12 A. Three.
 13 Q. How long have you been married?
 14 A. I've been married 25 years.
 15 Q. Good authoritative answer. That's good.
 16 What's your highest degree of education?
 17 A. I have an Associate Degree.
 18 Q. From what institution?
 19 A. From the Cincinnati College of Mortuary Science.
 20 Q. When did you get that?
 21 A. In 1980. Excuse me. I graduated in 1981. I'm
 22 sorry.
 23 Q. No problem at all.
 24 And do you have any other degrees or any
 25 other degrees or certifications?

Page 7

1 A. I have a certification as a celebrant, a
 2 certified celebrant, relating to the funeral
 3 business.
 4 Q. Okay. Where did you get that?
 5 A. I received that from a company called Insight,
 6 and they train funeral directors and nonfuneral
 7 directors to become celebrants or people that
 8 conduct services for families.
 9 Q. Okay. Yeah, could you -- I was just going to ask
 10 you that. What is involved in being a celebrant?
 11 A. A celebrant is a person who meets with families
 12 who have had a loss, had a death in their family,
 13 and they gather information from the family about
 14 the deceased to create a eulogy and create a
 15 service for the deceased to honor the person's
 16 life and fully focus on that deceased person's
 17 life, and that's exactly what they do.
 18 Q. Okay. When did you get this degree or the
 19 certification, I'm sorry, can you recall?
 20 A. I'm going to -- I'm thinking about eight years
 21 ago.
 22 Q. Okay. Just ballparking. That's all I'm asking.
 23 A. Yeah.
 24 Q. I'm not going to hold you to that.
 25 A. Thank you.

Page 8

1 Q. All right. Now, what was involved in getting
 2 that degree or certification? Sorry.
 3 A. I took a weekend class, a full weekend course.
 4 Mine was in Seattle, Washington, and basically
 5 two-and-a-half days of training and then several
 6 on-the-job opportunities for perfecting that.
 7 Q. Did R.G. & G.R. pay for that certification?
 8 A. Yes.
 9 Q. Yes? All right. Were you approached to do it or
 10 was it something you wanted to do?
 11 A. I wanted to do it.
 12 Q. And how often would you estimate that you've
 13 since then performed these kind of celebrant
 14 duties?
 15 A. I've probably performed about ten.
 16 Q. Okay. And is this something that would happen in
 17 the absence of a minister or a priest or someone
 18 that's giving the eulogy?
 19 A. Usually, yes.
 20 Q. Okay. People with no religious affiliation,
 21 generally speaking? The decedent would not have
 22 much of a religious background, that sort of
 23 thing?
 24 A. Generally, yes.
 25 Q. Now, how long have you been at R.G. & G.R.?

Page 9

1 A. Altogether going on 25 years.
 2 Q. Is that 25 continuous years?
 3 A. No.
 4 Q. Okay. How long have you been from this day
 5 back --
 6 A. Twenty-three years.
 7 Q. Twenty-three. So we're looking at 1992 you
 8 started?
 9 A. Actually, I started there in 1993, so I should
 10 clarify that would be 22 years going on 23 here
 11 shortly.
 12 Q. Fair enough. And when you started in 1993, what
 13 was your job title?
 14 A. Manager at our Livonia chapel.
 15 Q. And is that the position you still hold today?
 16 A. Yes.
 17 Q. All right. Have you ever been a manager at any
 18 other chapel for R.G. & G.R.?
 19 A. Yes.
 20 Q. Okay. Where?
 21 A. Garden City.
 22 Q. When were you the manager there?
 23 A. 1984.
 24 Q. Till about '86?
 25 A. '85.

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<p>1 A. He did our outside maintenance over the summer 2 and then has helped us make removals, body 3 removals, get death certificates signed, things 4 like that. 5 Q. Okay. 6 A. There are -- and I'm sorry, there are a couple of 7 other part-time employees that have come to my 8 mind. I'm sorry. 9 Q. Sure. No, please, no apology. Don't worry. 10 A. So there is also Bill Condron. William, I 11 suppose, and he is a driver for us, drives 12 funeral coach. 13 Q. And who else? 14 A. Chris Scanlon. 15 Q. And what is his job? 16 A. He's a driver also. 17 Q. So that's -- I'm sorry, part-time people as well? 18 A. Yes. 19 Q. All right. 20 A. And Sue Harrison. 21 Q. What is her job? 22 A. She is the former full-time administrative 23 assistant for us part time now just helping out. 24 And Denise Leininger. 25 Q. And what is her job?</p>	<p>1 enforcing a dress code or a grooming code, 2 correct? 3 A. Sure. Yes. 4 Q. Now, what is the dress code -- excuse me, the 5 grooming. No, sorry. Apologies. 6 What is the dress code for male 7 employees for R.G. & G.R.? 8 A. The men wear a dark-colored suit, white shirt and 9 tie that is provided. The suit for most of our 10 employees is provided as well. 11 Q. So a suit, pants, the coat and the pants and the 12 tie? 13 A. Yes. 14 Q. Shirt as well? 15 A. No. 16 Q. Not shirt. Okay. And who are the suits provided 17 to? 18 A. They're provided to all of our full-time and 19 part-time men after they've been there for six 20 months or in that neighborhood. 21 Q. Now, would that include the drivers as well that 22 you mentioned before? 23 A. Yes. 24 Q. All right. How many suits are provided? 25 A. For most part-time employees one suit, and that</p>
<p>1 A. Housekeeping. 2 Q. Housekeeping. All right. Do you set the -- now, 3 are all these people hourly? 4 A. Yes. 5 Q. All right. Do you set the pay for them or no? 6 A. Yes. 7 Q. You do? Okay. 8 Now, how is pay calculated? Is it a 9 matter of how long you've been there seniority 10 wise? 11 A. Yes. 12 Q. Where does it start, minimum wage? 13 A. No. 14 Q. Start above that? 15 A. Closer to ten dollars. 16 Q. Okay. Now, is that for all these persons the 17 starting wage would be closer to ten dollars an 18 hour? 19 A. Yes. 20 Q. All right. What is your current salary? 21 A. 75,000. 22 Q. 75, okay. When was the last time you got a 23 raise, if you can recall? 24 A. Four years ago. 25 Q. Okay. Now, you are also kind of responsible for</p>	<p>1 would be every year to two years. For full-time 2 employees it would be normally two suits per 3 year. 4 Q. Is that your -- you get two suits per year 5 yourself? 6 A. Yes. Uh-huh. 7 Q. It wears out over time, that sort of thing? 8 A. Absolutely. 9 Q. Now, you said most part-timers got just one suit. 10 Are there some part-timers who get more? 11 A. No, I'm sorry. Yeah. 12 Q. Okay. Fair enough. I just wanted to clarify. 13 And how are the employees, these male 14 employees, provided the suits? 15 A. They are instructed to go to a men's clothing 16 store that we have an agreement with called Sam 17 Michaels, and they're fitted and they go back. 18 And once a suit is in and they get tailored and 19 that's it. 20 Q. Okay. Now, if the suit is damaged in some way, 21 at least things happen on the job, you can go get 22 another suit, these people can go get another 23 replacement suit; is that correct? 24 A. Yes, or have it repaired. 25 Q. Right, depending on the nature of the -- but they</p>

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	Page 22		Page 24
1	would be repaired free of cost to the employee, correct?	1	Q. All right. Now, going back to the people we were talking about before, do you know how much the drivers are making?
2		2	
3	A. Yes.	3	A. I believe --
4	Q. Okay. Have you ever had to have your suits repaired?	4	Q. Go ahead.
5		5	A. I believe ten dollars an hour.
6	A. Yes.	6	Q. Okay. So they're getting paid the same amount as the administrative assistants or the people that are helping out with the visitations as well?
7	Q. Do you recall ever paying anything for it or no?	7	
8	A. No.	8	A. No, the administrative assistant makes more.
9	Q. Okay. What is your understanding of the dress code for female employees?	9	Q. Makes more. Okay. I'm not talking about full time. Part time? Does the part-time administrative assistant make more than the driver?
10		10	
11	A. Female employees are asked to wear conservative dark-colored clothing, a dress, if they are in positions where they will be meeting the public.	11	A. No. I only have one administrative assistant. She's full time.
12		12	Q. Okay. But you said there's someone who fills in. Sue Harrison?
13	Q. Now, you said conservative dark-colored dress. We talking skirts, that sort of thing?	13	
14		14	A. Sue Harrison, yes.
15	A. Yes.	15	Q. Okay. She --
16	Q. Okay. Do you know of any women that you supervise who wear pants?	16	A. I'm sorry. Yes, she would make more.
17		17	Q. Okay. Do you know how much she makes, just offhand or no?
18	A. Yes.	18	
19	Q. You do you have someone?	19	A. I believe \$12.50.
20		20	Q. All right. Do you know how the stipend is
21	A. Yes.	21	
22	Q. Who would that be?	22	
23	A. That would be Denise, my housekeeper.	23	
24	Q. And she's not seeing the public?	24	
25	A. Correct.	25	
Page 23		Page 25	
1	Q. All right. So if the women are meeting with the public, interacting with the public, they're wearing these dark colors and a skirt, correct?	1	calculated for what the women are going to be paid for their clothing?
2		2	
3	A. Yes.	3	A. I do not.
4	Q. Now, is it the case now that women get a stipend to help with defraying the cost of their clothing?	4	Q. Okay. Do you know how much they are paid?
5		5	A. It may have been mentioned to me. I do not recall.
6	A. Yes.	6	Q. You don't pass out the checks or anything like that to the women, do you?
7	Q. Okay. When did that start?	7	
8		8	A. No, I don't.
9	A. About a year ago. Somewhere within the last year.	9	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?
10	Q. What was your understanding -- were you asked about -- were you consulted in the process that made the decision that women were going to start getting stipends?	10	
11		11	A. No.
12	A. No.	12	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?
13	Q. From whom did you learn of it?	13	
14	A. Shannon Kish.	14	A. Yes.
15	Q. What did she say?	15	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?
16	A. She said that we are going to start providing a stipend for the ladies to help with their clothing.	16	
17	Q. And anything else? Do you recall any other further discussion?	17	A. Well, when death occurs and the family comes to the funeral home to make funeral arrangements, I
18		18	
19	A. No.	19	
20		20	
21		21	
22		22	
23		23	
24		24	
25		25	

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Page 26	Page 28
<p>1 or one of the other managers would meet with 2 them, but if it's our Livonia chapel more than 3 likely it would be me unless it was my day off. 4 I meet with the family, talk about the 5 details relating to filling out a death 6 certificate. I talk about what their wishes are 7 for the type of service they'd like us to 8 perform, all details relating to a funeral; 9 ministers, whether a minister or a celebrant was 10 going to be used; where the funeral would be 11 held, at the funeral home or at a church; discuss 12 visitation times, funeral times; whether they 13 would like to have a notice placed in the 14 newspaper, and if so helping assisting them in 15 doing that; music; all things relating to a 16 funeral. 17 Q. And you are also responsible for directing the 18 funeral? That's one of your primary 19 responsibilities? 20 A. Yes. Uh-huh. 21 Q. When you direct a funeral, what do you do? What 22 are you doing in this? 23 A. Well, I make sure that the room is set up 24 properly for a funeral. If it's at the funeral 25 home that the chairs are all set up; that there's</p>	<p>1 A. Well, for instance, Derek Hamer, who is working 2 with me there at our Livonia chapel, he has met 3 with two or three families. 4 Q. On his own or -- 5 A. Yes, because myself or one of the other managers 6 wasn't available. 7 Q. Okay. 8 A. Before that, before him Matthew Rost had made 9 some funeral arrangements as well. 10 Q. What about directing the funeral, you know, 11 getting it set up, the podium, that sort of 12 thing. Are you primarily the one that does that? 13 A. Myself or one of the other managers, yes. 14 Q. Okay. Has a nonmanager ever done that part of 15 it? 16 A. Yes. 17 Q. Okay. Whom? 18 A. Again, Derek, who works with me at Livonia. 19 Q. And how often has he done that? 20 A. Three or four or five times. I don't recall 21 exactly how many. And before him, of course, 22 Matthew. 23 Q. Right. And currently Matthew Rost is a manager 24 at the Detroit location; is that correct? 25 A. Yes.</p>
<p>1 a podium for the minister to use. I meet the 2 minister when he comes in. I talk to the family, 3 show them where to be seated, coordinate any 4 music wishes that they would like to have for the 5 service, play music in the background. 6 We record our funerals, video record 7 them, so I set up the video. And then after the 8 funeral is over I'll go in and give families or 9 give the attendees instructions on what's going 10 to happen next, whether we're going to be leaving 11 and going to a cemetery or if we're going to be 12 invited to a funeral luncheon, things like that. 13 Q. Fair enough. And do the funeral director 14 embalmers ever do these sort of things, these 15 kind of interactions with the families, you know, 16 the shepherding through the process? 17 A. Which part of the process? 18 Q. Meeting with the families to ascertain their 19 wishes and desires. Anything like that? 20 A. Mostly not. 21 Q. Okay. 22 A. Occasionally one of the -- someone other than a 23 manager has met with the family. Mostly not. 24 Q. Okay. And who else -- who can you recall having 25 done this?</p>	<p>1 Q. All right. Now, with respect to -- at some point 2 you were introduced to Anthony Stephens? 3 A. Yes. 4 Q. Okay. What was your first encounter with 5 Mr. Stephens? 6 A. Well, that was some time ago. I met him at 7 our -- probably at our Garden City funeral home 8 where he was employed to work as their embalmer, 9 funeral director embalmer. I can't tell you the 10 exact. I'm sorry. 11 Q. Now, were you involved at all with hiring 12 Stephens? 13 A. I was not, no. 14 Q. Okay. Do you recall Stephens coming up and 15 inquiring about an opening or employment 16 possibilities with R.G. & G.R.? 17 A. No. 18 Q. Is it possible and you just don't remember or -- 19 A. Well, that he inquired about a job? 20 Q. Yes. 21 A. You know, yes. I suppose, yes. It may have been 22 mentioned to me that he was a candidate that Tom 23 had been talking to. 24 Q. Do you recall being -- I apologize if I've asked 25 this. Were you involved at all in the hiring</p>

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	Page 30		Page 32
1	process interviewing for that?	1	A. Yes.
2	A. No.	2	Q. How would you describe Stephens' performance in
3	Q. No. All right. And your understanding was that	3	that role that you observed?
4	Stephens was working out of the Garden City	4	A. He was a very good embalmer. He was very, very
5	facility?	5	thorough. Had obviously had a lot of practice
6	A. Yes.	6	prior to coming to the Harris Funeral Home.
7	Q. Who was Stephens' supervisor there?	7	Families seemed very pleased with his work. He
8	A. Would be George Crawford.	8	did a good job.
9	Q. Did you ever work with Stephens directly?	9	(A pause was had in the proceedings.)
10	A. Sure.	10	BY MR. PRICE:
11	Q. Okay. Under what circumstances?	11	Q. All right. Back on. At some point did you
12	A. Well, he would come to Livonia to embalm, make --	12	become aware of Stephens communicating to people
13	you know, bring a body in and embalm. He would	13	at R.G. & G.R. that she had intended to present
14	come to Livonia occasionally to help out on	14	as female and not as a male?
15	funerals. I would go to Garden City and make	15	A. I did hear rumors, yes.
16	funeral arrangements there. I would see him on	16	Q. Okay. Now, was this before Stephens was fired?
17	those occasions, work with him.	17	A. Yes.
18	Q. Now, you mentioned that Stephens would come to	18	Q. Okay. What did you hear?
19	work at Garden City to help with the funerals.	19	A. I had heard that he was beginning the process of
20	What kind of things would --	20	changing, whatever that includes, hormones or
21	A. I'm sorry, do you mean Livonia?	21	whatever.
22	Q. Livonia. I'm sorry. Thank you. You caught	22	Q. Whatever is involved in that process?
23	that.	23	A. Whatever is included.
24	A. That's okay.	24	Q. Sure.
25	Q. What kind of things would Stephens do to help out	25	A. Right.
Page 31		Page 33	
1	with funerals at Livonia?	1	Q. From whom did you hear this?
2	A. He would help in the parking lot lining up cars.	2	A. Other employees.
3	He would help in the dismissal of the funeral,	3	Q. Can you recall anyone specific?
4	opening doors, generally whatever needed to be	4	A. I can't.
5	done as we do working a funeral.	5	Q. Could it have been another manager?
6	Q. Can you think about anything else specifically	6	A. No.
7	besides helping out in the parking lot and	7	Q. It was not another manager?
8	dismissals of the families and friends?	8	A. It was not another manager.
9	A. No.	9	Q. Was it one of your employees at the time then?
10	Q. Now, you would come over to -- you said you would	10	A. No. Probably an employee at the Garden City
11	come over to Garden City. You would be helping	11	location.
12	with funerals there?	12	Q. But not Mr. Crawford?
13	A. Well, as a manager, all of us managers cover for	13	A. No.
14	each other on our days off. So if the manager at	14	Q. Was he the manager, during the time that Stephens
15	Garden City was off I would come there and make	15	was there, of Garden City?
16	funeral arrangements or direct a funeral.	16	A. Yes, I believe so.
17	Q. Do you recall how often you would be covering at	17	Q. So you heard this and you heard it prior to
18	Garden City while Stephens was employed?	18	Stephens' termination?
19	A. Once or twice a week.	19	A. Yes.
20	Q. So you would have fairly regular contact with	20	Q. All right. Did you ever hear about a letter?
21	Stephens, then; is it safe to say?	21	A. I did hear that he had drafted a letter and had
22	A. Yes.	22	shown it to some people.
23	Q. What did you ever see -- obviously, then you	23	Q. Okay. Shown it to some people at Garden City as
24	would have a chance to see Stephens work as an	24	far as you know?
25	embalmer and director, correct?	25	A. Garden City, possibly Harper.

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Page 46	Page 48
<p>1 Q. Okay. Now, there are -- so you don't know who --</p> <p>2 you don't even know if it was drafted by somebody</p> <p>3 at R.G. & G.R., correct?</p> <p>4 A. I do not have -- no, that's correct.</p> <p>5 Q. All right. Okay. And there are two statements.</p> <p>6 There is about at the first paragraph "Our</p> <p>7 mission is to honor God in all that we do as a</p> <p>8 company and as individuals." And also there's a</p> <p>9 biblical verse at the bottom from the gospel</p> <p>10 according to Matthew.</p> <p>11 Okay. Is that the religious part of</p> <p>12 the -- is that the basis by which you say it's</p> <p>13 kind of a Christian business?</p> <p>14 A. Yes.</p> <p>15 Q. Anything else?</p> <p>16 A. Well, I happen to know that Tom Rost is a</p> <p>17 Christian. I know that he's been affiliated with</p> <p>18 the church over the years.</p> <p>19 Q. Do you have people, to your knowledge, who work</p> <p>20 at R.G. & G.R. who are not of any particular</p> <p>21 religious affiliation?</p> <p>22 A. Not that I'm aware of.</p> <p>23 Q. Okay. It's certainly something -- you don't ask</p> <p>24 about someone's religious affiliation or</p> <p>25 something like that before you hire them?</p>	<p>1 A. That's what you see.</p> <p>2 Q. We've already talked with Mr. Kirkpatrick about</p> <p>3 this.</p> <p>4 MR. KIRKPATRICK: No objection.</p> <p>5 BY MR. PRICE:</p> <p>6 Q. Yeah, to show you this. We're not going to have</p> <p>7 it as an exhibit. This is our Daily Bread here</p> <p>8 from January, February -- December, January,</p> <p>9 February. That's the current one that's out</p> <p>10 there?</p> <p>11 A. I believe so, yes.</p> <p>12 Q. And Mr. Rost supplies those?</p> <p>13 A. Yes.</p> <p>14 Q. All right. And the next item is the Jesus card.</p> <p>15 It's been called What Do You See and there's the</p> <p>16 shadow?</p> <p>17 A. Yep.</p> <p>18 Q. Is that again provided by Mr. Rost?</p> <p>19 A. I don't know. It's been there forever. It's</p> <p>20 been there since I've been there. I don't know.</p> <p>21 Q. Are these available like at the credenza up front</p> <p>22 where people come in?</p> <p>23 A. Yes.</p> <p>24 Q. It's something they can take or not take as the</p> <p>25 mood strikes them?</p>
<p>1 A. Absolutely not.</p> <p>2 Q. Okay. Now, what is your religious observance?</p> <p>3 A. I'm a Christian.</p> <p>4 Q. What church do you go to?</p> <p>5 A. I attend Ward Presbyterian Church.</p> <p>6 Q. Where is that located?</p> <p>7 A. In Northville.</p> <p>8 Q. Now, with respect to -- is there any way that</p> <p>9 religion is exercised at R.G. & G.R.? Are there</p> <p>10 religious activities there?</p> <p>11 A. No.</p> <p>12 Q. Okay. No bible studies?</p> <p>13 A. No.</p> <p>14 Q. Nothing like that. No meetings for prayer or</p> <p>15 anything like that?</p> <p>16 A. No.</p> <p>17 Q. Okay. Do you -- is there anything that Mr. Rost</p> <p>18 hands -- provides for the public to take, like</p> <p>19 devotional books or anything like that that you</p> <p>20 can recall?</p> <p>21 A. He provides The Daily Bread booklet that's</p> <p>22 sitting on our tables at each one of our</p> <p>23 locations for people to take if they wish. Oh,</p> <p>24 I'm sorry, and our Jesus card.</p> <p>25 Q. That's okay. Yep, and the Jesus card.</p>	<p>1 A. Sure.</p> <p>2 Q. All right. Can you think of any other ways that</p> <p>3 Christianity is expressed at R.G. & G.R. apart</p> <p>4 from the devotional or the Jesus card?</p> <p>5 A. If we have a company meal together or a managers</p> <p>6 meal, Tom will say a -- ask a blessing on the</p> <p>7 food.</p> <p>8 Q. So he'll offer an invocation, kind of a prayer?</p> <p>9 A. Offer a blessing.</p> <p>10 Q. Offer a blessing.</p> <p>11 Manager meetings. Where are these</p> <p>12 manager meetings you're talking about?</p> <p>13 A. Occasionally we will meet as managers to discuss</p> <p>14 business.</p> <p>15 Q. Where are these meetings held?</p> <p>16 A. At the Detroit Athletic Club.</p> <p>17 Q. And how often would you say they occur?</p> <p>18 A. Possibly once a month. Sometimes more, times</p> <p>19 less.</p> <p>20 Q. And there's a meal there?</p> <p>21 A. Yes.</p> <p>22 Q. You take a meal and so forth. All right.</p> <p>23 And this is just for the managers and</p> <p>24 Mr. Rost?</p> <p>25 A. Yes, with the exception of Shannon Kish.</p>

<p style="text-align: right;">Page 54</p> <p>1 clean shaven?</p> <p>2 A. Well, my full-time people are, of course. There</p> <p>3 are a couple of part-time men that do have a</p> <p>4 moustache and, like, maybe very closely-trimmed</p> <p>5 hair in this lower area.</p> <p>6 Q. On the chin?</p> <p>7 A. Yeah.</p> <p>8 Q. Okay. And who would those persons be?</p> <p>9 A. Bill Condron, one of my drivers. And my son</p> <p>10 Daniel. He doesn't have a moustache but he has a</p> <p>11 little neatly trimmed --</p> <p>12 Q. A chin beard kind of thing? Okay.</p> <p>13 MR. PRICE: Nothing else.</p> <p>14 EXAMINATION</p> <p>15 BY MR. KIRKPATRICK:</p> <p>16 Q. All right. Just a few questions, Mr. Cash.</p> <p>17 Mr. Price asked you questions. Is there</p> <p>18 any prayers that Tom Rost might offer when you</p> <p>19 were at your meetings? Do you recall that?</p> <p>20 A. Yes.</p> <p>21 Q. And I think he was asking is it a generic prayer?</p> <p>22 Does it have anything to do with Jesus? Do you</p> <p>23 recall that conversation?</p> <p>24 A. Yes.</p> <p>25 Q. Do you know Tom Rost to be a Christian?</p>	<p style="text-align: right;">Page 56</p> <p>1 funeral directors and the fact that as a manager</p> <p>2 you would be the one or the managers would be the</p> <p>3 one to meet with families and make the</p> <p>4 arrangements. Do you recall that?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. So funeral directors and embalmers, do</p> <p>7 they come into contact at all with the public?</p> <p>8 A. Oh, sure.</p> <p>9 Q. And I think there was testimony about the fact</p> <p>10 that they would maybe do parking or assist the</p> <p>11 managers during funerals?</p> <p>12 A. Yes.</p> <p>13 Q. So are they constantly exposed to the public?</p> <p>14 A. Absolutely.</p> <p>15 Q. Is that why they're required to wear a suit?</p> <p>16 A. Yes. We want all of our men to.</p> <p>17 Q. Are you currently wearing the uniform for male</p> <p>18 funeral directors?</p> <p>19 A. I am.</p> <p>20 Q. Okay. It's a navy blue suit with a maroon tie</p> <p>21 and white shirt?</p> <p>22 A. Yes.</p> <p>23 Q. Would that be accurate to say?</p> <p>24 Okay. Are there currently any female</p> <p>25 funeral directors at Harris?</p>
<p style="text-align: right;">Page 55</p> <p>1 A. Yes.</p> <p>2 Q. And the Christian faith believes in Jesus as the</p> <p>3 Messiah?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. You didn't believe Tom Rost was offering</p> <p>6 prayers to, say, Allah, do you?</p> <p>7 A. No.</p> <p>8 Q. How about Confucius?</p> <p>9 A. No.</p> <p>10 Q. How about Buddah?</p> <p>11 A. Nope.</p> <p>12 Q. So you believe that when he would offer prayers</p> <p>13 it's because of his Christian faith?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Derek. We just talked about Derek,</p> <p>16 counseling him on his suit, right? Do you recall</p> <p>17 that?</p> <p>18 A. Yes. Uh-huh.</p> <p>19 Q. Have you had to counsel Derek or any other male</p> <p>20 employees for wearing what you consider to be</p> <p>21 female attire?</p> <p>22 A. No.</p> <p>23 Q. Okay. Has that ever happened?</p> <p>24 A. No.</p> <p>25 Q. Okay. Now, I think there was questions about</p>	<p style="text-align: right;">Page 57</p> <p>1 A. No.</p> <p>2 Q. Do you know if they would be required to wear a</p> <p>3 similar uniform to what you're wearing?</p> <p>4 A. Yes. Well, I don't know that for a fact, but</p> <p>5 that would be my understanding.</p> <p>6 Q. All right. Now, were you there when Stephens was</p> <p>7 terminated from his position?</p> <p>8 A. Was I present?</p> <p>9 Q. Yes.</p> <p>10 A. No.</p> <p>11 Q. Did Tom Rost or anyone else consult with you and</p> <p>12 ask you what your opinion should be regarding the</p> <p>13 future of Stephens?</p> <p>14 A. No.</p> <p>15 Q. Okay. So do you actually know the specific</p> <p>16 reasons why Stephens was terminated?</p> <p>17 A. No.</p> <p>18 Q. Okay. Is this part of the speculation because</p> <p>19 you now know everything with this letter that</p> <p>20 came out and that kind of thing?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. I have no further questions.</p> <p>23 RE-EXAMINATION</p> <p>24 BY MR. PRICE:</p> <p>25 Q. Do you have any idea what the female version of</p>

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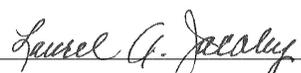
Page 58

1 the funeral directors suit would be? Do you have
 2 any speculation as to what it would look like?
 3 A. I would speculate it would look similar to the
 4 men's suit without -- obviously, without a tie
 5 but -- and with a skirt.
 6 Q. Okay. But essentially you've never seen it.
 7 It's just kind of your best guess?
 8 A. It is.
 9 Q. Okay. Nothing further.
 10 (Deposition concluded at 10:53 a.m.)
 11 - - -
 12
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2 ERRATA SHEET
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 4
 5 I declare under penalty of perjury that I have read the
 6 foregoing _____ pages of my testimony, taken
 7 on _____ (date) at
 8 _____(city), _____(state),
 9
 10 and that the same is a true record of the testimony given
 11 by me at the time and place herein
 12 above set forth, with the following exceptions:
 13
 14 Page Line Should read: Reason for Change:
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1 CERTIFICATE OF NOTARY
 2 STATE OF MICHIGAN)
 3) SS
 4 COUNTY OF OAKLAND)
 5
 6 I, Laurel A. Jacoby, a Notary Public in and for
 7 the above county and state, do hereby certify that the
 8 above deposition was taken before me at the time and
 9 place hereinbefore set forth; that the witness was by
 10 me first duly sworn to testify to the truth and nothing
 11 but the truth; that the foregoing questions asked, and
 12 the answers given by the witness were duly recorded by
 13 me and reduced to computer transcription; that this is
 14 a true, full and correct transcript so taken; and that
 15 I am not related to, nor of counsel to either party,
 16 nor interested in the event of this cause.
 17
 18
 19
 20 
 21 Laurel A. Jacoby, CSR-5059, RPR
 22 Notary Public
 23 Oakland County, Michigan
 24
 25 My Commission Expires: September 1, 2018

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1 ERRATA SHEET
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EXHIBIT 9

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

4 -----
5 EQUAL EMPLOYMENT OPPORTUNITY
6 COMMISSION,

7 Plaintiff,

8 - vs -

9 No. 2:14-cv-13740

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

11 Defendants.
12 -----

13 D E P O S I T I O N O F

14 WITNESS: DAVID KOWALEWSKI

15 LOCATION: Joel Kirkpatrick, PC
16 843 Penniman Avenue, Suite 201
17 Plymouth, Michigan 48170

18 DATE: Thursday, January 21, 2016
19 10:44 a.m.

20 APPEARANCES:

21 FOR PLAINTIFF: EQUAL EMPLOYMENT OPPORTUNITY
22 COMMISSION
23 477 Michigan Avenue, Room 865
24 Detroit, Michigan 48226
25 313.226.7808
 dale.price@eeoc.gov
 miles.shultz@eeoc.gov
 BY: DALE R. PRICE, JR. (P55578)
 MILES E. SHULTZ (P73555)

FOR DEFENDANT: JOEL J. KIRKPATRICK, PC
 843 Penniman Avenue, Suite 201
 Plymouth, Michigan 48170
 734.404.5170
 joel@joelkirkpatrick.com
 BY: JOEL J. KIRKPATRICK (P62851)

REPORTED BY: Laurel A. Jacoby, CSR-5059, RPR
 Job no. 285886-B

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<p>1 Nothing that derogatory but just not 2 professional, and it got back to us and we just 3 didn't want that associated with us, the lack of 4 professionalism. 5 Q. Did you ever fire anybody for violating the dress 6 code? 7 A. No. 8 Q. Do you understand what I mean by dress code? 9 A. If you'd like to explain it. 10 Q. Well, what is R.G. & G.R. Harris's dress code 11 policy? 12 A. Well, for the males it's a suit and tie. And 13 then for the females it's no slacks, a skirt, a 14 blouse and a jacket. A professional, I guess, 15 business attire. 16 Q. And you're wearing the suit today? 17 A. Yes, I am. 18 Q. And this is provided to you by R.G. & G.R. 19 Harris? 20 A. Yes, it is. 21 Q. And what's the policy for providing you with the 22 suit? 23 A. I was provided with two suits when I started, and 24 as needed I can get more suits. 25 Q. Can you estimate how often you get a new suit?</p>	<p>1 A. Correct. 2 Q. Can you describe what you've done to discipline 3 employees at R.G. & G.R.? 4 A. Usually just sitting down and talking with them, 5 pointing out what their error was or what the 6 problem was. I never had to send anybody home or 7 anything like that where they lost time. So just 8 disciplining verbally. 9 Q. So typically verbal disciplines, no written 10 disciplines? 11 A. Correct. 12 Q. And what sort of things would you do a verbal 13 discipline regarding? 14 A. Ask what happened in their own words. It would 15 most of the time be a family complaining to us 16 about somebody doing something and/or saying 17 something. I would always ask their side of the 18 story, and if they were, in fact, at fault we 19 would just talk about it and make sure it doesn't 20 happen again. Explain to them why, what the 21 ramifications were and move on from there. 22 Q. So -- 23 A. It's always been a civil conversation. I'm 24 sorry, I didn't mean to interrupt you. It's 25 always been a civil conversation.</p>
<p>1 A. Roughly, once a year. 2 Q. And where do you go? 3 A. Sam Michaels Clothiers. 4 Q. And they bill R.G. & G.R. directly? 5 A. Yes. 6 Q. Have you fired anybody else besides Maruta, 7 Debbie, Chris, Mike and Dan? 8 A. No. 9 Q. Let's move to discipline. 10 A. Actually, there was one other. I'm sorry. Marie 11 Byrski was her name. She had taken Maruta's job, 12 after we let Maruta go, on a part-time basis, not 13 full time. 14 Q. When was she terminated? 15 A. Probably about four years ago, roughly. 16 Q. And why? 17 A. She had a mix-up with a family that left a bad 18 taste in our mouth with us and we couldn't have 19 that. 20 Q. If Maruta Tropps was downsized -- 21 A. Uh-huh. 22 Q. -- why was she replaced with Marie? 23 A. We had ended up needing somebody part time. The 24 load was too much to go without a person. 25 Q. So you went from a full-time to a part-time?</p>	<p>1 Q. No, I violated my own rule by speaking over your 2 answer. 3 Besides family complaints, what sort of 4 things do you discipline over? 5 A. If things don't get done as they should, if 6 there's a list whether verbally, written or 7 things to get done and things don't get done, I 8 just inquire why and why not. If they have a 9 valid excuse, that's fine. If they don't, then 10 we just need to address it and make sure things 11 get done as they should. 12 Q. Okay. So that's basically for job performance 13 issues? 14 A. Correct. 15 Q. That don't involve family? 16 A. Correct. 17 Q. How about for violations of the dress code? Do 18 you discipline? Give verbal discipline for 19 violations of the dress code? 20 A. I've never had to. 21 Q. Have you ever had an employee who wore an 22 inappropriate jacket that said body snatcher? 23 A. Oh, that was Dan. Dan Kozlauskos. 24 Q. Could you describe that incident? 25 A. I believe it was when he had gone to pick</p>

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1	somebody up rather than wearing his suit coat	1	Q. You weren't in any way involved in the process?
2	he had that on, and the hospice person or the	2	A. I was not.
3	nurse -- I don't remember if it was a hospice	3	Q. No one asked your input?
4	facility or hospital -- had contacted us and just	4	A. No.
5	said how inappropriate it was.	5	Q. Has Tom Rost ever fired any employees that you
6	Q. What did you do to address that?	6	supervised?
7	A. I told him he can't wear it anymore. So I guess	7	A. No. No, not that I remember.
8	I did. I just answered my own question that you	8	Q. Did you consult with Tom Rost in firing the
9	asked.	9	employees we've previously discussed?
10	Q. I just want to make the record clear.	10	A. Yes.
11	A. Oh, that's fine. I appreciate that.	11	Q. All of them?
12	Q. But he didn't get terminated for that?	12	A. Yes.
13	A. No, he did not.	13	Q. And what would the nature of those communications
14	Q. He was terminated for other reasons?	14	with Tom Rost be?
15	A. Yes.	15	A. Voice my concern as far as why a person should be
16	Q. What was his position?	16	let go, and Tom would usually concur and proceed
17	A. He was a runner or transporter.	17	with the termination.
18	Q. And what are the duties of a runner or	18	Q. Has Tom ever told you not to fire someone you
19	transporter?	19	wanted to fire?
20	A. They get death certificates signed at doctors'	20	A. He has not.
21	offices, file death certificates as well as pick	21	Q. Has Tom Rost ever discussed his religious beliefs
22	up bodies.	22	with you?
23	Q. I'd like to revisit the dress code for a second.	23	A. No.
24	Are women provided clothing from R.G. & G.R.	24	Q. Has Tom Rost ever led you in religious
25	Harris?	25	activities?
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1	A. No.	1	A. No.
2	Q. Are women provided a clothing allowance or	2	Q. Has Tom Rost ever encouraged you to participate
3	stipend?	3	in religious activities?
4	A. Yes.	4	A. No.
5	Q. Has that always been the case since you've worked	5	Q. Have you ever had any sort of religious
6	there?	6	conversation with Tom Rost?
7	A. No.	7	A. No.
8	Q. Do you know when that changed?	8	Q. Would you consider R.G. & G.R. Harris to be a
9	A. Within probably about the last few months.	9	Christian business?
10	Q. Last few months?	10	A. Yes.
11	A. I think, yeah. I believe so.	11	Q. Why would you consider that?
12	Q. You're not sure?	12	A. All of us that go there are church-going people
13	A. No.	13	of different faiths, and to me a church-going
14	Q. Do you know why that changed?	14	person constitutes a Christian.
15	A. No.	15	Q. Do you know that Tom Rost goes to church?
16	Q. Do you know how much the stipend or allowance is	16	A. I believe he belongs to Highland Park Baptist
17	for?	17	Church.
18	A. I know the part-time and full-time are two	18	Q. If you've never discussed religion with him, how
19	different amounts. I believe it's 75 for the	19	do you know he goes to that church?
20	part-time.	20	A. Because we've had families that come to us and we
21	Q. Okay.	21	find out the source of the call, and they'll say
22	A. And more for the full-time. I'm not sure the	22	I go to church with Tom Rost.
23	exact amount.	23	Q. R.G. & G.R. Harris provides funeral services for
24	Q. Do you know who decided to implement the stipend?	24	non-Christian families, right?
25	A. No.	25	A. Yes.

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<p>1 Q. And even for atheist, nonreligious families?</p> <p>2 A. Oh, yes.</p> <p>3 Q. So your understanding that R.G. & G.R. is a</p> <p>4 Christian business you've testified is based on</p> <p>5 the fact that a lot of the employees are</p> <p>6 church-going people?</p> <p>7 A. Yes.</p> <p>8 Q. Any other way you would consider R.G. & G.R. to</p> <p>9 be a Christian business?</p> <p>10 A. Not really, no.</p> <p>11 Q. There aren't bible studies or employee prayers?</p> <p>12 A. There are not.</p> <p>13 Q. Do you discuss your religious beliefs with your</p> <p>14 employees?</p> <p>15 A. No. No.</p> <p>16 Q. I'm going to show you what's been marked</p> <p>17 previously as Exhibit 6.</p> <p>18 A. Okay.</p> <p>19 MR. SHULTZ: Take a quick break and you</p> <p>20 can review it while we're breaking.</p> <p>21 THE WITNESS: Oh, sure.</p> <p>22 (A pause was had in the proceedings.)</p> <p>23 BY MR. SHULTZ:</p> <p>24 Q. Joel Kirkpatrick, R.G. & G.R. Harris's attorney,</p> <p>25 provided us with three documents responsive to</p>	<p>1 A. Yes.</p> <p>2 Q. Why have you seen it?</p> <p>3 A. They're available at the funeral home for anyone</p> <p>4 to take.</p> <p>5 Q. Where at?</p> <p>6 A. I think on the front credenza at each of the</p> <p>7 branches.</p> <p>8 Q. Do you place those cards there?</p> <p>9 A. Our secretaries make sure that they're filled and</p> <p>10 there's cards there for people to take.</p> <p>11 Q. Okay. Do you direct them to place them there?</p> <p>12 A. I don't think I've ever directed them. They just</p> <p>13 knew to do that prior to me getting there.</p> <p>14 Q. Who would have told them to do that?</p> <p>15 A. It could have been George Crawford.</p> <p>16 Q. George Crawford?</p> <p>17 A. It might have been Tom. I don't know. I'd have</p> <p>18 to speculate on that.</p> <p>19 Q. So you're not sure if Tom Rost or George Crawford</p> <p>20 asked these to be placed at the front desks?</p> <p>21 A. Correct. I'm not sure.</p> <p>22 Q. Okay. Have you ever -- has Tom Rost ever</p> <p>23 encouraged you to take this card?</p> <p>24 A. No, he hasn't.</p> <p>25 Q. Have you ever encouraged an employee to take the</p>
<p>1 document requests.</p> <p>2 MR. SHULTZ: Do you want to describe</p> <p>3 what these are real fast for the record, Joel?</p> <p>4 MR. KIRKPATRICK: Well, these are</p> <p>5 pursuant to your request for discovery, and you</p> <p>6 asked us to provide a Daily Bread that is used in</p> <p>7 the funeral home, a card there that says "What do</p> <p>8 you see" with the word Jesus on it. It's another</p> <p>9 card that's provided, and you also asked us to</p> <p>10 provide documents concerning our previous expert,</p> <p>11 Carl Jennings', material that he has provided,</p> <p>12 and so that's what we provided.</p> <p>13 MR. SHULTZ: Let's go off the record for</p> <p>14 a second.</p> <p>15 (Discussion held off the record.)</p> <p>16 BY MR. SHULTZ:</p> <p>17 Q. I'm going to show you what Mr. Kirkpatrick</p> <p>18 provided to us, which is the "What do you see,</p> <p>19 Jesus" card. We're not going to mark this as an</p> <p>20 exhibit right now because this is our only copy,</p> <p>21 and Mr. Kirkpatrick doesn't have any objections</p> <p>22 to the three exhibits we discussed.</p> <p>23 MR. KIRKPATRICK: I have no objection.</p> <p>24 BY MR. SHULTZ:</p> <p>25 Q. Have you seen this card before?</p>	<p>1 card?</p> <p>2 A. No, I haven't.</p> <p>3 Q. Have you ever taken this card?</p> <p>4 A. No, I haven't.</p> <p>5 Q. I'm going to reference this Daily Bread pamphlet</p> <p>6 Mr. Kirkpatrick also has provided to us. We</p> <p>7 won't mark it as an exhibit since it's the only</p> <p>8 copy that we have, and I believe Mr. Kirkpatrick</p> <p>9 similarly has no objection.</p> <p>10 MR. KIRKPATRICK: No objection.</p> <p>11 BY MR. SHULTZ:</p> <p>12 Q. Have you seen this Daily Bread?</p> <p>13 A. Yes, I have.</p> <p>14 Q. And have you seen multiple -- are there different</p> <p>15 versions of this Daily Bread?</p> <p>16 A. I believe it comes out monthly or bimonthly.</p> <p>17 Q. And where is this located?</p> <p>18 A. It's on one of the tables in the funeral home in</p> <p>19 the public area.</p> <p>20 Q. It's similar to the Jesus card, I assume, that</p> <p>21 families can take that if they need it?</p> <p>22 A. Correct.</p> <p>23 Q. Has anyone at R.G. & G.R. Harris ever encouraged</p> <p>24 you to take The Daily Bread?</p> <p>25 A. No.</p>

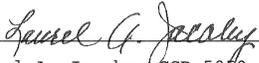
<p style="text-align: right;">Page 54</p> <p>1 A. Roughly, once a month.</p> <p>2 Q. Where are they at?</p> <p>3 A. DAC, Detroit Athletic Club.</p> <p>4 Q. Would this -- would Stephens' termination have</p> <p>5 been discussed at one of these manager meetings?</p> <p>6 A. Prior to the termination or after?</p> <p>7 Q. Either.</p> <p>8 A. Most likely after because prior to we didn't have</p> <p>9 a lot of knowledge or a lot of communication from</p> <p>10 Tom about what was going to happen.</p> <p>11 Q. So after the termination, do you remember</p> <p>12 discussing this at a managers meeting?</p> <p>13 A. Not specifically, but I'm sure we had talked</p> <p>14 about it because it's something important that</p> <p>15 happened at the funeral home, and the meetings</p> <p>16 are designed to talk about important things that</p> <p>17 happen.</p> <p>18 Q. So it's more akin to the course of normal</p> <p>19 business you would discuss important things that</p> <p>20 happen at a managers meeting and this is an</p> <p>21 important thing so it probably was discussed?</p> <p>22 A. Correct.</p> <p>23 Q. You just don't have any specific recollection of</p> <p>24 any such conversation at a managers meeting?</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 56</p> <p>1 A. Like I said, possibly with Wendy.</p> <p>2 Q. Anybody else besides Wendy?</p> <p>3 A. I may have after it came out and after everyone</p> <p>4 seen it, but prior to Tom receiving it, no.</p> <p>5 Q. Do you remember any of those conversations you</p> <p>6 may have had after Stephens was terminated?</p> <p>7 A. Just general information, just general</p> <p>8 conversation about the letter. Like I said, it's</p> <p>9 still a mystery to me. I don't understand things</p> <p>10 like this, so I really didn't say too much about</p> <p>11 it. But it still, seeing the letter, yeah, it's</p> <p>12 a little shocking about what had happened with</p> <p>13 Anthony or with his transgender.</p> <p>14 Q. Have any of the employees you -- have any of R.G.</p> <p>15 & G.R. Harris's employees came to you with</p> <p>16 questions about Stephens' termination or</p> <p>17 Stephens' transition, gender transition?</p> <p>18 A. As far as the termination, if they had I don't</p> <p>19 know anything about it so I would just tell them</p> <p>20 that.</p> <p>21 Q. Uh-huh.</p> <p>22 A. And as far as the transgender, I'm not sure what</p> <p>23 you mean, just the letter itself or something</p> <p>24 other than the letter?</p> <p>25 Q. Just the fact that Stephens is a transgender</p>
<p style="text-align: right;">Page 55</p> <p>1 Q. Have you ever had any training on employment law</p> <p>2 issues?</p> <p>3 A. No.</p> <p>4 Q. Have you ever heard of Title 7 of the 1964 Civil</p> <p>5 Rights Act?</p> <p>6 A. I've heard of it but I don't know exactly what</p> <p>7 it's all about, but I've heard of it.</p> <p>8 Q. You don't have an understanding of the Title 7 of</p> <p>9 the 1964 Civil Rights Act?</p> <p>10 A. I do not.</p> <p>11 Q. Okay. I'm going to hand you Exhibit 7.</p> <p>12 MR. SHULTZ: Do you have a deponent copy</p> <p>13 over there, Joel? Did we lose that in the --</p> <p>14 MR. PRICE: The letter? Yeah, we just</p> <p>15 did the last one.</p> <p>16 BY MR. SHULTZ:</p> <p>17 Q. Could you review that for a second, please?</p> <p>18 Do you recognize that document?</p> <p>19 A. Yes, I do.</p> <p>20 Q. What is Exhibit 7?</p> <p>21 A. It's the letter that I read that Anthony gave to</p> <p>22 me.</p> <p>23 Q. Did you have any communication with anyone</p> <p>24 besides Tom Rost or the other managers regarding</p> <p>25 this letter?</p>	<p style="text-align: right;">Page 57</p> <p>1 woman. Have any of the employees come to you</p> <p>2 with questions or raised that topic?</p> <p>3 MR. KIRKPATRICK: I'm going to place an</p> <p>4 objection to characterization as fact that</p> <p>5 Stephens is a transgendered woman. If you can</p> <p>6 answer the question on what the letter says, then</p> <p>7 go ahead.</p> <p>8 THE WITNESS: Okay.</p> <p>9 BY MR. SHULTZ:</p> <p>10 Q. Do you understand what I mean by transgender</p> <p>11 woman?</p> <p>12 A. No, I really don't. I really don't have that</p> <p>13 come to me with questions regarding that. I</p> <p>14 don't quite understand.</p> <p>15 Q. So for -- you worked with Stephens for four or</p> <p>16 five years, correct?</p> <p>17 A. Yes.</p> <p>18 Q. Stephens presented consistent with what you would</p> <p>19 consider to be a man?</p> <p>20 A. Yes.</p> <p>21 Q. This letter, Exhibit 7 that you've just reviewed,</p> <p>22 discusses that following a vacation she was going</p> <p>23 to present as a female at work; is that correct?</p> <p>24 A. Yes.</p> <p>25 Q. So that's what I mean. Stephens had presented as</p>

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<p>1 a man --</p> <p>2 A. Yes.</p> <p>3 Q. -- for four or five years of your working</p> <p>4 history --</p> <p>5 A. Yes.</p> <p>6 Q. -- with her?</p> <p>7 A. Yes.</p> <p>8 Q. And now she was going to present consistent with</p> <p>9 her gender identity as a female. You understand</p> <p>10 that general concept, that this letter is stating</p> <p>11 her intention to dress inconsistent with what you</p> <p>12 had previously thought to be her gender, correct?</p> <p>13 A. Yes, I understand.</p> <p>14 Q. Okay. So that is what I mean by transgender</p> <p>15 woman. Whether or not we want to talk if it's --</p> <p>16 you understand the terminology, but -- you</p> <p>17 understand this concept?</p> <p>18 A. Oh, yes. Yeah.</p> <p>19 Q. Has any employee ever come to you in any way to</p> <p>20 talk about --</p> <p>21 A. Like how I feel about it?</p> <p>22 Q. Any type of discussion or conversation.</p> <p>23 A. I'm sure.</p> <p>24 MR. KIRKPATRICK: I'm going to place an</p> <p>25 objection to relevance on how he felt about it,</p>	<p>1 Q. Okay.</p> <p>2 A. It's not very often at all.</p> <p>3 Q. If you're involved in embalming then most likely</p> <p>4 you're preparing the body for a funeral so you're</p> <p>5 also doing the cosmetizing, the dressing and the</p> <p>6 casketing?</p> <p>7 A. Correct.</p> <p>8 Q. Two or three times a year --</p> <p>9 A. Correct.</p> <p>10 Q. -- you're downstairs prepping a decedent for a</p> <p>11 funeral?</p> <p>12 A. Correct.</p> <p>13 Q. At the manager meetings at the DAC, are there</p> <p>14 prayers before those meetings?</p> <p>15 A. Yes, there are.</p> <p>16 Q. And who leads those prayer?</p> <p>17 A. Tom Rost.</p> <p>18 Q. And what is the nature of that prayer?</p> <p>19 A. Blessing of food, thanking God for the business</p> <p>20 provided to us and being able to help families at</p> <p>21 a time of need.</p> <p>22 Q. Outside of that instance, do you remember Tom</p> <p>23 Rost ever leading employees in prayer?</p> <p>24 A. At our -- we have a company meeting or a company</p> <p>25 party once a year, and I think he usually leads</p>
<p>1 what they said, but answer if you can.</p> <p>2 THE WITNESS: I'm sure they did come to</p> <p>3 me, but it wasn't anything that I really recall</p> <p>4 exactly.</p> <p>5 BY MR. SHULTZ:</p> <p>6 Q. Okay.</p> <p>7 A. I'm sure because, I mean, when something like</p> <p>8 this happens in a company it's very unique, and</p> <p>9 of course everyone's going to talk about it</p> <p>10 amongst themselves. So I'm sure there was a lot</p> <p>11 of talk, I just don't remember anything specific.</p> <p>12 Q. Okay. Previously you testified that 95 percent</p> <p>13 of your duties are upstairs duties --</p> <p>14 A. Yes.</p> <p>15 Q. -- at Garden City. How often are you actually</p> <p>16 downstairs doing the various downstairs tasks of</p> <p>17 cosmetizing, embalming, casketing?</p> <p>18 A. As far as --</p> <p>19 Q. I'm missing one.</p> <p>20 MR. PRICE: Dressing.</p> <p>21 BY MR. SHULTZ:</p> <p>22 Q. Dressing?</p> <p>23 A. Dressing. As far as embalming, maybe two to</p> <p>24 three times a year. Roughly about the same for</p> <p>25 the others.</p>	<p>1 us in prayer there to start the meal as well.</p> <p>2 Q. Before a meal as well?</p> <p>3 A. Correct, before a meal.</p> <p>4 Q. When is this company meeting usually held?</p> <p>5 A. It's once a year, usually in May.</p> <p>6 Q. Where is it held?</p> <p>7 A. Different places. We've gone to the Coach</p> <p>8 Insignia Restaurant, we've gone to Tiger games,</p> <p>9 something fun for the whole staff to come</p> <p>10 together and do out of the context of the funeral</p> <p>11 home.</p> <p>12 Q. So it's like an annual company party or outing?</p> <p>13 A. Correct. Yes.</p> <p>14 Q. And he will lead a prayer -- similar to before</p> <p>15 the breakfast meal at a monthly manager meeting,</p> <p>16 he'll lead the prayer for a meal at this company</p> <p>17 outing?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Any other instances where Tom Rost leads</p> <p>20 employees in prayer that you can think of?</p> <p>21 A. No.</p> <p>22 Q. Okay. When you had to counsel Jason regarding</p> <p>23 his beard --</p> <p>24 A. Yes.</p> <p>25 Q. -- how much did he -- you say he had worn facial</p>

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<p>1 an hour to two hours tops?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. So if there's eight to 12 done in a month,</p> <p>4 leaves ten as a figure, and you can tell me if</p> <p>5 you agree with that or not, and the average would</p> <p>6 be two hours, that would be 20 hours a month just</p> <p>7 for the embalming?</p> <p>8 A. Correct.</p> <p>9 Q. And maybe another hour to hour and a half for the</p> <p>10 casketing, for the cosmetics, for the dressing,</p> <p>11 all of the other stuff that goes into that?</p> <p>12 A. Yes.</p> <p>13 Q. So maybe there's a total of 30 hours a month</p> <p>14 would you say on average for an embalming?</p> <p>15 A. Correct.</p> <p>16 Q. So Troy Shaffer, is he required to wear the</p> <p>17 uniform that you're wearing, the suit and tie?</p> <p>18 Does he wear that?</p> <p>19 A. He does.</p> <p>20 Q. Okay. So Troy Shaffer doesn't spend, you know,</p> <p>21 40 hours a week doing downstairs work, does he?</p> <p>22 A. He does not.</p> <p>23 Q. So he participates with other activities that a</p> <p>24 funeral director would participate in such as</p> <p>25 maybe picking up bodies?</p>	<p>1 saying that Anthony Stephens is no longer with</p> <p>2 the company, right?</p> <p>3 A. That was the protocol with the funeral home when</p> <p>4 somebody's terminated.</p> <p>5 Q. Right.</p> <p>6 A. So everybody knows.</p> <p>7 Q. What's going on?</p> <p>8 A. I'm assuming we got it with Anthony as well, but</p> <p>9 I don't remember exactly, but I would think we</p> <p>10 would have.</p> <p>11 Q. Okay. Have you known Anthony to be anything</p> <p>12 other than a man --</p> <p>13 A. No, I haven't.</p> <p>14 Q. -- in your dealings with him? No? Okay.</p> <p>15 Just to get back to the grooming policy,</p> <p>16 you were asked questions about personal grooming</p> <p>17 as part of the employee guide or the employee</p> <p>18 manual here that you looked at, Exhibit 6.</p> <p>19 A. Yes.</p> <p>20 Q. There was some discussion about your hair. I</p> <p>21 mean, you're allowed to have neat mustaches,</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. I would characterize, looking at your moustache</p> <p>25 and goatee, as very neatly trimmed. Would you</p>
<p>1 A. Yes.</p> <p>2 Q. Participating in the services and that kind of</p> <p>3 thing?</p> <p>4 A. Yes.</p> <p>5 Q. And having access and contact with the families?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. All right. You also mentioned about</p> <p>8 getting the letter. You think you received the</p> <p>9 letter from Stephens the day before Tom Rost did,</p> <p>10 right?</p> <p>11 A. Yes.</p> <p>12 Q. But I think you also testified that you thought</p> <p>13 that Stephens was fired the next day as well. Is</p> <p>14 that true? Did I hear that right?</p> <p>15 A. No, that's not what I said.</p> <p>16 Q. Okay.</p> <p>17 A. He said he was going to give Tom the letter the</p> <p>18 next day.</p> <p>19 Q. Okay.</p> <p>20 A. And then as the letter stated, I think he's on</p> <p>21 vacation for one or two weeks.</p> <p>22 Q. Okay.</p> <p>23 A. And that was for Tom, I guess, to digest the</p> <p>24 letter maybe or whatever.</p> <p>25 Q. You had gotten a fax at some point after that</p>	<p>1 believe that's also in conformity with the</p> <p>2 grooming code?</p> <p>3 A. Yes, I do.</p> <p>4 Q. Okay. And your hair is very neatly trimmed.</p> <p>5 It's not extreme hair style and you don't have</p> <p>6 any sideburns, right?</p> <p>7 A. Correct.</p> <p>8 Q. And as far as you understand it you are complying</p> <p>9 with the personal grooming policy with having</p> <p>10 your moustache and goatee neatly trimmed?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. You don't have a beard, do you?</p> <p>13 A. I do not.</p> <p>14 Q. Okay. That's it. I don't have further</p> <p>15 questions.</p> <p>16 RE-EXAMINATION</p> <p>17 BY MR. SHULTZ:</p> <p>18 Q. I just have a few followups regarding the</p> <p>19 upstairs/downstairs distinction.</p> <p>20 What sort of contact -- how often is</p> <p>21 Shaffer performing upstairs duties?</p> <p>22 A. It's very limited. It's kind of hard to say. I</p> <p>23 mean, you talking about, like, hours wise or --</p> <p>24 Q. However it makes sense for you to describe.</p> <p>25 A. Well, usually if we have a visitation or a</p>

<p style="text-align: right;">Page 70</p> <p>1 funeral and he's not doing anything downstairs, 2 he would be upstairs assisting us, dressed, of 3 course, in a suit as we are. 4 Q. And I guess I want to clarify the nature of the 5 business and how upstairs and downstairs work 6 correlates to the nature of the business. So a 7 family comes in and they have a death. 8 Typically, you would meet with the family and 9 Troy would take care of processing and preparing 10 the decedent for that family? 11 A. Yes. 12 Q. In what instances would the inverse happen where 13 Troy met with the family and you prepared the 14 decedent? 15 A. Troy has never met with a family. I don't know 16 if he would be able to, not knowing what to do 17 upstairs. 18 Q. So he's never met with a family regarding funeral 19 arrangements? 20 A. That's correct. 21 Q. So what is the nature of his upstairs work, then? 22 A. Working visitation, possibly parking cars for the 23 funeral, assisting with funeral services. Not 24 directing them, merely assisting. 25 Q. So working a visitation, parking cars, and</p>	<p style="text-align: right;">Page 72</p> <p>1 Q. Are you also there for these visitations? 2 A. I am usually. 3 Q. What's the distinction between what you do at 4 these visitations than what Shaffer does at these 5 visitations? 6 A. I usually have a lot of interaction with the 7 family as far as regarding the business aspect of 8 the service or arranging the service. 9 Q. Okay. What's involved in parking cars? 10 A. The day of the funeral, the attendants outside 11 would have a list. We call it a car list. The 12 family is going to be in a specific order. As 13 they pull in, they direct them where to park. 14 Relatives and friends, they direct them where to 15 park as well so when we leave in the funeral 16 procession it's in an orderly manner. 17 Q. So if I'm understanding correctly, parking cars 18 consists of reading a list regarding the 19 processional order and directing people who are 20 going to be in the processional to park in 21 designated spots so that the process can proceed 22 as ordered by the list? 23 A. Correct. 24 Q. Anything else involved in parking cars? 25 A. No. No.</p>
<p style="text-align: right;">Page 71</p> <p>1 assisting funeral services are the nature of 2 Shaffer's upstairs work. Anything else? 3 A. Going out in the public as far as picking bodies 4 up, getting death certificates signed, filing 5 death certificates at the City or County. 6 Q. Okay. Anything besides those five things? 7 A. No. 8 Q. What does it mean to assist a visitation? 9 A. Basically opening the doors for people and 10 directing them which chapel to go to to visit the 11 family. 12 Q. So it's -- so I'm understanding you correctly, 13 it's standing at the front door and kind of 14 directing, this is where the visitation will be 15 held -- 16 A. Correct. 17 Q. -- for this funeral? 18 A. Correct. Correct. 19 Q. What does parking -- anything else for assisting 20 visitations? 21 A. It could be just tending to the family's needs. 22 If they need another pitcher of water in the 23 chapel, getting that; setting flowers out as they 24 get in. There's just a lot of various things 25 that we do.</p>	<p style="text-align: right;">Page 73</p> <p>1 Q. What's involved in picking up bodies and getting 2 death certificates? 3 A. Going to either the home or the hospital where a 4 person passes away, placing them on a gurney 5 similar to an ambulance, putting them back in our 6 vehicle, bringing them back to our care. 7 With death certificates it's going to 8 the doctor's office or hospital where they may 9 be, getting a signature and information on the 10 death certificate. We'd be going to the City or 11 County to which a person passed away to file and 12 obtain certified copies of the death certificate. 13 Q. And I believe you also said one of the upstairs 14 duties would be assisting funerals? 15 A. Yes. 16 Q. Is that similar to assisting visitations? 17 A. It's a little more -- I guess it's a little bit 18 different. Mostly what his role would be there 19 is after I'd make an announcement about people to 20 step forward to pass the casket, he would be up 21 front to direct people up in an orderly manner. 22 Q. Okay. I don't have anything further. 23 (Deposition concluded at 12:15 p.m.) 24 - - - 25</p>

DAVID KOWALEWSKI - 01/21/2016

<p style="text-align: right;">Page 74</p> <p style="text-align: center;">CERTIFICATE OF NOTARY</p> <p>1 STATE OF MICHIGAN) 2) SS 3) 4 COUNTY OF OAKLAND) 5 6 I, Laurel A. Jacoby, a Notary Public in and for 7 the above county and state, do hereby certify that the 8 above deposition was taken before me at the time and 9 place hereinbefore set forth; that the witness was by 10 me first duly sworn to testify to the truth and nothing 11 but the truth; that the foregoing questions asked, and 12 the answers given by the witness were duly recorded by 13 me and reduced to computer transcription; that this is 14 a true, full and correct transcript so taken; and that 15 I am not related to, nor of counsel to either party, 16 nor interested in the event of this cause. 17 18 19 20  21 _____ 22 Laurel A. Jacoby, CSR-5059, RPR 23 Notary Public 24 Oakland County, Michigan 25 My Commission Expires: September 1, 2018</p>	<p style="text-align: right;">Page 76</p> <p style="text-align: center;">ERRATA SHEET</p> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:5%;"></td> <td style="width:5%;">Page</td> <td style="width:5%;">Line</td> <td style="width:60%;">Should read:</td> <td style="width:25%;">Reason for Change:</td> </tr> <tr><td>1</td><td></td><td></td><td></td><td></td></tr> <tr><td>2</td><td></td><td></td><td></td><td></td></tr> <tr><td>3</td><td></td><td></td><td></td><td></td></tr> <tr><td>4</td><td>---</td><td>---</td><td>_____</td><td>_____</td></tr> <tr><td>5</td><td></td><td></td><td>_____</td><td>_____</td></tr> <tr><td>6</td><td>---</td><td>---</td><td>_____</td><td>_____</td></tr> <tr><td>7</td><td></td><td></td><td>_____</td><td>_____</td></tr> <tr><td>8</td><td>---</td><td>---</td><td>_____</td><td>_____</td></tr> <tr><td>9</td><td></td><td></td><td>_____</td><td>_____</td></tr> <tr><td>10</td><td>---</td><td>---</td><td>_____</td><td>_____</td></tr> <tr><td>11</td><td></td><td></td><td>_____</td><td>_____</td></tr> <tr><td>12</td><td>---</td><td>---</td><td>_____</td><td>_____</td></tr> <tr><td>13</td><td></td><td></td><td>_____</td><td>_____</td></tr> <tr><td>14</td><td>---</td><td>---</td><td>_____</td><td>_____</td></tr> <tr><td>15</td><td></td><td></td><td>_____</td><td>_____</td></tr> <tr><td>16</td><td>---</td><td>---</td><td>_____</td><td>_____</td></tr> <tr><td>17</td><td></td><td></td><td></td><td></td></tr> <tr><td>18</td><td colspan="2">Date: _____</td><td colspan="2">_____</td></tr> <tr><td>19</td><td></td><td></td><td colspan="2" style="text-align: center;">Signature of Witness</td></tr> <tr><td>20</td><td></td><td></td><td colspan="2">_____</td></tr> <tr><td>21</td><td></td><td></td><td colspan="2" style="text-align: center;">Name Typed or Printed</td></tr> <tr><td>22</td><td></td><td></td><td></td><td></td></tr> <tr><td>23</td><td></td><td></td><td></td><td></td></tr> <tr><td>24</td><td></td><td></td><td></td><td></td></tr> <tr><td>25</td><td></td><td></td><td></td><td></td></tr> </table>		Page	Line	Should read:	Reason for Change:	1					2					3					4	---	---	_____	_____	5			_____	_____	6	---	---	_____	_____	7			_____	_____	8	---	---	_____	_____	9			_____	_____	10	---	---	_____	_____	11			_____	_____	12	---	---	_____	_____	13			_____	_____	14	---	---	_____	_____	15			_____	_____	16	---	---	_____	_____	17					18	Date: _____		_____		19			Signature of Witness		20			_____		21			Name Typed or Printed		22					23					24					25				
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<p style="text-align: right;">Page 75</p> <p style="text-align: center;">ERRATA SHEET</p> <p>2 3 4</p> <p>5 I declare under penalty of perjury that I have read the 6 foregoing _____ pages of my testimony, taken 7 on _____ (date) at 8 _____(city), _____(state), 9 10 and that the same is a true record of the testimony given 11 by me at the time and place herein 12 above set forth, with the following exceptions: 13 14 Page Line Should read: Reason for Change: 15 16 _____ 17 _____ 18 _____ 19 _____ 20 _____ 21 _____ 22 _____ 23 _____ 24 _____ 25</p>	
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EXHIBIT 10

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

4 -----
5 EQUAL EMPLOYMENT OPPORTUNITY
6 COMMISSION,

7 Plaintiff,

8 -vs-

9 No. 2:14-cv-13740

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

12 Defendants.
13 -----

14 D E P O S I T I O N O F

15 WITNESS: MATTHEW ROST

16 LOCATION: Joel Kirkpatrick, PC
17 843 Penniman Avenue, Suite 201
18 Plymouth, Michigan 48170

19 DATE: Thursday, January 21, 2016
20 9:29 a.m.

21 APPEARANCES:

22 FOR PLAINTIFF: EQUAL EMPLOYMENT OPPORTUNITY
23 COMMISSION
24 477 Michigan Avenue, Room 865
25 Detroit, Michigan 48226
313.226.7808
dale.price@eeoc.gov
miles.shultz@eeoc.gov
BY: DALE R. PRICE, JR. (P55578)
MILES E. SHULTZ (P73555)

FOR DEFENDANT: JOEL J. KIRKPATRICK, PC
843 Penniman Avenue, Suite 201
Plymouth, Michigan 48170
734.404.5170
joel@joelkirkpatrick.com
BY: JOEL J. KIRKPATRICK (P62851)

REPORTED BY: Laurel A. Jacoby, CSR-5059, RPR
Job no. 285886-A

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	Page 14		Page 16
1	that out into the so-called chapel area for that?	1	A. Correct.
2	A. Right.	2	Q. And that would explain if there's not going to be
3	Q. Correct?	3	a funeral or public visiting that women can wear
4	A. Correct.	4	slacks at that point?
5	Q. All right. Is there anything else you can think	5	A. Right.
6	of that is done with respect to preparing the	6	Q. So given that there's a limited amount of
7	body for a funeral?	7	funerals in Detroit, that's where you would start
8	A. No.	8	working? You would maybe help out, pitch in at
9	Q. Now, what is your understanding of the dress code	9	the other locations?
10	at R.G. & G.R. Harris?	10	A. Yes.
11	A. Men are required to wear a dark suit.	11	Q. You mentioned we've already talked about the
12	Q. Tie?	12	men's dress code. You're given suits, correct?
13	A. Correct.	13	A. Correct.
14	Q. White shirt?	14	Q. Okay. How many suits do you -- how often do you
15	A. Yes.	15	have to replace your suits?
16	Q. And what's the dress code for women employees?	16	A. Once a year.
17	A. Skirt, like a sport coat.	17	Q. Okay. Do you get one new suit every year, would
18	Q. Lady's business jacket?	18	you say?
19	A. Yeah. Yeah, a jacket.	19	A. Yes.
20	Q. Do you have any female employees at the Detroit	20	Q. All right. How do you get that?
21	location?	21	A. Tailor.
22	A. Yes.	22	Q. You go up to a tailor --
23	Q. All right. And is your experience that they are	23	A. Uh-huh.
24	always wearing a coat and skirt?	24	Q. -- and order a new suit?
25	A. Not all the time over there.	25	A. Yes.
Page 15		Page 17	
1	Q. Okay.	1	Q. And that's billed to the business office?
2	A. They'll wear slacks and a coat.	2	A. Correct.
3	Q. Is the Detroit facility a little different from	3	Q. All right. Are there any other men who work with
4	the other two?	4	you at the Detroit facility?
5	A. Yes. I would say yes.	5	A. Oh, we have a part-time guy who works outside.
6	Q. How so?	6	Q. Maintenance or grounds person?
7	A. We don't see the public that much in that	7	A. Right. Right.
8	facility.	8	Q. All right. He would not be expected to wear a
9	Q. Why is that?	9	suit?
10	A. It's mainly our business office.	10	A. No.
11	Q. So who works out of the Detroit location?	11	Q. What's your understanding of how often the women
12	A. Me, of course; Shannon Kish; and Wendy McKie.	12	-- what's your understanding of how women are
13	Those are our full-time employees.	13	compensated for clothing?
14	Q. What about the part-timers?	14	A. I believe it's a couple hundred dollars a year.
15	A. As far as?	15	Q. Okay. Did you -- when did that start?
16	Q. Out of the Detroit office. Any people work part	16	A. Two years ago, I believe.
17	time out of the Detroit facility?	17	Q. Were you involved in the process of deciding a
18	A. Yeah, there's a couple.	18	stipend should be paid to women?
19	Q. Okay. Who are they?	19	A. No.
20	A. There's Pam and Daytona.	20	Q. Who made that decision, if you know?
21	Q. How often do you have funerals at the Detroit	21	A. I don't know.
22	facility?	22	Q. Do you recall any discussion of it in the office?
23	A. Once a month.	23	A. No.
24	Q. Okay. So it's definitely not as busy funeral	24	Q. Is there a grooming policy for men at R.G. &
25	wise as Garden City or Livonia?	25	G.R.?

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1 Q. Okay. So has he ever told you that hey, I'm
 2 going to have to fire this person or I'm going to
 3 have to let this person go? Apart from Stephens,
 4 has he ever told you that?
 5 A. Like somebody other than Stephens?
 6 Q. Yes.
 7 A. Since then, no.
 8 Q. What about before then?
 9 A. We've had employees come and go.
 10 Q. Okay.
 11 A. You know, there's been employees that have been
 12 fired.
 13 Q. Okay. But has your father ever told you I got to
 14 let this person go?
 15 A. No.
 16 Q. All right. Stephens is the only person he ever
 17 told you I got to let this person go?
 18 A. Yes.
 19 Q. All right. Did he ever mention any kind of
 20 religious reasoning behind not continuing to
 21 employ Stephens?
 22 A. No.
 23 Q. All right. Do you have any understanding of your
 24 father's religious beliefs?
 25 A. He's a follower of Jesus.

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1 Q. Okay. Would you say the same for yourself?
 2 A. Yes.
 3 Q. Okay. What church does he go to, the
 4 Highland Park Church?
 5 A. Mainly, yes.
 6 Q. Mainly. Okay. Has he ever told you -- well, let
 7 me put it this way: How does your father express
 8 his faith in Jesus through the business? Does he
 9 express faith through it? Does he do anything to
 10 show his faith at R.G. & G.R.?
 11 A. The only thing I can really think of is pray
 12 before we eat breakfast before our managers
 13 meetings.
 14 Q. Okay. How often does this take place?
 15 A. Four or five times a year.
 16 Q. Where do these meetings take place?
 17 A. Downtown.
 18 Q. At the Detroit location or?
 19 A. No, at the Detroit Athletic Club.
 20 Q. Now, these are the managers. Who would be there?
 21 Would that include funeral directors or just the
 22 managers?
 23 A. Yes, and our office manager.
 24 Q. Miss Kish?
 25 A. Yes.

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1 Q. All right. Now, was Stephens ever a participant
 2 in any of these?
 3 A. No.
 4 Q. No. How long have these meetings gone on?
 5 A. A hundred years.
 6 Q. They've been having these as long as you've been
 7 there?
 8 A. Yes.
 9 Q. All right. Apart from having a prayer before the
 10 manager meeting breakfast, did your father
 11 expresses his Christian faith in any other way at
 12 R.G. & G.R. Harris that you can think of?
 13 A. No.
 14 Q. Has he ever told you that he wants to run R.G. &
 15 G.R. Harris on Christian principles?
 16 A. No.
 17 Q. Okay. It certainly is the case that you bury
 18 people of any religion or none, correct?
 19 A. Correct.
 20 Q. Okay. There's been other mentions at depositions
 21 about something called The Daily Bread?
 22 A. Uh-huh.
 23 Q. Are you familiar with that?
 24 A. Yes.
 25 Q. Okay. Is that something your father displays?

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1 A. Yes.
 2 Q. All right. At all the locations?
 3 A. Yes.
 4 Q. Okay. Are there Jesus cards? You ever heard of
 5 those?
 6 A. Yes.
 7 Q. Okay. Is that something that your father also
 8 does?
 9 A. Uh-huh. Yes.
 10 Q. Again, displayed at all locations?
 11 A. Correct.
 12 Q. Okay. These things are available -- as I
 13 understand, correct me if I'm wrong, if people
 14 want to the come by and pick one up, it's
 15 available but it's just sort of offered?
 16 A. Correct.
 17 Q. All right. It's not like they're handed out to
 18 people or anything like that?
 19 A. Correct.
 20 Q. Okay. So apart from the prayer before the
 21 breakfast and these cards or publications, is
 22 there any other way that your father expresses
 23 the Christian faith through his business?
 24 A. No.
 25 Q. All right. Do you have any understanding of the

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Page 38	Page 40
<p>1 anyone being disciplined for a dress code 2 violation? 3 A. Yes. 4 Q. Okay. When? 5 A. Probably within the last year. 6 Q. What was the nature of that? 7 A. Guys coming in with ripped suits. 8 Q. Okay. Who was that, if you can recall? 9 A. The employee? 10 Q. Yeah. 11 A. Derek. 12 Q. What's the last name? 13 A. Hamer. 14 Q. And what Mr. Hamer's -- 15 A. He's a licensed funeral director. 16 Q. Okay. Out of which location? 17 A. Livonia. 18 Q. This was over the last year? 19 A. Yes. 20 Q. Okay. What else? Anybody else? 21 A. No. 22 Q. Presumably Mr. Hamer got another suit, was told 23 to go get another suit and be more presentable? 24 A. Yes. And, actually, I did tell him -- you know, 25 go back. I did tell him once, I said Derek, your</p>	<p>1 up, but just kind of informally, hey, you know, 2 you need to -- like Derek Hamer where get your 3 suit fixed or you need to shave, whatever it may 4 be or female employee wasn't dressing the way 5 that they expected female employees to dress 6 where it was just handled kind of informally? 7 A. That does happen. 8 Q. Okay. Now, I think there was questions earlier 9 also about the female dress code. Do you know if 10 there was ever a time that it was discussed to 11 actually have the female employees actually wear 12 a uniform kind of like the men do? 13 A. Yes, there was a time when that has been 14 discussed. 15 Q. Okay. Do you know why that was never implemented 16 to have a female specific uniform kind of like 17 the men have to wear a suit? 18 A. Yes. They couldn't decide what they wanted to 19 wear. 20 Q. Okay. So there was no consensus among the women 21 as to what color might look good or exactly the 22 length of the skirt, that kind of thing? 23 A. Correct. 24 Q. So a decision was made to have the women wear 25 conservative business attire?</p>
<p>1 suit is ripped, you got to fix it. 2 Q. What would have happened? Did he explain why? I 3 mean, ripping a suit is kind of -- is not 4 something super easy to do. Did he have an 5 excuse for it or no? 6 A. No. 7 Q. All right. I don't have anything else at this 8 point. Joel has some followup. 9 MR. KIRKPATRICK: Just a few questions. 10 EXAMINATION 11 BY MR. KIRKPATRICK: 12 Q. Mr. Rost, Mr. Price was just asking you about 13 disciplining employees. Has there ever been an 14 occasion for you or are you aware of any other 15 managers that may have counseled employees where 16 there's no formal discipline like hey, you need 17 to correct anything, if it's longer hair or 18 anything like that that you felt was not up to 19 par with the policy where it was just informally 20 taken care of? 21 A. That wouldn't surprise me. 22 Q. Have you ever done it? 23 A. No. 24 Q. Okay. Are you aware of any other managers maybe 25 -- I know the word used was discipline or written</p>	<p>1 A. Correct. 2 Q. And that they would obviously make the proper 3 decisions to make sure they are wearing proper 4 business attire? 5 A. Yes. 6 Q. And I understand skirts are okay, but business 7 slacks are okay too with the employees at some 8 times? 9 A. It's a gray area. On the east side, where we 10 don't come in contact with the public a lot, you 11 know, we do allow -- I allow them to wear slacks. 12 When we have a funeral or a memorial service I 13 ask them to dress up a little bit more 14 conservatively. 15 Q. All right. Now, we had -- there was some 16 discussion about the male funeral director 17 uniform. Is the uniform you're wearing right 18 now, is that the uniform you're to wear? 19 A. Yes. 20 Q. That's a navy blue suit with looks like a maroon 21 tie, some sort a white shirt? 22 A. Uh-huh. Correct. 23 Q. Are there currently any female funeral directors 24 working for R.G. & G.R. Harris? 25 A. No.</p>

Page 42

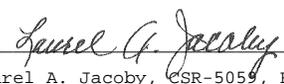
1 Q. Okay. If there were, would they be required to
 2 where a similar uniform?
 3 MR. PRICE: Objection; speculation. Go
 4 ahead.
 5 BY MR. KIRKPATRICK:
 6 Q. If you know.
 7 A. I don't know.
 8 Q. Okay. So would they be allowed to wear what the
 9 females wear now or wear a similar outfit?
 10 A. I'd say similar, something dark.
 11 Q. But it would be obviously female, such as a skirt
 12 or --
 13 A. Correct.
 14 Q. -- tailored like a woman would wear?
 15 A. Correct.
 16 Q. Probably not wearing a tie but wearing something
 17 -- a blouse or whatever would be appropriate?
 18 A. Yes.
 19 Q. Okay. Just to be clear, when Mr. Price was
 20 asking you about the circumstances surrounding
 21 Stephens' termination, did you participate at all
 22 in making a decision on whether or not to
 23 terminate Stephens?
 24 A. No, I didn't -- I wasn't part of that.
 25 Q. Whose decision was that, as far as you know?

Page 43

1 A. My father's.
 2 Q. Okay. You don't remember the exact day, do you?
 3 A. No.
 4 Q. As a matter of fact, there's no date on this
 5 letter that I can see. So you don't know when
 6 the letter was actually delivered, right?
 7 A. No.
 8 Q. Okay.
 9 MR. KIRKPATRICK: I have no further
 10 questions.
 11 MR. PRICE: I don't have anything else
 12 either.
 13 (Deposition concluded at 10:16 a.m.)
 14 - - -
 15
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Page 44

CERTIFICATE OF NOTARY

1 STATE OF MICHIGAN)
 2) SS
 3)
 4 COUNTY OF OAKLAND)
 5
 6 I, Laurel A. Jacoby, a Notary Public in and for
 7 the above county and state, do hereby certify that the
 8 above deposition was taken before me at the time and
 9 place hereinbefore set forth; that the witness was by
 10 me first duly sworn to testify to the truth and nothing
 11 but the truth; that the foregoing questions asked, and
 12 the answers given by the witness were duly recorded by
 13 me and reduced to computer transcription; that this is
 14 a true, full and correct transcript so taken; and that
 15 I am not related to, nor of counsel to either party,
 16 nor interested in the event of this cause.
 17
 18
 19 
 20 _____
 21 Laurel A. Jacoby, CSR-5059, RPR
 22 Notary Public
 23 Oakland County, Michigan
 24
 25 My Commission Expires: September 1, 2018

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ERRATA SHEET

1
 2
 3
 4
 5 I declare under penalty of perjury that I have read the
 6 foregoing _____ pages of my testimony, taken
 7 on _____ (date) at
 8 _____(city), _____(state),
 9
 10 and that the same is a true record of the testimony given
 11 by me at the time and place herein
 12 above set forth, with the following exceptions:
 13
 14 Page Line Should read: Reason for Change:
 15
 16 _____
 17 _____
 18 _____
 19 _____
 20 _____
 21 _____
 22 _____
 23 _____
 24 _____
 25

EXHIBIT 11

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

4 -----
5 EQUAL EMPLOYMENT OPPORTUNITY
6 COMMISSION,

7 Plaintiff,

8 -vs-

9 No. 2:14-cv-13740

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

12 Defendants.
13 -----

14 D E P O S I T I O N O F

15 WITNESS: MICHELLE PETERSON

16 LOCATION: Joel Kirkpatrick, PC
17 843 Penniman Avenue, Suite 201
18 Plymouth, Michigan 48170

19 DATE: Friday, January 22, 2016
20 11:57 a.m.

21 APPEARANCES:
22 FOR PLAINTIFF: EQUAL EMPLOYMENT OPPORTUNITY
23 COMMISSION
24 477 Michigan Avenue, Room 865
25 Detroit, Michigan 48226
313.226.7808
dale.price@eeoc.gov
miles.shultz@eeoc.gov
BY: DALE R. PRICE, JR. (P55578)
MILES E. SHULTZ (P73555)
KATIE LINEHAN (P77974)

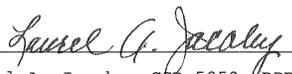
FOR DEFENDANT: JOEL J. KIRKPATRICK, PC
843 Penniman Avenue, Suite 201
Plymouth, Michigan 48170
734.404.5170
joel@joelkirkpatrick.com
BY: JOEL J. KIRKPATRICK (P62851)

REPORTED BY: Laurel A. Jacoby, CSR-5059, RPR
Job no. 285887-C

MICHELLE PETERSON - 01/22/2016

	Page 26		Page 28
1	expressed to you or described that R.G. & G.R.	1	statues?
2	Harris is a business run on Christian principles?	2	A. Yes.
3	A. No.	3	Q. Detroit has like a statue of Jesus behind a
4	Q. Do you know if R.G. & G.R. has any kind of	4	curtain?
5	mission statement which expresses Christian	5	A. Yes.
6	principles?	6	Q. And it's displayed if the family wants that?
7	A. No.	7	A. Yes.
8	Q. Are there any kind of -- strike that.	8	Q. Is it a statue of Mary at Livonia?
9	The business, R.G. & G.R., does funerals	9	A. No. They have Jesus behind the curtain too at
10	for people of various religions, correct?	10	Livonia.
11	A. Yes.	11	Q. Same thing, if the family wants it then it's
12	Q. And have you participated in a visitation or a	12	displayed?
13	funeral for a nonChristian family or --	13	A. Yeah.
14	A. Geez, I'm sure they have, but I can't think of	14	Q. All right. Have you ever heard of any kind of
15	one offhand. Most families have some kind of	15	bible studies or prayers occurring at R.G. & G.R.
16	funeral or --	16	amongst the employees?
17	Q. Well, actually, I didn't ask that very well. I	17	A. No.
18	apologize.	18	Q. All right. What about any kind of religious
19	Have you ever been in a visitation where	19	literature, is that on display at R.G. & G.R.?
20	the family of the -- the decedent and the family	20	A. Yes.
21	were like of a Hindu or Muslim or Jewish	21	Q. What?
22	religion?	22	A. Daily Bread we have by the front door on a
23	A. Oh, yes.	23	credenza. There's a bible down a little hallway
24	Q. Okay. Now, when you participate in that do you	24	with a chair and a table and a lamp. I think
25	put out any kind of religious objects, anything	25	that's it.
Page 27		Page 29	
1	like that?	1	Q. That's all you can --
2	A. We do have things, but a lot of times they'll	2	A. Yeah.
3	have their own when they're, you know, Hindu or	3	Q. Okay. Now, where do the Daily Breads come from?
4	Indian.	4	A. Tom will bring a box and give them --
5	Q. So they may ask -- the family may ask you to	5	Q. Tom Rost will put those out?
6	place objects that they bring for the funeral; is	6	A. No. I usually put them out, but he'll bring the
7	that correct?	7	box from -- I believe it gets shipped to Detroit,
8	A. They kind of put them out, but yeah.	8	the Detroit office.
9	Q. Okay. They do it on their own?	9	Q. And you'll put them out at Garden City when you
10	A. Yeah.	10	get them?
11	Q. All right. Are there other objects that R.G. &	11	A. Yes.
12	G.R. will put out or display for funerals?	12	Q. All right. You said there's a bible at a table
13	A. Yes.	13	with a chair and a lamp?
14	Q. What kind of things?	14	A. Yeah, our music -- we have little hallways. Two
15	A. We have crucifix, kneeler, candles.	15	big hallways, three little hallways. There's two
16	Q. Now, with the candles, who is that requested by?	16	chairs, a table, a lamp, a bible, Kleenex, a
17	A. Catholics.	17	music box.
18	Q. Anybody else you can think of?	18	Q. Okay. It's for people who --
19	A. Sometimes a family that isn't Catholic will ask	19	A. Well, yeah. Just -- the other table there's, you
20	for the kneeler or the crucifix or even the	20	know, greenery and candies. So --
21	candles.	21	Q. Okay.
22	Q. Okay. Now, is there any statuary or anything	22	A. -- it's just on a table.
23	like that at Garden City?	23	Q. It's kind of decorative is it or --
24	A. Statues, no.	24	A. Well, no, I wouldn't say decorative. But, I
25	Q. Nothing. Okay. Other locations are there	25	mean, just like this.

	Page 30		Page 32
1	Q. With the Kleenex box?	1	Q. Nothing like that?
2	A. Yeah. It's a short little table, Kleenex box,	2	A. No.
3	table, bible, lamp.	3	Q. All right. Now, it's currently the case --
4	Q. So people could sit down at the table and look at	4	what's the female dress code?
5	the bible if they wanted to kind of thing?	5	A. A blazer and a skirt.
6	A. Oh, yeah.	6	Q. And has that been the case the entire time you've
7	Q. Have you ever seen people doing that?	7	been employed?
8	A. Yeah.	8	A. Yes.
9	Q. They actually have?	9	Q. Now, recently it's come about that women are
10	A. Yeah.	10	given a stipend for clothing?
11	Q. Okay. So it's available for the public?	11	A. Yes.
12	A. Oh, yes.	12	Q. Okay. When did you start getting that?
13	Q. All right. Are there occasions where you've been	13	A. I'm going to guess and say three years.
14	present where Tom Rost has led a prayer?	14	Q. Okay. Sometime in the last three years?
15	A. No.	15	A. Yes.
16	Q. Okay. And I'm talking maybe at an employee	16	Q. And how much do you get?
17	gathering. Do you recall if that's ever	17	A. \$75.
18	happened?	18	Q. And how did you -- how did you learn you were
19	A. Could have.	19	going to get a stipend?
20	Q. Okay.	20	A. It was with my check.
21	A. But I can't recall.	21	Q. All right. So you were given your paycheck?
22	Q. You don't have -- nothing stands out?	22	A. Yes.
23	A. No.	23	Q. And -- okay. And was your check handed out to
24	Q. All right. What is your understanding of the	24	you or how is that?
25	dress code for R.G. & G.R. for men?	25	A. No. At our office they come in, and they're just
Page 31		Page 33	
1	A. They wear their suits.	1	on a thing and we can just help ourselves, you
2	Q. And how do they get their suits?	2	know. Get them ourselves.
3	A. I believe they go and pick them up at a place. I	3	Q. Okay. And was there a note explaining it or
4	don't know where they get them from, but I'm sure	4	anything like that?
5	they all go to the same place.	5	A. There could have been, but I don't know offhand.
6	Q. So the men are provided suits?	6	Q. All right. But it was -- it did give some
7	A. Right.	7	indication that it was --
8	Q. Do you know how many suits they get?	8	A. Uh-huh.
9	A. No, I don't.	9	Q. -- to help with clothing costs?
10	Q. And when you say men, are we talking all the male	10	A. Uh-huh.
11	employees who interact with the public?	11	Q. Yes?
12	A. Yes.	12	A. Yes.
13	Q. Okay. So it would be the managers?	13	Q. Actually, believe it or not, you've been great
14	A. (Nodding head up and down.)	14	with that. I've been a whole lot worse. Don't
15	Q. Yes?	15	worry about it.
16	A. Yes. I'm sorry.	16	Do you have any understanding of why you
17	Q. Funeral director, embalmers?	17	got \$75?
18	A. Yes.	18	A. It did say clothing allowance.
19	Q. Drivers?	19	Q. Okay. Do you know if any women are getting more?
20	A. Yes.	20	A. I don't know. I would assume, you know,
21	Q. Anybody else?	21	full-time people would probably get more than a
22	A. No. That's all we have.	22	part-time person.
23	Q. Is there, like, an assistant funeral director	23	Q. So it's your guess that they're getting more?
24	embalmers or part-timers for that?	24	A. Yeah.
25	A. No.	25	Q. All right, but you don't know how much they'd be

<p style="text-align: right;">Page 38</p> <p style="text-align: center;">CERTIFICATE OF NOTARY</p> <p>1 STATE OF MICHIGAN) 2) SS 3) 4 COUNTY OF OAKLAND) 5 6 I, Laurel A. Jacoby, a Notary Public in and for 7 the above county and state, do hereby certify that the 8 above deposition was taken before me at the time and 9 place hereinbefore set forth; that the witness was by 10 me first duly sworn to testify to the truth and nothing 11 but the truth; that the foregoing questions asked, and 12 the answers given by the witness were duly recorded by 13 me and reduced to computer transcription; that this is 14 a true, full and correct transcript so taken; and that 15 I am not related to, nor of counsel to either party, 16 nor interested in the event of this cause. 17 18 19 20  21 Laurel A. Jacoby, CSR-5059, RPR 22 Notary Public 23 Oakland County, Michigan 24 25 My Commission Expires: September 1, 2018</p>	<p style="text-align: right;">Page 40</p> <p style="text-align: center;">ERRATA SHEET</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="width:5%;">Page</th> <th style="width:5%;">Line</th> <th style="width:60%;">Should read:</th> <th style="width:30%;">Reason for Change:</th> </tr> </thead> <tbody> <tr><td>2</td><td></td><td></td><td></td></tr> <tr><td>3</td><td></td><td></td><td></td></tr> <tr><td>4</td><td>---</td><td>---</td><td>---</td></tr> <tr><td>5</td><td></td><td></td><td></td></tr> <tr><td>6</td><td>---</td><td>---</td><td>---</td></tr> <tr><td>7</td><td></td><td></td><td></td></tr> <tr><td>8</td><td>---</td><td>---</td><td>---</td></tr> <tr><td>9</td><td></td><td></td><td></td></tr> <tr><td>10</td><td>---</td><td>---</td><td>---</td></tr> <tr><td>11</td><td></td><td></td><td></td></tr> <tr><td>12</td><td>---</td><td>---</td><td>---</td></tr> <tr><td>13</td><td></td><td></td><td></td></tr> <tr><td>14</td><td>---</td><td>---</td><td>---</td></tr> <tr><td>15</td><td></td><td></td><td></td></tr> <tr><td>16</td><td>---</td><td>---</td><td>---</td></tr> <tr><td>17</td><td></td><td></td><td></td></tr> <tr><td>18</td><td colspan="2">Date: _____</td><td>_____</td></tr> <tr><td>19</td><td></td><td></td><td style="text-align: center;">Signature of Witness</td></tr> <tr><td>20</td><td></td><td></td><td>_____</td></tr> <tr><td>21</td><td></td><td></td><td style="text-align: center;">Name Typed or Printed</td></tr> <tr><td>22</td><td></td><td></td><td></td></tr> <tr><td>23</td><td></td><td></td><td></td></tr> <tr><td>24</td><td></td><td></td><td></td></tr> <tr><td>25</td><td></td><td></td><td></td></tr> </tbody> </table>	Page	Line	Should read:	Reason for Change:	2				3				4	---	---	---	5				6	---	---	---	7				8	---	---	---	9				10	---	---	---	11				12	---	---	---	13				14	---	---	---	15				16	---	---	---	17				18	Date: _____		_____	19			Signature of Witness	20			_____	21			Name Typed or Printed	22				23				24				25			
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<p style="text-align: right;">Page 39</p> <p style="text-align: center;">ERRATA SHEET</p> <p>2 3 4</p> <p>5 I declare under penalty of perjury that I have read the 6 foregoing _____ pages of my testimony, taken 7 on _____ (date) at 8 _____(city), _____(state), 9 10 and that the same is a true record of the testimony given 11 by me at the time and place herein 12 above set forth, with the following exceptions: 13 14 Page Line Should read: Reason for Change: 15 16 _____ 17 _____ 18 _____ 19 _____ 20 _____ 21 _____ 22 _____ 23 _____ 24 _____ 25</p>	
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EXHIBIT 12

1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4

5 EQUAL EMPLOYMENT OPPORTUNITY)
6 COMMISSION,)

7 Plaintiff,)

8 vs.) Case No. 14-13710

9 R.G. & G.R. HARRIS FUNERAL) Hon. Sean F. Cox

10 HOMES, INC.,) United States

11 Defendants.) District Court Judge

12 _____)
13

14 DEPOSITION OF TROY SHAFFER
15 PLYMOUTH, MICHIGAN
16 FRIDAY, NOVEMBER 13, 2015
17
18
19
20
21
22
23

24 REPORTED BY: QUENTINA R. SNOWDEN, CSR NO. 5519

25 JOB NO.: 276004-C

Page 46

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

Page 47

1 A Correct.
 2 Q Is it safe to say that managers of the homes
 3 are the ones who are having the most contact
 4 with families?
 5 A Yes.
 6 Q Okay. Helping them out with the grieving
 7 process?
 8 A Yes.
 9 Q The most contact helping them make arrangements
 10 and so forth?
 11 A Yes.
 12 Q Okay. In your workplace, are there any kind of
 13 posters on the wall that talk about your rights
 14 under the law like Equal Employment Opportunity
 15 Commission or workers' comp posters or
 16 something like that, that you can think of?
 17 A Not that I can think of.
 18 Q Okay.
 19 A Not that I've noticed.
 20 Q Okay. Is there like a break room or employee
 21 room there where you can have lunch in Garden
 22 City?
 23 A Yes.
 24 Q Do you recall if there's any kind of posters up
 25 there that deal with employment at all?

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

Page 49

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

<p style="text-align: right;">Page 50</p> <p>1 while working or on TV. I've heard it referred 2 to as that, but I couldn't tell you where I've 3 heard that. 4 Q Okay. I apologize if I've asked this before, 5 it's just -- we're at the end of the week here. 6 Do you recall specifically religious literature 7 being offered in the workplace? 8 A I know -- 9 Q Other than the Bible. You talked about the 10 placement of the Bible. But anything else like 11 being offered to people? 12 A There are pamphlets near the front door. One 13 is our Daily Bread is the title of it. And 14 those are free for anyone that would like to 15 take one. 16 Q Okay. Is that all you can think of? 17 A Yeah. 18 Q Do you know who puts them there? 19 A No. 20 MR. PRICE: Okay. I don't have 21 anything else. 22 MR. KIRKPATRICK: Take a break, see 23 if I have any followup or anything like that. 24 MR. PRICE: Sounds good. 25 (Off the record at 2:03 p.m.)</p>	<p style="text-align: right;">Page 52</p> <p>1 to do these procedures, right? 2 A Correct. 3 Q So what percentage would you give, if you 4 could, as to you being required to have your 5 suit on during your normal workday or work 6 month, I should say? 7 A I would say 90 percent of the time I'm wearing 8 a suit. 9 Q Okay. And you were hired to be a licensed 10 funeral director; is that true? 11 A Yes. 12 Q And you -- and part of your job you have to go 13 pick up bodies times from hospitals or homes, I 14 think you testified? 15 A Correct. 16 Q You were wearing a suit at that stage, right? 17 A Yes. 18 Q Why is that? 19 A Because I'm representing the funeral home and 20 anybody that I come into contact with, needs to 21 represent the funeral home. I need to look 22 professional. So, that's why I wear a suit. 23 Q When you were hired by Mr. Rost, was there an 24 understanding that you would be doing all job 25 requirements of a licensed funeral director,</p>
<p style="text-align: right;">Page 51</p> <p>1 (Back on the record at 2:14 p.m.) 2 EXAMINATION 3 BY MR. KIRKPATRICK: 4 Q Mr. Shaffer, do you recall Mr. Price asking you 5 questions about embalming and the procedures 6 and processes; do you recall that? 7 A Yes. 8 Q Okay. I think you testified, if I'm not 9 mistaken, that you had a very busy month where 10 you had once nine embalmings; is that right? 11 A Yes. 12 Q That would be the high end of your monthly 13 output, so to speak, for embalmings? 14 A Yes. 15 Q And I think you testified an embalming could 16 take anywhere from half hour to two hours? 17 A Yes. 18 Q So if there was nine done in a month, talking 19 anywhere from 4 and a half to 18 hours of 20 embalming time? 21 A Correct. 22 Q Depending on the circumstances? 23 A (Shook head in an affirmative manner.) 24 Q I think you testified that you remove your suit 25 only to put on appropriate garb, so to speak,</p>	<p style="text-align: right;">Page 53</p> <p>1 that a licensed funeral director would be 2 required to do; was that your understanding? 3 A I'm sorry, can you ask me again? 4 Q Yeah, I -- kind of a confusing question. 5 When you were hired as a funeral 6 director by Harris Funeral Homes, was it your 7 understanding that you would be doing all of 8 the responsibilities of a funeral director? 9 A No, not all. 10 Q Would it be just doing embalmings only? 11 A No. 12 Q So you would be required to meet with the 13 public? 14 A Yes. 15 Q Interact with the public? 16 A Interact, yes. 17 Q Did you guys or did you, "you" being Garden 18 City, did you have any funerals this month? 19 A Yes. 20 Q How many funerals have you done this month? 21 A I believe it was two. 22 Q Two. What were your job responsibilities or 23 what did you do during those two funerals? 24 A I was in the parking lot when family members 25 and friends of the decedent came to the funeral</p>

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	Page 54		Page 56
<p>1 home; and I either helped get them in 2 procession to the cemetery or I told them where 3 they could park if they weren't going to the 4 cemetery. After the cars were parked, I went 5 inside and stood by the front door. Any family 6 or friends that come to the funeral home after 7 the service is started, I help direct them to 8 which chapel they came to see the person. I -- 9 I kind of -- I -- I play it by ear by watching 10 the director that's in charge of the funeral. 11 If I see he needs assistance with closing the 12 casket, then I will go help him; or if he needs 13 assistance carrying the casket, then I will 14 help them with that as well. 15 Q Is this when the public isn't present? 16 A Yes. 17 Q I think you testified about sometimes when 18 you're arranging the chapel for a service, you 19 may be in a T-shirt. Do you recall testifying 20 about that? 21 A Yes. 22 Q Would that ever happen if there were, you know, 23 clients or customers or the public in the 24 building? 25 A No.</p>		<p>1 Funeral Home family, so to speak? 2 A Yes. 3 Q So, like I think you've testified when Mr. 4 Price was asking you questions, that you have a 5 preference to do more of the downstairs work, 6 there's others that have more of a preference 7 to do the upstairs work? 8 A Correct. 9 Q Would that be fair to say? 10 A That -- yes. 11 Q So the funeral may be using your expertise of 12 doing some of the work that others don't want 13 to do? 14 A Correct. 15 Q Or at least prefer not to do? 16 A Correct. 17 Q Is Mr. Kowalewski, who's your boss, has he done 18 any embalmings this year, that you know of? 19 A Yes. 20 Q He still does embalm, right? 21 A Yes. 22 Q He's the manager, I think you testified to Mr. 23 Price, that he's the main point man for 24 receiving families, correct? 25 A Yes.</p>	
<p>1 Q And why is that? 2 A The -- again, the professionalism, and I've 3 even, when I first started, I had my suit 4 jacket off and my dress shirt rolled up, and 5 Tom came into the building and I was upstairs 6 working, and I apologized to him that I didn't 7 have my suit on. And he said that's okay, 8 you're working. 9 Q Okay. Have you ever done an embalming without 10 wearing your scrubs and having part of your 11 suit on? 12 A Yes. 13 Q When did that happen or when does that happen? 14 A When I'm embalming in Garden City, I like to 15 wear my scrub pants and my T-shirt, but if I'm 16 out and about and I have to embalm in Livonia 17 and I don't have my normal embalming clothing, 18 then I'll leave my suit pants on, and also my 19 dress shoes, because in Garden City I wear the 20 boots. 21 Q Right. 22 A So I just need to be a little more comfortable, 23 if I don't have my proper embalming attire. 24 Q I got it. Okay. And have you developed a 25 recognized expertise at embalming in the Harris</p>	Page 55	<p>1 Q You're just there to kind of support and back 2 him up for whatever he might need? 3 A Yes. 4 Q Okay. When you go to a funeral off site, are 5 you required to wear your suit? 6 A Yes. 7 Q When you are getting signatures from doctors to 8 sign for death certificates, are you required 9 to wear a suit? 10 A Yes. 11 Q When you deliver a decedent to a crematorium, 12 are you required to wear a suit? 13 A Yes. 14 Q When you do removals of bodies, whether it be 15 from hospitals or home or wherever they might 16 be, are you required to wear a suit? 17 A Yes. 18 Q Okay. Just to be clear, you were asked 19 questions about Stephens and when he was -- 20 Stephens was fired. You have no knowledge of 21 the reasons that he was fired or Stephens was 22 fired, would that be true? 23 A I have heard rumors, but I don't know -- I 24 don't know without -- without a doubt why the 25 person was fired.</p>	Page 57

Page 58

1 Q Okay. Mr. Rost never told you why he was
 2 fired?
 3 A No.
 4 Q You weren't present when Stephens was fired?
 5 A No.
 6 Q Okay. So all you know is rumors --
 7 A Correct.
 8 Q -- would that be fair to say?
 9 All right. How many suits have you
 10 received since you've been employed with Harris
 11 Funeral Homes?
 12 A I believe five.
 13 Q Okay. Is it because you wore out a few suits?
 14 A Yes.
 15 Q Okay. Did you ever receive a new suit when you
 16 didn't need a new suit? Did that make sense?
 17 A I'm trying to think.
 18 Q If you can remember. If you don't, that's
 19 fine.
 20 A I -- I don't remember. I always have at least
 21 two suits that are ready to wear and ready to
 22 go at all times. Sometimes I may get a
 23 replacement suit and other times I'm trying to
 24 remember if I've ever just was given a brand
 25 new suit.

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1 MR, KIRKPATRICK: Okay. I have no
 2 further questions.
 3 RE-EXAMINATION
 4 BY MR. PRICE:
 5 Q Have you ever stained a suit while embalming;
 6 did you ever get any embalming stains?
 7 A I'm sure I have. Yes.
 8 Q Okay. Did that -- did you have to get a new
 9 suit because of that?
 10 A No.
 11 Q Okay. They can be cleaned up?
 12 A The time that I may have been wearing suit
 13 pants and embalming fluid may have for one
 14 reason or another, came off the table and hit
 15 my legs, I didn't -- I didn't inspect my pants
 16 to see if there were stains. So, I haven't
 17 noticed any spots or stains on my suits.
 18 MR. PRICE: Okay. Nothing further.
 19 MR, KIRKPATRICK: Thank you.
 20 (The deposition of Troy Shaffer
 21 concluded at or about the hour of 2:45 p.m.)
 22
 23
 24
 25

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1 CERTIFICATE OF REPORTER
 2 STATE OF MICHIGAN)
 3)SS:
 4 COUNTY OF GENESEE)
 5 I, Quentina R. Snowden, a duly
 6 commissioned and licensed Court Reporter,
 7 Genesee County, State of Michigan, do hereby
 8 certify: That I reported the taking of the
 9 deposition of the witness, TROY SHAFFER,
 10 commencing on Friday, November 13, 2015, at
 11 12:58 p.m.
 12 That prior to being examined, the
 13 witness was, by me, duly sworn to testify to
 14 the truth. That I thereafter transcribed my
 15 said shorthand notes into typewriting and that
 16 the typewritten transcript of said deposition
 17 is a complete, true and accurate transcription
 18 of said shorthand notes.
 19 I further certify that I am not a
 20 relative or employee of an attorney or counsel
 21 of any of the parties, nor a relative or
 22 employee of an attorney or counsel involved in
 23 said action, nor a person financially
 24 interested in the action.
 25
 IN WITNESS WHEREOF, I have hereunto
 set my hand, in my office, in the County of
 Genesee, State of Michigan, this 23rd day of
 November, 2015.

 QUENTINA R. SNOWDEN, CSR NO. 5519

EXHIBIT 13

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

4 -----
5 EQUAL EMPLOYMENT OPPORTUNITY
6 COMMISSION,

7 Plaintiff,

8 -vs-

9 No. 2:14-cv-13740

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

12 Defendants.
13 -----

14 D E P O S I T I O N O F

15 WITNESS: WENDY McKIE

16 LOCATION: Joel Kirkpatrick, PC
17 843 Penniman Avenue, Suite 201
18 Plymouth, Michigan 48170

19 DATE: Friday, January 22, 2016
20 10:56 a.m.

21 APPEARANCES:
22 FOR PLAINTIFF: EQUAL EMPLOYMENT OPPORTUNITY
23 COMMISSION
24 477 Michigan Avenue, Room 865
25 Detroit, Michigan 48226
313.226.7808
dale.price@eeoc.gov
miles.shultz@eeoc.gov
BY: DALE R. PRICE, JR. (P55578)
MILES E. SHULTZ (P73555)
KATIE LINEHAN (P77974)

FOR DEFENDANT: JOEL J. KIRKPATRICK, PC
843 Penniman Avenue, Suite 201
Plymouth, Michigan 48170
734.404.5170
joel@joelkirkpatrick.com
BY: JOEL J. KIRKPATRICK (P62851)

REPORTED BY: Laurel A. Jacoby, CSR-5059, RPR
Job no. 285887-B

Page 10	<p>1 A. Correct.</p> <p>2 Q. How did you come to work at R.G. & G.R.?</p> <p>3 A. An elderly gentleman that lived down the road</p> <p>4 worked there part time. Just came across.</p> <p>5 Started part time, something to do. Full time</p> <p>6 shortly after.</p> <p>7 Q. So you had a neighbor who worked for R.G. & G.R.</p> <p>8 and suggested that you apply?</p> <p>9 A. Correct.</p> <p>10 Q. Who hired you at R.G. & G.R.?</p> <p>11 A. Larry Froreip.</p> <p>12 Q. Who is Larry Froreip?</p> <p>13 A. He's an old manager. Retired.</p> <p>14 Q. And you were initially hired in a part-time</p> <p>15 position?</p> <p>16 A. Correct.</p> <p>17 Q. Do you remember when you went from part time to</p> <p>18 full time?</p> <p>19 A. Probably a week or two later.</p> <p>20 Q. Okay. And have you been performing the same</p> <p>21 sorts of duties since you were hired?</p> <p>22 A. Yes. Learning and growing more as the years --</p> <p>23 throughout years.</p> <p>24 Q. And what is your current salary at R.G. & G.R.?</p> <p>25 A. Thirteen an hour.</p>	Page 12	<p>1 Q. And where did you attend high school?</p> <p>2 A. West side of the state, Covert.</p> <p>3 Q. Covert, Michigan?</p> <p>4 A. Yes. C-O-V-E-R-T.</p> <p>5 Q. And did you graduate?</p> <p>6 A. Yes.</p> <p>7 Q. What year?</p> <p>8 A. '85.</p> <p>9 Q. Any post high school education?</p> <p>10 A. Some college.</p> <p>11 Q. Where was that at?</p> <p>12 A. Lake Michigan.</p> <p>13 Q. You didn't finish a degreed program, though?</p> <p>14 A. Correct.</p> <p>15 Q. Any other post high school education besides</p> <p>16 that?</p> <p>17 A. No.</p> <p>18 Q. Any professional certifications or licenses that</p> <p>19 you maintain?</p> <p>20 A. No.</p> <p>21 Q. Any vocational schooling?</p> <p>22 A. No.</p> <p>23 Q. Do you have any convictions or arrests?</p> <p>24 A. No.</p> <p>25 Q. Have you ever been a witness or a party to a</p>
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Page 11	<p>1 Q. Do you remember the last time you received a</p> <p>2 raise?</p> <p>3 A. A few weeks ago.</p> <p>4 Q. Congratulations. What were you making before?</p> <p>5 A. 12.75 or 12.50. I'm sorry, one or the other.</p> <p>6 Q. Do you have any relatives who work for R.G. &</p> <p>7 G.R.?</p> <p>8 A. My daughter.</p> <p>9 Q. What's your daughter's name?</p> <p>10 A. Daytona McKie, M-C-K-I-E.</p> <p>11 Q. What is her position at R.G. & G.R.?</p> <p>12 A. She's been shadowing me, but for the most part</p> <p>13 office work.</p> <p>14 Q. So similar duties to what you perform?</p> <p>15 A. Correct. Also visitations.</p> <p>16 Q. Is she part time or full time?</p> <p>17 A. Just went full time.</p> <p>18 Q. How long has she worked for R.G. & G.R.?</p> <p>19 A. I don't even know if it's been a year, to be</p> <p>20 honest.</p> <p>21 Q. She was initially working part time and recently</p> <p>22 transitioned to full time?</p> <p>23 A. Correct.</p> <p>24 Q. Where did you work previously from R.G. & G.R.?</p> <p>25 A. I was home. Housewife. Homemaker.</p>	Page 13	<p>1 lawsuit other than this?</p> <p>2 A. No.</p> <p>3 Q. Have you ever filed an administrative claim with</p> <p>4 a local, state or federal agency?</p> <p>5 A. No.</p> <p>6 Q. And you've never been deposed before; that's</p> <p>7 correct?</p> <p>8 A. Correct.</p> <p>9 Q. How did you prepare for this deposition?</p> <p>10 A. I spoke to Mr. Kirkpatrick Wednesday.</p> <p>11 Q. And how long did that take?</p> <p>12 A. Fifteen, 20 minutes.</p> <p>13 Q. Did you review any documents?</p> <p>14 A. No.</p> <p>15 Q. Have you spoken with anyone about your deposition</p> <p>16 testimony here today other than Mr. Kirkpatrick?</p> <p>17 A. Shannon as far as what time to arrive.</p> <p>18 Q. Anyone besides Shannon and Joel that you talked</p> <p>19 to about your deposition testimony here today?</p> <p>20 A. No.</p> <p>21 Q. Did you ever work with Anthony Stephens?</p> <p>22 A. Yes.</p> <p>23 Q. What sort of interaction did you have with</p> <p>24 Stephens?</p> <p>25 A. When he would -- our paths would cross at</p>
---------	--	---------	--

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1 different locations of different funeral homes
 2 amongst the three, whether he was coming to
 3 either bring remains to our chapel or I was going
 4 to work a visitation at where he was, at Garden
 5 City.
 6 **Q. You testified there's sort of cross pollination**
 7 **between you going to other offices. Is it**
 8 **similar that Stephens would also --**
 9 A. Oh, correct.
 10 **Q. -- do services at other offices and you would run**
 11 **into each other?**
 12 A. Correct.
 13 **Q. Okay. Would you say you would have day-to-day**
 14 **interaction with him?**
 15 A. Oh, no.
 16 **Q. Weekly interaction?**
 17 A. Not even weekly.
 18 **Q. Just a few times a month?**
 19 A. Correct.
 20 **Q. Do you know where his primary location was for**
 21 **R.G. & G.R.?**
 22 A. Garden City.
 23 **Q. And that has never been your primary location?**
 24 A. No.
 25 **Q. Do you know why Stephens was fired?**

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1 A. Yes, I do.
 2 **Q. Explain to me what you understand about why**
 3 **Stephens was fired.**
 4 A. From my understanding, he was let go -- he was
 5 transitioning from Anthony to Amy.
 6 **Q. And his termination dealt with his gender**
 7 **transition from Anthony Stephens to Amy Stephens,**
 8 **from male to female?**
 9 A. To be honest, not certain if that's why he was
 10 let go. I know that there was talk of that. I
 11 never come out and asked, but it's not my place
 12 to.
 13 **Q. How do you know there was talk of that?**
 14 A. Throughout the funeral home. I mean, somebody's
 15 transitioning, it's spoken about briefly. I
 16 assumed -- I shouldn't have -- that's why he was
 17 let go.
 18 **Q. Do you remember who you heard talking about it?**
 19 A. Probably just office staff.
 20 **Q. So none of your --**
 21 A. Nobody higher up than me I should say.
 22 **Q. So none of your four managers ever discussed it**
 23 **with you?**
 24 A. Oh, no. No, and I never asked.
 25 **Q. But you think that fellow employees discussed it**

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1 **with you?**
 2 A. Correct.
 3 **Q. Do you remember specifically which employees?**
 4 A. It's been a while. I don't recall specifics or
 5 names. I don't know if I spoke about it either.
 6 It's just in passing you'd hear.
 7 **Q. I'm going to show you what's been previously**
 8 **marked as Exhibit 7.**
 9 A. Okay.
 10 **Q. If you could take a second to review that.**
 11 **Do you recognize this document?**
 12 A. I never seen it in its entirety.
 13 **Q. You have seen a version of this document?**
 14 A. No, not the full version. I've seen a paragraph
 15 prior to him being let go.
 16 **Q. And who shared that paragraph with you?**
 17 A. Anthony.
 18 **Q. And this letter is written by Anthony stating**
 19 **that he was going on a vacation and coming --**
 20 **desired to come back presenting as a female known**
 21 **as Amy Stephens; is that correct?**
 22 A. Correct.
 23 **Q. And Anthony showed you a paragraph of this**
 24 **letter?**
 25 A. Not certain if it's this letter. At the time he

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1 showed me the paragraph, it was more so to -- for
 2 his father when we spoke, so I've never seen this
 3 particular letter.
 4 **Q. But you're testifying that the underlying concept**
 5 **that Anthony would be transitioning from**
 6 **presenting as the male gender to a female and**
 7 **known as Amy Stephens is the same -- is**
 8 **consistent with the paragraph that you saw?**
 9 MR. KIRKPATRICK: I'm going to object
 10 because her testimony was it had something to do
 11 with his father. I guess if you want to ask
 12 questions about the father. She says she's never
 13 seen this document before. She, I believe,
 14 testified that she saw a paragraph and I think
 15 when you asked her further she testified it had
 16 to do with his father.
 17 I understand what you're asking, but I
 18 think you need to be very clear about what she
 19 observed or conversations.
 20 MR. SHULTZ: Can you read back my
 21 question?
 22 (Reporter read pending question).
 23 MR. KIRKPATRICK: Just so we're clear,
 24 you can answer if you know, but I'm objecting to
 25 the fact I believe she testified that it had to

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1 felt bad. Sad and bad, sorry.
 2 BY MR. SHULTZ:
 3 Q. Could you say why did you feel sad and bad?
 4 A. For him as an individual with a family, and he's
 5 an incredible embalmer, learned a lot. I just
 6 feel bad for somebody's struggles like that with
 7 internal issues.
 8 Q. After Stephens was terminated, did you have any
 9 communications with any other R.G. & G.R.
 10 employees regarding Stephens or Stephens'
 11 termination?
 12 A. No.
 13 Q. Have you had any contact with Amy Stephens since
 14 she was terminated from R.G. & G.R.?
 15 A. No.
 16 Q. You've never had a meal with her after the
 17 termination?
 18 A. No.
 19 Q. Does R.G. & G.R. have a dress code for its
 20 employees?
 21 A. Yes.
 22 Q. What is your understanding of that dress code?
 23 A. The gentlemen wear suit and ties, dark suit and
 24 ties, white shirts. And the women, we wear skirt
 25 suits and tops.

Page 23

1 Q. And that's been the same since you started in the
 2 late nineties?
 3 A. Correct.
 4 Q. Do you have any understanding of R.G. & G.R.
 5 providing suits for its male employees?
 6 A. Yes.
 7 Q. Could you describe your understanding of that?
 8 A. Each of the male employees get two suits. I
 9 believe part time get one, but the rest get two.
 10 Q. And by get you mean R.G. & G.R. provides the
 11 suits?
 12 A. Provides. I'm sorry.
 13 Q. Provides the suits free of cost to the employees?
 14 A. Correct.
 15 Q. To the male employees?
 16 A. Yes.
 17 Q. And I understand that there is now a stipend or
 18 allowance for the female -- a clothing stipend or
 19 allowance for the female employees; is that
 20 correct?
 21 A. Correct.
 22 Q. When did that begin?
 23 A. Shortly after Anthony was let go.
 24 Q. And you've received this stipend?
 25 A. Every year. Oh, I have. Yes.

Page 24

1 Q. And do you know how much you receive?
 2 A. Yes.
 3 Q. How much?
 4 A. 150.
 5 Q. And you said every year so it's a yearly stipend?
 6 A. Correct.
 7 Q. Do you know when you received the stipend?
 8 A. It's been three years.
 9 Q. Sorry, when during the year do you receive the
 10 stipend?
 11 A. Oh. I don't recall when it's given. I'm sorry.
 12 Q. Were you involved in the decision-making process
 13 for determining that female employees would
 14 receive a stipend?
 15 A. No.
 16 Q. Were you consulted at all about the amount of the
 17 stipend?
 18 A. No.
 19 Q. How were you told that you would be receiving a
 20 stipend?
 21 A. It was handed to me.
 22 Q. Who handed it to you?
 23 A. Shannon Kish.
 24 Q. She handed you a check for \$150?
 25 A. In an envelope, yes.

Page 25

1 Q. And what did she say about the check?
 2 A. It was clothing allowance.
 3 Q. Do you have any -- scratch that.
 4 Can you describe the effect of the \$150
 5 annual clothing stipend on your ability to
 6 purchase work clothes?
 7 A. Can you -- I don't understand what you're asking
 8 me.
 9 Q. Essentially how does receiving \$150 every year
 10 help you to buy work clothes?
 11 A. How does it help me buy work clothes?
 12 Q. How much work clothes have you been able to
 13 purchase because of the \$150 annual stipend?
 14 A. Do you want to know what I've purchased? How
 15 much has it helped me? Oh, goodness. It's
 16 helped.
 17 Q. What have you been able to purchase with \$150?
 18 A. Tights, shoes.
 19 Q. You make these purchases during your own personal
 20 time and not on company time, correct?
 21 A. Correct.
 22 Q. Do you have any sense of the relative
 23 relationship between the \$150 annual stipend you
 24 receive versus the two suits that full-time men
 25 receive or the one suit that part-time men

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1 the women would wear?

2 A. Correct.

3 Q. And why was that never implemented?

4 A. Until Daytona came aboard, I was the youngest in
5 the funeral home female. There's a large age
6 group or -- yeah, and we couldn't get along or
7 agree with the same suit.

8 Q. So if you're testifying that there was
9 discussions and there was no consensus reached by
10 all the female employees about what color suit to
11 wear, that kind of thing?

12 A. That and the style of the suit. I think skirt
13 length was a big issue.

14 Q. So at some point was it determined that since
15 there could be no consensus among the female
16 employees that there would be no specific uniform
17 that all the females had to wear?

18 A. Correct.

19 Q. Okay. Was it your understanding that if and when
20 there was a decision made that was agreed upon
21 for a female uniform that the funeral home would
22 purchase that for the females?

23 A. Correct.

24 Q. Okay. Now, Mr. Shultz asked you questions about
25 how much shoes cost and shirts, blazers,

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1 etcetera. Do you recall that?

2 A. Yes.

3 Q. Now, are these clothes that you only wear for
4 work or are you free to wear them any time?

5 A. Free to wear any time.

6 Q. Okay.

7 A. Wouldn't.

8 Q. Okay. Right. But you could and you have. Have
9 you worn these things, like, to an event or
10 something like that, to a wedding or funeral or
11 something else?

12 A. Yes.

13 Q. Okay.

14 MR. KIRKPATRICK: I don't have any other
15 questions.

16 RE-EXAMINATION

17 BY MR. SHULTZ:

18 Q. Just a limited followup. I promise.
19 You primarily wear the clothes that we
20 were discussing for work, correct?

21 A. Correct.

22 Q. So on an odd occasion you may wear them to a
23 nonwork event?

24 A. Correct.

25 Q. Could you estimate how often that happens?

Page 40

1 A. I have no idea.

2 Q. Are we talking once a year? Once every six
3 months?

4 A. Maybe once every six months.

5 Q. So the more formal events in your life, a wedding
6 or a funeral you might wear your work clothes to
7 that event?

8 A. A funeral, yes.

9 Q. Not a wedding, though?

10 A. No.

11 Q. But fairly rarely?

12 A. Correct.

13 Q. Twice a year?

14 A. Correct.

15 Q. And Mr. Kirkpatrick just asked you about the
16 discussions R.G. & G.R. had with the female
17 employees regarding providing a suit similar to
18 what the men received to the women; is that
19 correct?

20 A. Correct.

21 Q. You said that was a long time ago; is that
22 correct?

23 A. Yes. It was brought up a few times.

24 Q. And do you remember when it was brought up?

25 A. Not exactly. It was before.

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1 Q. You started, like, in the late nineties, right?

2 A. Correct.

3 Q. Was it within the first few years of you starting
4 R.G. & G.R.?

5 A. I would say about -- probably about five.

6 Q. Okay.

7 A. And then brought up again. More than once.

8 Q. So somewhere in 2003-ish?

9 A. I guess. Yes.

10 Q. So the period of time between 2003 when R.G. &
11 G.R. decided it couldn't provide suits to the
12 women and the -- between that period of time of
13 R.G. & G.R.'s decision not to provide suits to
14 women and providing the clothing allowance, there
15 was neither a clothing allowance or suits
16 provided to women for that decade?

17 A. I would say the discussion of it back then wasn't
18 as -- we did look at some things, but it wasn't
19 as detrimental, like, or, you know, it wasn't --
20 we did discuss it again after that. I think some
21 of us weren't interested at all in it.

22 Q. In having --

23 A. Correct.

24 Q. -- a uniform suit that is worn?

25 A. Correct. Correct.

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1 Q. But irregardless, the only clothing benefit
 2 you've ever received just started the last couple
 3 of years with this clothing allowance?
 4 A. Correct.
 5 Q. I have nothing further.
 6 MR. KIRKPATRICK: Thank you.
 7 (Deposition concluded at 11:55 a.m.)
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1 CERTIFICATE OF NOTARY
 2 STATE OF MICHIGAN)
 3) SS
 4 COUNTY OF OAKLAND)
 5
 6 I, Laurel A. Jacoby, a Notary Public in and for
 7 the above county and state, do hereby certify that the
 8 above deposition was taken before me at the time and
 9 place hereinbefore set forth; that the witness was by
 10 me first duly sworn to testify to the truth and nothing
 11 but the truth; that the foregoing questions asked, and
 12 the answers given by the witness were duly recorded by
 13 me and reduced to computer transcription; that this is
 14 a true, full and correct transcript so taken; and that
 15 I am not related to, nor of counsel to either party,
 16 nor interested in the event of this cause.
 17
 18
 19
 20 
 21 Laurel A. Jacoby, CSR-5059, RPR
 22 Notary Public
 23 Oakland County, Michigan
 24
 25 My Commission Expires: September 1, 2018

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2 ERRATA SHEET
 3
 4
 5 I declare under penalty of perjury that I have read the
 6 foregoing _____ pages of my testimony, taken
 7 on _____ (date) at
 8 _____(city), _____(state),
 9
 10 and that the same is a true record of the testimony given
 11 by me at the time and place herein
 12 above set forth, with the following exceptions:
 13
 14 Page Line Should read: Reason for Change:
 15
 16 _____
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Page 45

1 ERRATA SHEET
 2 Page Line Should read: Reason for Change:
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 18 Date: _____
 19 Signature of Witness
 20 _____
 21 Name Typed or Printed
 22
 23
 24
 25

EXHIBIT 14

In The Matter Of:

**Equal Employment Opportunity Commission v. R.G.
& G.R. Harris Funeral Homes**

Aimee Stephens

December 16, 2015



Aimee Stephens
December 16, 2015

Page 1	Page 3
<p>UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION</p> <p>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. Case No. 2:14-cv-14-13710 Hon. Sean F. Cox R.G. & G.R. HARRIS FUNERAL HOMES, INC., Defendant.</p> <hr/> <p>The Deposition of AIMEE A. STEPHENS, Taken at 39111 Six Mile Road, Livonia, Michigan, Commencing at 9:28 a.m., Wednesday, December 16, 2015, Before Deborah A. Culver, #3001.</p>	<p>1 BRADLEY ABRAMSON 2 Alliance Defending Freedom 3 15100 N. 90th Street 4 Scottsdale, Arizona 85260 5 (480) 444-0020 6 Appearing on behalf of the Defendant. 7 8 JEFF T. SCHRAMECK 9 Schrameck Law, P.L.L.C. 10 843 Penniman Avenue 11 Plymouth, Michigan 48170 12 (734) 454-5400 13 Appearing on behalf of the Defendant. 14 15 Also Present: 16 Thomas F. Rost 17 18 19 20 21 22 23 24 25</p>
Page 2	Page 4
<p>1 APPEARANCES: 2 3 DALE R. PRICE, JR. 4 MILES E. SHULTZ 5 KATIE N. LINEHAN 6 Equal Employment Opportunity Commission 7 477 Michigan Avenue, Room 865 8 Detroit, Michigan 48226 9 (313) 226-7808 10 Dale.price@eeoc.gov 11 Appearing on behalf of the Plaintiff. 12 13 JOEL J. KIRKPATRICK 14 Kirkpatrick Law Offices, P.C. 15 843 Penniman Avenue 16 Suite 201 17 Plymouth, Michigan 48170 18 (734) 404-5710 19 Joel@joelkirkpatrick.com 20 Appearing on behalf of the Defendant. 21 22 23 24 25</p>	<p>1 TABLE OF CONTENTS 2 3 WITNESS PAGE 4 AIMEE A. STEPHENS 5 6 EXAMINATION 7 BY MR. KIRKPATRICK: 5 8 EXAMINATION 9 BY MR. PRICE: 131 10 RE-EXAMINATION 11 BY MR. KIRKPATRICK: 135 12 13 EXHIBITS 14 15 EXHIBIT PAGE 16 (Exhibits attached to transcript.) 17 18 DEPOSITION EXHIBIT 1 51 19 (Resumé) 20 DEPOSITION EXHIBIT 2 55 21 (Employee Manual) 22 DEPOSITION EXHIBIT 3 67 23 (Letter) 24 DEPOSITION EXHIBIT 4 119 25 (Plaintiff's Witness List)</p>

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<p>1 followed your apprenticeship, so to speak?</p> <p>2 A. Yes.</p> <p>3 Q. Is that when you decided that you wanted to get into</p> <p>4 the funeral business?</p> <p>5 A. Yes.</p> <p>6 Q. So after 1988 when you graduated --</p> <p>7 And you did receive the associate's degree?</p> <p>8 I think I just asked you that.</p> <p>9 A. Yes.</p> <p>10 Q. What did you do next in 1988?</p> <p>11 A. Went to work for Norris Funeral Home.</p> <p>12 Q. Norris. Do you know how to spell that?</p> <p>13 A. N-O-R-R-I-S.</p> <p>14 Q. Okay. Where were they located?</p> <p>15 A. Alliance, A-L-L-I-A-N-C-E, North Carolina.</p> <p>16 Q. Just for geography sake, is that close to Fayetteville</p> <p>17 or is it close to Charlotte?</p> <p>18 A. Closer to Fayetteville, but still 100 and some miles</p> <p>19 away.</p> <p>20 Q. What was your position there?</p> <p>21 A. Funeral director, embalmer.</p> <p>22 Q. So as a funeral director there, were you the only</p> <p>23 funeral director at Norris when you were there?</p> <p>24 A. No, the owner was also there.</p> <p>25 Q. Okay. And who was the owner?</p>	<p>1 A. It means going to wherever the person died, whether it</p> <p>2 be hospital, nursing home, residence. Down there we</p> <p>3 went to the site of accidents.</p> <p>4 Q. And what would be entailed in doing a body removal?</p> <p>5 What would physically you do?</p> <p>6 A. You had to put the body on a stretcher and then bring</p> <p>7 the stretcher back to the funeral home.</p> <p>8 Q. Would you have like a special vehicle that you would</p> <p>9 load the body into, just so I know, or was it a</p> <p>10 hearse?</p> <p>11 A. Down there we used a hearse.</p> <p>12 Q. So that's a body removal. And I think you said</p> <p>13 cosmetologizing?</p> <p>14 A. Cosmetizing.</p> <p>15 Q. Sorry. I added some syllables there.</p> <p>16 What does that mean?</p> <p>17 A. Returning the body to a life-like-looking state,</p> <p>18 whether through the use of cosmetics.</p> <p>19 Q. Is that done before or after there's an embalming?</p> <p>20 A. After.</p> <p>21 Q. And I take you also participated in and did</p> <p>22 embalming's?</p> <p>23 A. Yes.</p> <p>24 Q. And what other duties did you have? I know you</p> <p>25 rattled them off, and I'm sorry, I can't remember them</p>
Page 22	Page 24
<p>1 A. I can't remember his first name.</p> <p>2 Q. Would he have been a Norris?</p> <p>3 A. Yes, he was a Norris.</p> <p>4 Q. Was this a large funeral home?</p> <p>5 A. No, very small.</p> <p>6 Q. Were there any funeral directors besides you and the</p> <p>7 owner?</p> <p>8 A. No.</p> <p>9 Q. So it was just the two of you were funeral directors?</p> <p>10 MR. PRICE: Yes?</p> <p>11 A. Yes.</p> <p>12 MR. KIRKPATRICK: Thanks.</p> <p>13 BY MR. KIRKPATRICK:</p> <p>14 Q. What were your duties there as a funeral director at</p> <p>15 the Norris Funeral Home?</p> <p>16 A. Body removal, embalming, dressing, cosmetizing,</p> <p>17 casketing, visitations, funerals.</p> <p>18 Q. If I could, I'd like to kind of break that down a</p> <p>19 little bit. I don't want to assume things. You've</p> <p>20 worked in the funeral industry, I haven't.</p> <p>21 When you say body retrieval -- right, is</p> <p>22 that what you said?</p> <p>23 A. Removal.</p> <p>24 Q. Does that mean going to like a hospital if there's a</p> <p>25 death?</p>	<p>1 all. But after that, what would be your next duty</p> <p>2 with a body like that, after you've embalmed it,</p> <p>3 removed it -- or removed, embalmed, and then did</p> <p>4 cosmetology to it?</p> <p>5 A. You dress it, you get it put in the casket ready for</p> <p>6 viewing.</p> <p>7 Q. And you would participate in bringing the body out to</p> <p>8 your viewing location?</p> <p>9 A. Yes.</p> <p>10 Q. Would you interact with families?</p> <p>11 A. Yes.</p> <p>12 Q. Did you participate in the initial meeting of the</p> <p>13 family when they came to make arrangements?</p> <p>14 A. Sometimes.</p> <p>15 Q. Okay.</p> <p>16 A. There, generally not, because I was in the embalming</p> <p>17 room while Mr. Norris was making the arrangements.</p> <p>18 Q. Okay. Now, how long does it take to do an embalming?</p> <p>19 Is there like kind of like a range?</p> <p>20 A. There is a variance depending on the condition of the</p> <p>21 body. I would say anywhere from an hour to two hours.</p> <p>22 Q. Okay. And while you were at Norris Funeral Home, how</p> <p>23 many embalming's would you average a month?</p> <p>24 A. Let's see. They did around 100 calls a year, so we're</p> <p>25 looking at maybe seven or eight a month.</p>

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<p>1 Q. Just so I'm clear, in 2001 did you leave Advance Auto? 2 A. Yes. 3 Q. What did you leave to do? 4 A. I went into automotive repair. 5 Q. When you say auto repair, are you talking about as 6 like a mechanic? 7 A. Yes. 8 Q. And where did you work? 9 A. The first place I worked was Car Pro Auto. 10 Q. Car -- 11 A. Pro. 12 Q. Where was that located? 13 A. Livonia, Michigan. 14 Q. Is there a reason you chose to come to Michigan as 15 opposed to somewhere else, if you're from North 16 Carolina? 17 A. I got remarried in 2000. 18 Q. Okay. Who were you remarried to? 19 A. Donna. 20 Q. Donna. Are you still married to Donna? 21 A. Yes. 22 Q. Did she have family in Michigan? Is that why you came 23 to Michigan? 24 A. Yes. 25 Q. Had you been to Michigan before then?</p>	<p>1 mechanic? 2 A. Yes. 3 Q. In 2005 did you leave Bill Brown? 4 A. Left Bill Brown. 5 Q. Why? 6 A. Promise of something better but didn't work out. 7 Q. So they didn't keep their end of the bargain? 8 A. It got to the point, auto repair was slowing down, 9 paychecks were getting smaller. 10 Q. Okay. 11 A. I was offered a job with Michigan Reconditioning 12 Services. 13 Q. Okay. 14 A. Refurbishing police cars. 15 Q. All right. 16 A. For 1000 bucks a week. 17 Q. So more pay? 18 A. Yes. 19 Q. Is why you left? 20 A. Yes. 21 Q. All right. Were you ever fired at any of these jobs, 22 like Bill Brown or Car Pro Auto? 23 A. No. 24 Q. Or any of the funeral homes we talked about? 25 A. No.</p>
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<p>1 A. To visit once. 2 Q. Certainly the weather was a little nicer in North 3 Carolina year round, I'm sure, than Michigan? 4 A. I don't know, it's pretty much the same. 5 Q. Okay. So in 2001 you left Advance Auto -- or you 6 started to work for Car Pro; right? 7 A. Yes. 8 Q. As a mechanic in Livonia. How long did you work 9 there? 10 A. Probably six months. 11 Q. Then what did you do? 12 A. I went to Bill Brown Ford. 13 Q. Is that Bill Brown Ford is Westland or is that in 14 Plymouth? 15 A. Livonia. 16 Q. If I keep saying cities, I'll get it right. 17 What did you do for Bill Brown Ford? 18 A. I was an automotive mechanic. 19 Q. Why did you take that position and leave Car Pro Auto? 20 A. Steady job, better benefits, more money. 21 Q. Okay. And you went there in 2001 or 2002? 22 A. 2001. 23 Q. How long were you at Bill Brown Ford? 24 A. Until 2005. 25 Q. Did you stay in that same position as an auto</p>	<p>1 Q. So you went there in 2005 to this Michigan 2 Recondition -- 3 A. Service. 4 Q. Service. What was your job title? 5 A. Mechanic. 6 Q. How long did you work there? 7 A. I was there about a year. 8 Q. Why did you leave there? 9 A. That I actually quit. 10 Q. Okay. Why did you quit? 11 A. He wanted to change pay structure. 12 Q. Okay. 13 A. He wanted to go to, instead of paying me a weekly 14 salary, he wanted to go to book hours. 15 Q. All right. 16 A. And he didn't have enough book hours to even meet what 17 I was supposed to be making. 18 Q. So there was just a dispute, or maybe not even a 19 dispute, the job was changing, the pay might be 20 changing, you left? 21 A. Yes. 22 Q. And that was in 2006? 23 A. Yes. 24 Q. What did you do then in 2006? 25 A. I went to work for a company called Westview</p>

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1 A. Yes.
 2 Q. Was that always your name legally when you were
 3 employed by R.G. & G.R. Funeral Homes?
 4 A. Yes.
 5 Q. Were you born a male?
 6 MR. PRICE: Objection. I think this is
 7 getting to the part of the Protective Order here.
 8 MR. KIRKPATRICK: It's not the Protective
 9 Order. I'm asking were you born a male or female.
 10 I'm not asking about any transition, I'm just asking
 11 about sex assigned at birth. Does that assist?
 12 MR. PRICE: You can go ahead and answer.
 13 A. I was assigned male at birth.
 14 BY MR. KIRKPATRICK:
 15 Q. What does that mean to be assigned male at birth, or
 16 any sex at birth?
 17 When I say that, what your understanding
 18 is.
 19 MR. PRICE: I really think we're getting
 20 into the transition phase. I'm going to object. I
 21 mean I really think this is relating to the transition
 22 from male to female, and I think we are -- it really
 23 does fall within the Protective Order.
 24 MR. KIRKPATRICK: I don't believe it does
 25 fall in the Protective Order.

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1 Why don't we go off the record for a minute
 2 and maybe the attorneys can have a conversation.
 3 MR. PRICE: Okay.
 4 (Off the record at 10:31 a.m.)
 5 (Back on the record at 10:37 a.m.)
 6 MR. KIRKPATRICK: Back on the record.
 7 BY MR. KIRKPATRICK:
 8 Q. So as we fast forward or actually go back to August of
 9 2007, you testified already that you worked at
 10 R.G. & G.R. Funeral Home; right?
 11 A. As of October 1st.
 12 Q. I'm sorry.
 13 A. 2007.
 14 Q. You're right. October 1st, 2007. What was your
 15 position?
 16 A. When I first started, I would basically have been an
 17 apprentice.
 18 Q. So your job title was apprentice. Was that similar to
 19 the job title you had in the very first funeral home
 20 you worked at back in North Carolina?
 21 A. Yes.
 22 Q. And was it your understanding that at some point you'd
 23 get another job title such as funeral director?
 24 A. Yes.
 25 Q. And how long did you work in that role as apprentice?

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1 A. Six months.
 2 Q. And after six months, were you then promoted to
 3 funeral director?
 4 A. More or less, yes, because I got my license.
 5 Q. Let's step back and talk about the hiring process for
 6 R.G. & G.R. Did you submit a resumé? How did you go
 7 about getting the position at R.G. & G.R. Funeral
 8 Home?
 9 A. Yes, resumé was submitted.
 10 MARKED FOR IDENTIFICATION
 11 DEPOSITION EXHIBIT 1
 12 (Resumé)
 13 10:39 a.m.
 14 BY MR. KIRKPATRICK:
 15 Q. Take a look at what's been marked Exhibit 1.
 16 Did you have a chance to review that?
 17 A. Yes.
 18 Q. Do you recognize that?
 19 A. Yes.
 20 Q. Would this be the resumé and cover letter you
 21 submitted to get the job at R.G. & G.R. Funeral Homes?
 22 A. Yes.
 23 Q. You see the first page down there, it says Anthony B.
 24 Stephens. Is that your signature?
 25 A. Yes.

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1 Q. And this resumé, you prepared this, I take it, to get
 2 a job at a funeral home?
 3 A. Yes.
 4 Q. So you submitted a resumé. And what happened next
 5 that got you into a position to get the job with
 6 R.G. & G.R. Funeral Home?
 7 A. Well, when I first dropped it off in person, I was
 8 told that there was nothing available.
 9 Q. Okay. When you say you dropped it off, who did you
 10 drop it off to?
 11 A. I dropped it off at the Livonia location.
 12 Q. Do you recall who you gave your resumé to?
 13 A. Actually it went to Sue.
 14 Q. Okay. Do you know if --
 15 A. I think she was the only one there at the time.
 16 Q. Do you know if this Sue is still employed?
 17 A. I have no idea.
 18 Q. And then what happened next?
 19 A. Mr. Rost called and said he'd like to talk to me, that
 20 he had a unique situation, that his son Matt was going
 21 to be going to California to participate in some kind
 22 of reality TV show.
 23 Q. Just for the record, who is Mr. Rost?
 24 A. He's sitting at the end of the table down there.
 25 Q. Would that be Tom Rost?

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1 A. Yes.
 2 Q. Is he the owner, as far as you know?
 3 A. As far as I know.
 4 Q. Of R.G. & G.R. Funeral Homes?
 5 A. As far as I know.
 6 Q. Do you know if he himself is a funeral director?
 7 A. Yes, he is.
 8 Q. So he called you and said I need somebody to work
 9 here?
 10 A. Yes.
 11 Q. And then what was the next step, what happened?
 12 A. I went in and talked to him and to his son Matt. Then
 13 a few days later, I was called by Mr. Cash and went
 14 back and talked to him.
 15 Q. Mr. Cash is who?
 16 A. The manager at Livonia.
 17 Q. So you had an interview with these people, Mr. Cash?
 18 A. Well, I would call it an interview with him and Mr.
 19 Rost.
 20 Q. Mr. Rost too. I'm sorry.
 21 And obviously you were hired?
 22 A. Yes.
 23 Q. And what do you recall of that conversation, what did
 24 they tell you your job duties would be or anything
 25 like that?

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1 MR. PRICE: Objection. Which they are you
 2 referring to? Vague.
 3 MR. KIRKPATRICK: That's fair enough.
 4 BY MR. KIRKPATRICK:
 5 Q. At this meeting -- you were hired at some point;
 6 correct?
 7 A. Yes.
 8 Q. At this interview or meeting, whatever it was, did
 9 they, being Mr. Rost and Mr. Cash, discuss with you
 10 what your job responsibilities were to be?
 11 A. I don't recall, actually.
 12 Q. Is it safe to assume, for lack of a better term, that
 13 you were going to be a funeral director?
 14 A. Basically, yes.
 15 Q. And they were comfortable enough knowing that you
 16 previously worked in the funeral business?
 17 A. That is --
 18 Q. You shook your head. It happens. So yes?
 19 A. Yes.
 20 Q. And when did you start working there? How long after
 21 this interview?
 22 A. I actually started on October the 1st.
 23 Q. And were you working in the Livonia office?
 24 A. For the majority of the time, yes, because that's
 25 where Matt was at.

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1 Q. And when you started working there, what were your job
 2 duties? Is it similar to what we've been talking
 3 about at all your funeral locations?
 4 A. Yes.
 5 Q. So you were doing the job as an apprentice, which was
 6 kind of everything you've already described as a
 7 funeral director. I take it you were assisting in
 8 embalmings?
 9 A. Yes.
 10 Q. You were assisting in casketing?
 11 A. Yes.
 12 Q. And removals?
 13 A. Yes.
 14 Q. And all the other duties you've already previously
 15 described?
 16 A. Yes.
 17 Q. Did they give you an employee handbook or anything
 18 like that?
 19 A. No.
 20 Q. They never gave you an employee handbook?
 21 A. No, sir.
 22 MARKED FOR IDENTIFICATION:
 23 DEPOSITION EXHIBIT 2
 24 (Employee Manual)
 25 10:44 a.m.

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1 BY MR. KIRKPATRICK:
 2 Q. Let me hand you what's been marked Exhibit 2.
 3 Have you had a chance to review that
 4 document?
 5 A. Yes.
 6 Q. Do you recognize that document?
 7 A. No.
 8 Q. Never received that?
 9 A. No, sir.
 10 Q. You can just put it aside there.
 11 So no one ever provided you at R.G. & G.R.
 12 an employee manual?
 13 A. No, sir.
 14 Q. So you began to work in Livonia in 2007?
 15 A. Yes.
 16 Q. Who was your supervisor there?
 17 A. Well, I would assume it would be Dave Cash.
 18 Q. What I'm asking you, first line supervisor, would that
 19 be fair to say? First line supervisor or first line
 20 boss or person you reported to?
 21 A. Well, being as Dave Cash was the manager, I assume it
 22 would be David Cash.
 23 Q. Obviously Tom Rost is in a management chain above you;
 24 would that be fair to say?
 25 A. Yes.

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1 Q. Was Tom Rost present at Livonia like the majority of
2 time when you were there?
3 A. He made his rounds to all the funeral homes, I think,
4 every day.
5 Q. But was he there like eight hours a day?
6 A. No.
7 Q. And did you work exclusively at Livonia?
8 A. I can't say yes to that because you were sent to
9 wherever business happened to be.
10 Q. Okay. So in your entire employment tenure with
11 R.G. & G.R. Funeral Home, did you go and drive every
12 day or go every day to the Livonia location to do your
13 job?
14 A. Not every day.
15 Q. What other locations would you go to?
16 A. Garden City.
17 Q. Garden City. Anywhere else?
18 A. And Harper, Downtown Detroit.
19 Q. Where would you say you spent the majority of your
20 time during the work day?
21 A. For the first six months, probably Livonia.
22 Q. And then after six months, where did you spend --
23 A. Garden City.
24 Q. Garden City. Were you considered a Garden City
25 employee with R.G. & G.R. Funeral Home?

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1 A. Well, that's a good question because the schedule
2 posted covered all three places on the same schedule.
3 Q. Would Dave Cash be considered a manager of the Livonia
4 location?
5 A. Yes.
6 Q. Who was the manager at the Garden City location?
7 A. Would have been George Crawford.
8 Q. I would imagine Dave Cash and George Crawford, and
9 correct me if I'm wrong, did they have a reason to go
10 to the other locations themselves?
11 A. Yes.
12 Q. But they were considered managers of their specific
13 locations?
14 A. Yes.
15 Q. So after six months, where would you spend the bulk of
16 your time, which location?
17 A. I think we just answered that. Garden City.
18 Q. Okay. Just wanted to be clear. That's where you
19 drove every day to work for the most part?
20 A. Yes.
21 Q. Obviously you had occasion to go to Livonia or Detroit
22 for whatever reason; right?
23 A. Yes.
24 Q. Just what I'm getting at, is in your words, and
25 correct me if I'm wrong, that was kind of your home

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1 location to work out of when you were employed there;
2 would that be fair to say?
3 A. Yes.
4 Q. So after six months you were no longer an apprentice;
5 correct?
6 A. Correct.
7 Q. And you were now a funeral director, embalmer?
8 A. Yes.
9 Q. What did you do as a funeral director, embalmer for
10 R.G. & G.R. Funeral Home that differed from what
11 you've already testified to about your time in the
12 funeral business?
13 A. Nothing really.
14 Q. Okay. Did you have a uniform or a dress code that you
15 had to follow while with R.G. & G.R. Funeral Home?
16 A. They bought suits.
17 Q. Okay.
18 A. I wore it.
19 Q. So they being the company, bought you a suit or suits?
20 A. Yes.
21 Q. Were these male suits?
22 A. I would assume they were.
23 Q. Okay.
24 A. I guess a female could have dressed in them.
25 Q. But were they considered suits that men would wear?

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1 A. Yes.
2 Q. Do you know how many suits they purchased for you?
3 A. Not right off the top of my head, no.
4 Q. You worked there, I think, would it be fair to say
5 about six years total?
6 A. Yes.
7 Q. Do you know if they purchased more than two suits for
8 you during your time there, if you recall?
9 A. Well, they were on an as-needed basis.
10 Q. So if you wore one out or something --
11 A. Right, it got replaced.
12 Q. Did you ever have a suit replaced while you were
13 there?
14 A. Yes.
15 Q. I imagine they get a lot of use?
16 A. Yes, they do.
17 Q. Were you required to wear these suits they purchased
18 for you as an employee of R.G. & G.R. Funeral Home
19 when you were there?
20 A. Yes.
21 Q. Did you ever dress differently than the dress code
22 that you just spoke about while you were employed
23 there at R.G. & G.R.?
24 A. No.
25 Q. Now, while you were at Garden City, I think you

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1 A. That I actually did myself.
 2 Q. Okay. So if you were employed there five or six
 3 years, you think you might have done 500, 600
 4 embalmings?
 5 A. That's a possibility, yes.
 6 Q. Does that seem high or low to you, do you know?
 7 A. Depends upon business. You can't --
 8 Q. Right, I got you.
 9 So that would put us right around, what,
 10 seven or eight a month average? Does that sound
 11 right?
 12 A. There again, it depends. It's hard to say.
 13 Q. Well, I know. But you just told me you've done about
 14 100 a year. So if you break that down, divide by 12,
 15 I'm not holding you to exact numbers, I'm just trying
 16 to get an understanding that you might do anywhere on
 17 an average of seven to eight embalmings a month;
 18 right?
 19 A. Okay.
 20 Q. Well, not okay. Does that sound right to you?
 21 MR. PRICE: If you can recall.
 22 A. I've come as close as I can come for you.
 23 BY MR. KIRKPATRICK:
 24 Q. I'm not really holding you to an exact number. I'm
 25 just trying to get an understanding.

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1 A. Well, like I said, I've come as close as I can get for
 2 you.
 3 Q. Okay. I appreciate that.
 4 And your typical job duties at R.G. & G.R.
 5 Funeral Home, what else did you do besides embalmings?
 6 I know we've kind of gone over that with others, but
 7 since we're in this litigation, I want to focus on
 8 your specific duties with this funeral home.
 9 A. Embalming, cosmetizing, casketing, dressing.
 10 Q. Anything else?
 11 A. Viewing.
 12 Q. Viewing like we talked before where --
 13 A. Correct.
 14 Q. -- you prepare. Okay.
 15 A. Funerals.
 16 Q. How about removals?
 17 A. Oh, of course removals.
 18 Q. And interaction with families, that kind of thing?
 19 A. Every time that you make a removal you have that
 20 chance.
 21 Q. And you always wore this suit and tie that was
 22 purchased for you by the company?
 23 A. Yes.
 24 Q. Did you ever request any other kind of clothing other
 25 than suit and ties when you were with R.G. & G.R.

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1 Funeral Home to wear?
 2 A. No.
 3 Q. Why don't you tell me a little bit about the
 4 circumstances surrounding your termination from the
 5 funeral home? What happened and how were you
 6 terminated from the funeral home?
 7 A. There was a letter given to Mr. Rost stating my
 8 intentions and what I needed to do.
 9 Q. Okay.
 10 A. As far as my life went or was going at that time.
 11 Q. Okay.
 12 A. He read the letter, and basically that was it at that
 13 point.
 14 Q. All right. Let's back up a little bit.
 15 You say you gave him a letter. Is it a
 16 letter that you typed up and wrote or --
 17 A. Yes, it is.
 18 MR. KIRKPATRICK: Just for the record --
 19 MARKED FOR IDENTIFICATION
 20 DEPOSITION EXHIBIT 3
 21 (Letter)
 22 11:02 a.m.
 23 BY MR. KIRKPATRICK:
 24 Q. You had an opportunity to review that Exhibit?
 25 A. Yes.

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1 Q. Is this the letter you were talking about?
 2 A. Yes.
 3 Q. If you look on page two, is that your signature,
 4 Anthony Stephens?
 5 A. Yes.
 6 Q. Is that your signature, Aimee A. Stephens?
 7 A. Yes, it is.
 8 Q. I notice this is not dated. Do you recall when you
 9 wrote this letter?
 10 A. The letter itself actually took a while.
 11 Q. Okay.
 12 A. Many drafts. It was delivered to Mr. Rost on July
 13 31st.
 14 Q. So July 31st, 2013?
 15 A. Yes.
 16 Q. And did you just present this letter only to Mr. Rost?
 17 A. It was presented to him.
 18 Q. Okay. Did you give it to anyone else?
 19 A. About everybody else that worked for the funeral home
 20 had read it.
 21 Q. So did you give copies of this letter --
 22 A. No.
 23 Q. -- to anyone else?
 24 A. No.
 25 Q. So there's one letter you brought in and gave to Mr.

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1 Q. Who was the manager of the Detroit location?
 2 A. David Kowalewski.
 3 Q. Did you show that to David Kowalewski?
 4 A. David saw it probably July 30th.
 5 Q. So the day before. Did you show it to him or --
 6 A. We were talking.
 7 Q. Did you actually show it to him or just tell him about
 8 it?
 9 A. Yes, he saw it.
 10 Q. So just so I'm understanding, the only people that may
 11 have seen the letter in some sort of draft form prior
 12 to approximately a week before July 31st, 2013 was
 13 Sharon, Michelle and Dolly; is that fair?
 14 A. Michelle and Dolly.
 15 Q. Michelle and Dolly?
 16 A. Yes.
 17 Q. Not Sharon?
 18 A. Not Sharon.
 19 Q. Did you show the final draft to Dolly and Michelle and
 20 Sharon like you showed everyone else?
 21 A. Yes.
 22 Q. When was the final draft shown to them?
 23 A. In that week before.
 24 Q. All right. So July 31st you meet with Tom Rost;
 25 correct?

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1 A. Yes.
 2 Q. And you present him with this letter; right?
 3 A. Yes.
 4 Q. Was anyone else present at that meeting?
 5 A. No.
 6 Q. Where did the meeting take place?
 7 A. It was at Garden City in the chapel.
 8 Q. The chapel is just that really big room?
 9 A. Yes.
 10 Q. No one else was around?
 11 A. No.
 12 Q. I think you stated that.
 13 Tell me what happened?
 14 A. I already did. I gave him the letter, he read it, and
 15 basically that was it.
 16 Q. So did you say anything to him other than what was on
 17 the letter?
 18 A. Not really. The letter pretty much explains
 19 everything.
 20 Q. Just so I understand, you gave him the letter and he
 21 read it while you were standing there?
 22 A. We were sitting down.
 23 Q. Okay. Sitting down.
 24 Did you say Tom, I have something to show
 25 you?

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1 A. I told him, I said, Tom, I've got a letter I'd like
 2 for you to read.
 3 Q. Okay.
 4 A. And I gave him the letter.
 5 Q. Did you say anything else to him about that?
 6 A. I don't recall, no.
 7 Q. What did he say after he read the letter?
 8 A. I don't recall him saying much of anything.
 9 Q. Okay. So he reads the letter, you don't recall what
 10 he said. What happened next?
 11 A. He folded up the letter, put it in his coat pocket,
 12 and that was it.
 13 Q. He didn't --
 14 A. Because we were right at the end of the day.
 15 Q. He didn't say anything to you about the letter, he
 16 just -- you don't recall him saying anything?
 17 A. I don't recall him saying anything.
 18 Q. And then what happened next?
 19 A. Well, I worked for the next two weeks.
 20 Q. All right.
 21 A. Then he came in just before I left for my vacation.
 22 Q. Okay.
 23 A. And said basically this is not going to work, and
 24 handed me a letter.
 25 Q. Not going to work is what Tom said?

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

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1 think you were going back to work? I'm just trying to
 2 understand what next happened.
 3 A. Do you have a copy of the letter he sent me?
 4 Q. Well, it works when I ask you a question. I
 5 understand --
 6 MR. PRICE: Just let him --
 7 A. Okay.
 8 BY MR. KIRKPATRICK:
 9 Q. I mean please understand, I just have to ask questions
 10 because there's been a lawsuit initiated that we're
 11 litigating, so I need to know specifically what you
 12 recall about what happened at these meetings and what
 13 happened next.
 14 A. Okay. I told you what I recall.
 15 Q. Okay. I appreciate that.
 16 Were you under the impression when he gave
 17 you that letter that you were no longer employed?
 18 A. Yes.
 19 Q. Did you like clean out your locker, if you have a
 20 locker, or take your personal stuff home?
 21 A. I took my personal stuff home.
 22 Q. Did you speak to any other employees?
 23 A. I think I was the only one there by the time we
 24 finished.
 25 Q. During that two-week period of time between the time

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1 you gave Tom the letter and this meeting where he gave
 2 you a letter, did you talk to any employees about
 3 this?
 4 A. No.
 5 Q. Did anyone ask you about it?
 6 A. Not really.
 7 Q. Did Dolly ask you anything about it?
 8 A. No.
 9 Q. How about Michelle?
 10 A. No.
 11 Q. How about Sharon?
 12 A. No.
 13 Q. How about any employees at Livonia?
 14 A. No.
 15 Q. How about any employees at Detroit?
 16 A. No.
 17 Q. And George Crawford didn't ask you anything about it?
 18 A. He didn't know anything about it.
 19 Q. Do you know if he ever became aware of it before you
 20 were let go?
 21 A. Not before I left.
 22 Q. Was he not there at the office or something?
 23 A. He wasn't there that particular day.
 24 Q. And no other managers knew -- you had no interaction
 25 with any employees during that two-week period?

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1 A. No.
 2 Q. Other than Tom Rost?
 3 A. No.
 4 Q. Okay.
 5 MR. PRICE: Just to clarify, do you mean no
 6 interaction with anybody regarding the letter?
 7 MR. KIRKPATRICK: Yes.
 8 MR. PRICE: Okay.
 9 MR. KIRKPATRICK: Obviously you're going to
 10 have conversations in a work place.
 11 BY MR. KIRKPATRICK:
 12 Q. I'm talking about the letter you gave Tom Rost and
 13 what you were hoping to accomplish with your letter?
 14 A. No.
 15 Q. After you believed you were fired then, terminated,
 16 whatever, what did you do next?
 17 A. I think that was like on a Friday when we had --
 18 exchanged that second letter. On Monday I was at an
 19 attorney's office.
 20 Q. And did you file a claim with the EEOC?
 21 A. Eventually, yes.
 22 Q. So if you presented him the letter on July 31st, 2014,
 23 it was approximately two weeks later he met with you
 24 and gave you some document?
 25 A. Yes.

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1 Q. And that you believed at that point you were fired?
 2 A. Yes.
 3 Q. So would that be approximately August 13th, August
 4 14th?
 5 A. Yes.
 6 Q. But it was a Friday?
 7 A. I'm pretty sure it was.
 8 Q. Okay. At that point your name was still legally
 9 Anthony Stephens?
 10 A. Yes.
 11 Q. I know I asked this kind of a question, but legally
 12 I'm asking certain things here.
 13 What was your understanding of why you were
 14 fired? I know you said Tom said something about this
 15 isn't going to work. But do you have any
 16 understanding of why you were fired?
 17 A. My understanding from what he said was that me coming
 18 to work dressed as a woman was not going to be
 19 acceptable.
 20 Q. Did he say that actually to you?
 21 A. I don't recall exactly.
 22 Q. Okay. I think you said you recalled it's not going to
 23 work?
 24 A. Correct.
 25 Q. And you can't recall anything else. But you don't

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1 know if he actually said anything of what you just
 2 said, I can't have somebody working here dressed as a
 3 woman?
 4 A. I couldn't swear he said it, no.
 5 Q. Well, that's --
 6 A. But that's the impression that I got.
 7 Q. Okay, it's the impression you got. I just want to be
 8 clear about that.
 9 Did you ever reach out to Mr. Rost after
 10 that letter and say I'll keep working here and still
 11 comply with the dress code as you believed he thought
 12 it should be complied with?
 13 A. No. As I stated in my letter, I was prepared to
 14 return to work after my vacation wearing the
 15 appropriate female attire, which is basically what I'm
 16 dressed in today.
 17 Q. So you never offered to, hey, Tom, I'll come back
 18 dressed as I've always been dressed in a coat and tie
 19 that you purchased for me?
 20 A. No.
 21 Q. Do you believe that he had the impression that you
 22 were going to continue dressing in the coat and tie
 23 that was purchased for you since you started your
 24 employment with R.G. & G.R.?
 25 A. I can't say what he thought.

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1 Q. Well, I know. But you just told me your impressions
 2 about certain things. Did you have any impressions to
 3 challenge that thought, that he thought you may come
 4 back dressed in the same business attire that he had
 5 purchased for you for the previous six years?
 6 A. No.
 7 Q. Did you ever challenge or ask questions as to why that
 8 R.G. & G.R. Funeral Homes required you to wear a male
 9 suit and tie when you became employed there in 2007?
 10 A. No.
 11 Q. Did you ever ask why they required you to wear a male
 12 suit coat and tie?
 13 A. No.
 14 Q. Did you ever wonder why they required you to wear a
 15 male suit coat and tie when you became employed there?
 16 A. No.
 17 Q. Why not?
 18 A. Actually, I think that's hinging on transition.
 19 MR. PRICE: Can you repeat the question,
 20 please?
 21 MR. KIRKPATRICK: First of all, I want to
 22 object to the deponent objecting. It's the role for
 23 an attorney to object.
 24 BY MR. KIRKPATRICK:
 25 Q. I'm asking you why you never asked why you were

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1 required to wear a male suit coat and tie since 2007.
 2 Because you said you never questioned it, and I said
 3 why did you not question it.
 4 MR. PRICE: You're being asked about --
 5 Let's take a quick break.
 6 (Off the record at 11:23 a.m.)
 7 (Back on the record at 11:29 a.m.)
 8 MR. KIRKPATRICK: Back on record.
 9 Can you read the last question I asked,
 10 please?
 11 (Record read back by reporter as follows:
 12 Q. Did you ever wonder why they required
 13 you wear to a male suit coat and tie when
 14 you became employed there? A. No. Q. Why
 15 not?)
 16 A. I was perceived as a male and that's the way that I
 17 was presenting at that time.
 18 BY MR. KIRKPATRICK:
 19 Q. Okay. I think you just testified about you had drafts
 20 of the letter that we showed you that you presented to
 21 Tom Rost on July 31st. Do you have copies of those
 22 drafts?
 23 A. No.
 24 Q. Did you throw them away or something?
 25 A. They've been -- I don't know what really happened to

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1 them.
 2 Q. Did you write it out in longhand --
 3 A. It was in longhand when I started.
 4 Q. And then when you were finished, you typed it out?
 5 A. Yes.
 6 Q. What did those other drafts say that wasn't said in
 7 this letter?
 8 A. Basically said the same thing, there was just a few
 9 words changed here and there to clarify.
 10 Q. Why did you show it to all these other employees and
 11 not management for this period of time?
 12 A. Because I guess I wanted their input.
 13 Q. Did they give you input?
 14 A. I didn't get anything negative.
 15 Q. What did you get?
 16 A. Most of them said they understood.
 17 Q. Okay.
 18 A. What I was going through and what I was up against.
 19 Q. Specifically who gave you, in your words, positive
 20 responses?
 21 A. Number one would be Tia Macklin.
 22 Q. Tia Macklin, okay.
 23 A. She's the, I guess probably the only one that was
 24 really positive.
 25 Q. Okay. Anybody else?

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1 to her?
 2 A. Right.
 3 Q. Any other times that you've either spoken, texted --
 4 A. No.
 5 Q. E-mailed, contacted Dolly?
 6 A. No.
 7 Q. How about Michelle?
 8 A. Haven't seen her since that dinner.
 9 Q. Did you talk to her before the dinner after --
 10 A. No.
 11 Q. Did you ever text her, e-mail or contact her in any
 12 way?
 13 A. No.
 14 Q. Any other employees that you may have contacted?
 15 A. No.
 16 Q. When you showed these drafts to people you've already
 17 discussed, or at least the final version before you --
 18 approximately a week before you gave it to Mr. Rost,
 19 did you instruct the people you talked to or asked
 20 them not to do anything about it, not to tell anyone?
 21 A. Oh, sure.
 22 Q. What did you say to them?
 23 A. I said just keep it between us.
 24 Q. Okay.
 25 A. I said Tom will get a copy of it.

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1 Q. Is it fair to say you've been involved with the
 2 funeral business for nearly 30 years?
 3 A. Yes.
 4 Q. And I think you've testified at every place there's
 5 been some sort of dress code?
 6 A. Yes.
 7 Q. Why is there a need or why does the funeral business,
 8 why is there a dress code, if you know?
 9 A. Well, I wouldn't think you'd want somebody showing up
 10 in shorts.
 11 Q. Okay.
 12 A. And a t-shirt for a funeral.
 13 Q. Why not?
 14 A. Doesn't look professional.
 15 Q. Okay. So in your experience, the industry standard is
 16 to have professional clothing?
 17 A. Yes.
 18 Q. Have you ever been in a situation where they, they,
 19 being a funeral home, have not followed any kind of
 20 professional clothing dress code?
 21 A. Other than the ones I've mentioned, no, but it was
 22 still perceived.
 23 Q. So there's an understanding of presenting yourself, if
 24 you work in the industry, in a professional --
 25 A. Manner, yes.

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

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

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1 Q. And I may have asked this, and I apologize if I did
 2 ask you this, but you understood there was a dress
 3 code at the funeral home; right? When I say funeral
 4 home, R.G. & G.R.?
 5 A. There would be a professional dress code anywhere you
 6 went.
 7 Q. Okay. So your understanding was that at R.G. & G.R.
 8 Funeral Home, there was a dress code; right?
 9 A. Yes.
 10 Q. And while you were employed there, you complied with
 11 the dress code?
 12 A. Yes.
 13 Q. And you complied with the male dress code?
 14 A. That's the way I was perceived up until the time of
 15 this letter.
 16 Q. But you did comply with the male dress code?
 17 A. Yes.
 18 Q. I think you said that they purchased these suits for
 19 you to wear as part of their dress code?
 20 A. Yes.
 21 Q. A suit and tie; correct?
 22 A. Yes.
 23 Q. And it was male clothing?
 24 A. Yes.
 25 Q. And did everyone have a dress code, all employees, or

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1 was it just certain classes of employees?
 2 A. Having never saw that employee handbook before, I
 3 couldn't tell you.
 4 Q. Well, from your six plus years at the funeral home,
 5 what did you perceive? Did people wear a dress code,
 6 did they dress professionally?
 7 A. Yes.
 8 Q. Did everyone wear a suit and tie that was a funeral
 9 director?
 10 A. As far as I'm aware, yes.
 11 Q. And that was a male suit and tie?
 12 A. Yes.
 13 Q. Were there any female funeral directors?
 14 A. No.
 15 Q. Did the female employees, did they wear professional
 16 suits or professional dress for women in the funeral
 17 home?
 18 A. I would say so, yes.
 19 Q. Do you believe that the funeral home, in this case,
 20 R.G. & G.R., can impose a dress code for its
 21 employees?
 22 MR. PRICE: Objection; calls for legal
 23 conclusion. Go ahead and answer.
 24 A. Yes.
 25 BY MR. KIRKPATRICK:

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1 Q. Do you believe that the funeral home can impose a
 2 dress code for their female employees?
 3 A. Yes.
 4 MR. PRICE: Same objection. Go ahead.
 5 A. Yes.
 6 BY MR. KIRKPATRICK:
 7 Q. That being R.G. & G.R.?
 8 A. Yes.
 9 Q. Do you believe that R.G. & G.R. can impose a dress
 10 code for its male employees?
 11 A. Yes.
 12 MR. PRICE: Same objection.
 13 MR. KIRKPATRICK: Did we get that yes down?
 14 All right.
 15 BY MR. KIRKPATRICK:
 16 Q. While you were employed with R.G. & G.R. Funeral Home,
 17 did you ever dress in anything other than the male
 18 dress code clothing that you were provided?
 19 A. No.
 20 Q. Are you aware if Tom Rost ever saw you dressing in
 21 female attire?
 22 A. No.
 23 Q. Do you know if any other employees at the funeral
 24 home, R.G. & G.R., saw you dress in anything other
 25 than male clothing?

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1 A. While I was working there?
 2 Q. Yes.
 3 A. No.
 4 Q. Did they ever see a picture of you ever not dressed in
 5 -- well, strike that.
 6 Are you aware of any employee at
 7 R.G. & G.R. Funeral Home seeing you dressed and
 8 presenting as a woman prior to your termination?
 9 A. There was a Halloween costume, but other than that,
 10 no.
 11 Q. So there was a picture of a Halloween costume party
 12 that you attended?
 13 A. Yes.
 14 Q. Did you show people that picture?
 15 A. I didn't show it to them per se.
 16 Q. Okay.
 17 A. It was found.
 18 Q. Okay, it was found. It was presented as a Halloween
 19 costume you were wearing?
 20 A. Yes.
 21 Q. So I know you said something you were perceived as a
 22 man, I believe -- did I get that wrong -- when you
 23 were working for the funeral home?
 24 A. You have it correct.
 25 Q. Was there anything that you can think of that would

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1 allow anyone at the funeral home to perceive you as
 2 anything other than a man while you were employed
 3 there?
 4 A. You need to clarify.
 5 Q. Well, what I'm asking for is that you testified that
 6 they perceived you as a man; correct?
 7 A. Yes.
 8 Q. Because you were wearing suits and ties and male dress
 9 code; right?
 10 A. Yes.
 11 Q. Is there anything that happened that you believe that
 12 they should have seen you or did see you presenting as
 13 anything other than a man while you were employed
 14 there?
 15 A. There should have been subtle changes they should have
 16 picked up on.
 17 Q. Such as what?
 18 A. Facial features.
 19 Q. What about facial features?
 20 A. I mean you look at somebody, you can -- ought to be,
 21 if you look at them close enough, determine where
 22 they're at.
 23 Q. So when it comes specifically to you, what about your
 24 facial features, if that's what you're saying, that
 25 they should have picked up on?

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1 MR. PRICE: Objection to the extent that
 2 we're talking about the transition process. I think
 3 that falls within the code -- or the Protective Order,
 4 excuse me.
 5 MR. KIRKPATRICK: Well, the deponent
 6 brought it up. I'm just asking him -- he says he was
 7 perceived as a male. I'm asking anything that he
 8 perceived not to be a male, a female, and the deponent
 9 brought that up. So that's called opening the door.
 10 I'm just trying to find if there's anything --
 11 MR. PRICE: I mean the Protective Order, I
 12 don't think you can open a door on a Protective Order.
 13 MR. KIRKPATRICK: But you can't start
 14 answering the question and then follow it up. I think
 15 you see what I'm getting at here. I just want to see
 16 -- he said facial features. I'm asking what. I
 17 didn't ask about transition, I'm asking what.
 18 MR. PRICE: Well, it could be transition
 19 related.
 20 MR. KIRKPATRICK: Well, it could be. I
 21 don't know if it is or not. But the point is that the
 22 deponent said that they should have perceived changes,
 23 facial features, and I'm asking what. That's all I'm
 24 asking. You're speculating as to where he's going.
 25 MR. PRICE: I still think that it falls

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1 within -- I mean if you're asking about changes in
 2 facial features, that's suggestive right there of
 3 transition.
 4 MR. KIRKPATRICK: Well, I didn't bring up
 5 facial features, the deponent brought that up.
 6 MR. PRICE: Well, that's true enough. But
 7 I think that we are in Protective Order territory now.
 8 MR. KIRKPATRICK: I understand. The
 9 deponent has to answer that question at least that the
 10 deponent brought up.
 11 You don't get the benefit of providing
 12 testimony and not have that testimony clarified.
 13 Do you want to take a break?
 14 MR. PRICE: Yeah, why don't we take a
 15 break.
 16 (Off the record at 1:09 p.m.)
 17 (Back on the record at 1:16 p.m.)
 18 MR. KIRKPATRICK: Back on the record.
 19 BY MR. KIRKPATRICK:
 20 Q. I just want to follow up on our last questions and ask
 21 you, was there anything during your employment with
 22 R.G. & G.R. Funeral Home that would let anyone, any of
 23 the employees perceive you to be anything other than a
 24 man?
 25 A. No.

Page 108

1 Q. Since you were removed from the funeral home in August
 2 of 2013, I know we kind touched on briefly jobs that
 3 you had. Chronologically we moved to Sinai-Grace, et
 4 cetera. Did you apply for any other jobs?
 5 A. There's been a lot applied for.
 6 Q. What jobs did you apply for?
 7 A. I applied several places for funeral director,
 8 embalmer.
 9 Q. Which places did you apply?
 10 A. I think A.H. Desmond.
 11 Q. A.H. Desmond. Where are they located?
 12 A. Troy.
 13 Q. Troy. And this was as a funeral director?
 14 A. Yes.
 15 Q. When did you apply?
 16 A. It was after I was let go there, and between --
 17 Q. Do you think it was in 2013 or --
 18 A. Yes.
 19 Q. And did you go for a job interview?
 20 A. Yes, I had two of them, in fact.
 21 Q. With A.H. Desmond Funeral Home?
 22 A. Yes.
 23 Q. Were you hired?
 24 A. No.
 25 Q. Why not?

Aimee Stephens
December 16, 2015

Page 117

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

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

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1 BY MR. KIRKPATRICK:
2 Q. Okay. We had talked about some of these funeral homes
3 that you applied to after your removal.
4 A. Uh-hum.
5 Q. Did you believe that they discriminated against you by
6 not hiring you?
7 A. That's a question I can't answer because I don't know
8 why they didn't.
9 Q. Did you wonder about that?
10 A. Oh, I wondered.
11 Q. Did you pursue any claims with, say, the EEOC?
12 A. Got to be able to prove it first.
13 Q. So the answer is no, you didn't pursue it?
14 A. No.
15 MARKED FOR IDENTIFICATION:
16 DEPOSITION EXHIBIT 4
17 (Plaintiff's Witness List)
18 1:36 p.m.
19 BY MR. KIRKPATRICK:
20 Q. I'm going to show you Exhibit 4. This is the
21 Plaintiff's witness list.
22 First of all, have you ever seen that
23 document before?
24 A. This one?
25 Q. Yes.

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1 A. No.
2 Q. Do you know the names of the people on this witness
3 list on the second page? Do you know all of them, I
4 guess?
5 Let me first ask you, the first one is
6 obviously your name; right?
7 A. Yes.
8 Q. Donna Stephens, that's your wife, I take it?
9 A. Yes.
10 Q. I'm sorry, I'm going to butcher the first name. Ms.
11 Khan, I believe. Do you know who that is?
12 A. Not sure.
13 Q. You know Mr. Rost, you already said you know Mr. Rost?
14 A. Yes.
15 Q. I think you mentioned Shannon Kish; right?
16 A. Yes.
17 Q. Do you know who Shannon Kish is?
18 A. Yes.
19 Q. How about George Crawford?
20 A. Yes.
21 Q. How about Ryan Kish?
22 A. I would assume he's kin to Ms. Kish but --
23 Q. You don't have any personal knowledge?
24 A. No.
25 Q. Cody Higley?

Aimee Stephens
December 16, 2015

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1 1:00 a.m., is that right?
 2 A. It's not necessarily that long.
 3 Q. Okay. Does it start at 6:00 p.m.?
 4 A. Yes.
 5 Q. Are there any schedules you can get on that would
 6 start after 6:00 p.m., options available to you?
 7 A. Generally they start them at 6:00. And they only do
 8 that, I guess what you call a first shift of that.
 9 They only have one shift of it.
 10 Q. So there's no option for you to go in and start, say,
 11 at 10:00 p.m.?
 12 A. No.
 13 Q. Would that prevent you from doing some of your duties
 14 at a funeral home if you had to be at a place at 6:00
 15 p.m., such as a late funeral visitation in the
 16 afternoon or nighttime?
 17 A. Well, it could impact it, yes.
 18 MR. KIRKPATRICK: Thank you. I have no
 19 further questions.
 20 MR. PRICE: I don't have anything.
 21 MR. KIRKPATRICK: All right. Thank you.
 22 (The deposition was concluded at 2:11 p.m.)
 23
 24
 25

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1 CERTIFICATE
 2 STATE OF MICHIGAN
 3 COUNTY OF MACOMB
 4
 5 I, Deborah Culver, a Notary Public in and
 6 for the above county and state, do hereby certify that
 7 this deposition was taken before me at the time and
 8 place hereinbefore set forth; that the witness was by
 9 me first duly sworn to testify to the truth; that this
 10 is a true, full and correct transcript of my
 11 electronic recording; and that I am not related, nor
 12 of counsel to either party, nor interested in the
 13 event of this cause.
 14
 15
 16
 17
 18
 19
 20
 21 
 22 Deborah A. Culver, CER-3001
 23 Notary Public
 24 Macomb County, Michigan
 25 My commission expires 12-21-2018

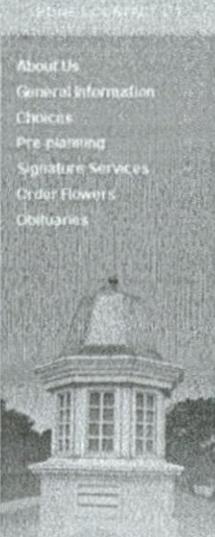


EXHIBIT 15



Harris
R.G. & G.R. HARRIS FUNERAL HOMES
AND CREMATION SERVICES
ESTABLISHED IN 1910

Get the Flash Player to see this player.



- About Us
- General Information
- Chocals
- Pre planning
- Signature Services
- Order Flowers
- Obituaries

Find us on Facebook

Mission Statement

OUR MISSION

R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life.

OUR VALUE

The following are values of R.G. & G.R. Harris Funeral Homes and its affiliates which will enable us to carry out our mission.

FAMILIES

The bereaved families and friends we serve are always our primary consideration. We provide the finest quality services to families from all incomes, races, cultural and religious backgrounds, and we will consistently strive to meet their individualized needs as they adjust to the loss of their loved one.

INTEGRITY

In all that we do, we will conduct ourselves with the highest possible integrity, adhering to the company's ethical standards. Honesty and integrity will be our guiding consideration each time we make a decision and each time we communicate with our families.

EXCELLENCE

We will always achieve the highest level of excellence in providing for our families. This will be done through knowledge of company policies and procedures and of the regulations and laws governing our services. We will not compromise the standards of excellence we have set for ourselves.

CAREGIVING PROFESSIONALS

Respecting the expertise of other care giving professionals, we seek to establish and maintain superior working relationships with them. In the best interest of family and friends, we work cooperatively together.

COMMUNITY INVOLVEMENT

We are committed to the well being of our community and dedicated to preserving the integrity of our environment. We strive to be a positive resource and good neighbor.

SUPPLIERS

We strive to develop and maintain superior working relationships with our suppliers and treat them with respect in all situations. As innovative and creative leaders in the profession, we strive to foster cooperative relationships within the industry. We bring to the profession the highest standards and a solid reputable organization.

EMPLOYEES

The staff is our most valuable resource. Each individual is honest and trustworthy, and deserves to be treated with dignity and respect. Needs to understand the purpose of his/her work and its relationship to the organization's mission. Makes an important contribution to achieving the goals of the organization and is willing to be innovative and take risks to accomplish those goals. Strives to achieve his/her potential and is willing to work hard to realize it. Has a role in problem-solving, coordinating work with others, and participating in the decision making process. Is committed to honest, open two-way communication. Is responsible and accountable for his/her work. Needs to be recognized for his/her accomplishments. Seeks to grow in knowledge, skills, and effectiveness. Is committed to working cooperatively as a supportive team member.

"But seek first his kingdom and righteousness, and all these things shall be yours as well."

Matthew 6:33

DEPOSITION EXHIBIT
5
11-12-15 (LPO)

18201 Harper Ave/Detroit, MI 48224 (313) 521-3121
15451 Farmington Road/Livonia, MI 48154 (734) 422-6720
71551 Ford Road/Barkley City, MI 48135 (734) 425-6250

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EXHIBIT 16

EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME Thomas Rost	TELEPHONE NUMBER (Give area code) HOME: _____ WORK: _____
----------------------------	--

ADDRESS (Number, street, city, state, zip)

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS (Number, street, city, state, zip)

STATUS OF EMPLOYMENT

CHECK ONE: <input checked="" type="checkbox"/> WORKING <input type="checkbox"/> NOT WORKING <input type="checkbox"/> SOUGHT EMPLOYMENT AT	NAME OF EMPLOYER RG+GR Harris Funeral
--	---

TYPE OF BUSINESS Funeral Home	DATES OF EMPLOYMENT FROM: _____ TO: _____ WHEN EMPLOYMENT WAS SOUGHT FROM: _____ TO: _____
---	--

POSITION TITLE President	DEPARTMENT
------------------------------------	------------

ADDRESS (Number, street, city, state, zip)

1. I am president here and also owner.
2. I've been employed here for 50 yrs.
3. We have pretty good business - about 30 Funerals a month and 60 Cremations on average
4. Cremation is the big one - When I began we only had 5% cremation now it is 50%. Its a reflection of the culture.
5. Everyone is a typical client. In this city it is a Blue Collar Southern People, Livonia is a little more white collar. Our business is about 3 mile to 5 mile radius, we are a local business.
6. In Family (Repeats) are very common to become their family, or others who have visited and were impressed, some its due to location.
7. They say on average you're making funeral arrangements every 8 yrs. It depends.
8. 3 mgrs + 1 Business mgr - Key people; I have 3 other full time females, 10 part time, and 2 licenced Embalmers who are non-mgmt - funeral directors. Roughly I have 20 employees.
9. There is not much turn over. In last year or two we only had Anthony's position open up - no others.
10. It is not an easy thing to do. We are a small specialized industry. I mean our key people not our lady attendants, sometime I keep files of resumes

for key people. Its mostly local. I would advertise on-line in local newspaper. God ~~provide~~ supplies the people when I need them most.

- 10. I don't associate with others in my industry other than at some conventions. Also we have large refrigeration unit - our market is unique we do more cremations than typical Funeral Home. Thats through our cremation society of Michigan - which Harris Funeral Home owns. Its a sign of the changing times.
- 11. Average Funeral Director tends to be not a type A person. This is an industry where you need to have the heart of a servant and serve people. You need compassion and heart. You cannot come with the personality of a Salesman/Carsalesman. Its nice to be nice we have to draw the line somewhere and not give the shirt off your back. We have a more spiritual person - the heart of what we do is a spiritual aspect. We deal with Clergy and ministers and Hospice. Even people who are not spiritual, at the time of death things change. A person not like this and emapthetic don't have the heart for it and need to do something else.
- 12. That would be the person I would look for. I'm limited to a small selection. Most of the people in this industry are this type of people. The industry has down sized due to the ~~eraction~~ cremations. Turning away from family owned towards corporation own business.
- 13. I have my mgmt people who run and over see daily activies that are 24/7 not 8 hrs a day. I have 3 rotating Mgrs running business. We don't have General Mgr. we dont have the income for another lvl of mgmt. They ~~are~~ have specific areas they oversee.

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

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
------	----------------------	----------------------------------	---------

PRIVACY ACT STATEMENT: (This form is covered by the Privacy Act of 1974, Public Law 93-579. Authority for requesting and uses of the personal data are given below.)

- 1. FORM NUMBER/TITLE/DATE: EEOC FORM 133, EEOC AFFIDAVIT, December 1993.
- 2. AUTHORITY: 42 USC 2000e(9), 29 USC 201, 29 USC 621, 42 U.S.C. 12117.
- 3. PRINCIPAL PURPOSES. Provides a standardized format for obtaining sworn statements of information relevant to a charge of discrimination.
- 4. ROUTINE USES. These affidavits are used to: (1) make an official determination regarding the validity of the charge of discrimination; (2) guide the Commission's investigatory activity; and (3) in Commission litigation, to impeach or substantiate a witness's testimony.
- 5. WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION: Voluntary. Failure to provide an affidavit has no effect upon the jurisdiction of the Commission to process a charge. However, sworn statements submitted by the parties, are, of course, relied upon more heavily than unsworn statements in making a determination as to the existence of unlawful discrimination.

But they rotate between facilities. The other Funeral Directors also rotate usually their base is near home. Anthony would be assigned a job for the day. The Funeral Director would come in he would do transfer, he will get death certificate, he will meet with doctors or meet family at hospice or Nursing Homes. We are parking cars. We take casket down front. Need Licence Funeral Director go to cemetery. Secretary Reception Area and P/T gopher / drivers - usually retired people. Carry over to what funeral directors do - We have 3 of them and yard people, Matience people, cleaning people.

14. Those are pretty much the duties. They are my go betweens for family, they are the ~~customers~~ ^{representatives}, they are educated in the industry and know the options available.

15. 2 people, doing less and less of that, because of the cremation. There are contract Embalmers that can be used if need be.

16. Right Now Troy & Matt, my son, - I have not there are some out there. Many are going to school. I think women would have an affinity more than men. Customers typically widows and other females. I typically use my Receptionists for this greeting of customers to pick up for the Funeral directors when need be. They are typically very well dress in suits with skirts.

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

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
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EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME	TELEPHONE NUMBER (Give area code) HOME: _____ WORK: _____
------	--

ADDRESS (Number, street, city, state, zip)

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS (Number, street, city, state, zip)

STATUS OF EMPLOYMENT

CHECK ONE: <input checked="" type="checkbox"/> WORKING <input type="checkbox"/> SOUGHT EMPLOYMENT AT	<input type="checkbox"/> NOT WORKING	NAME OF EMPLOYER
--	--------------------------------------	------------------

TYPE OF BUSINESS	DATES OF EMPLOYMENT FROM: _____ TO: _____ WHEN EMPLOYMENT WAS SOUGHT FROM: _____ TO: _____
------------------	---

POSITION TITLE	DEPARTMENT
----------------	------------

ADDRESS (Number, street, city, state, zip)

18. He was here for a reasonably longtime. As with all employees there is ups and downs. He started strong but leveled off. Great hours. 8-5pm for the industry it is a great thing. He did his job with only some issues here and there, mostly Attitude issues. 6 months before he left Mgr wanted to let him go but I'm laid back and spoke with him it was an attitude thing. He refused to help stack chairs for Dolly who is 80yrs. He had a hard time, we knew something was wrong. If we'd had fired ~~then~~ him then we wouldn't have the problem now. George Crawford may have more specifics for you.

19. That's not my job - but I believe it's just the Attitude - job was getting close but over the last year it really became a problem. He was taking Chemicals.

20. I was presented a letter, when I get back I will be dressing as a female and no longer as a male. I thought seriously for 2 weeks and said Anthony we are going to have to part ways.

21. Everything is all about healing. We are all about healing ~~to~~ ~~no~~ ~~body~~ is exempt from that. If you have something that is going to ~~affect~~ that process you don't belong. All male Employees are provided uniform and thus it was going to be an impossibility. There is no question that dressing as woman would have interrupted business and business transactions. Dress is paramount here. We are one funeral homes ~~the~~ provide clothing but I want to control what my Men are wearing. I want them looking uniform and that they are here and apart of the culture. I don't want them wearing other color suits and ties.

You women are a strange breed - they do wear a uniform but trying to have them come to a consensus is too difficult they say this color makes me look fat this one doesn't look good on me. Women like variety they don't like to wear the same thing every day. I lost the fight so long as they look professional. A little color and variety is okay. We could get matching women's suits with red line but I lost that fight years ago.

~~# 22. Absolutely that was the only consideration~~
 23. no other reason for CP's discharge

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

DATE	SIGNATURE OF WITNESS 	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
------	---	----------------------------------	---------

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EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME	TELEPHONE NUMBER (Give area code) HOME: WORK:
------	--

ADDRESS (Number, street, city, state, zip)

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS (Number, street, city, state, zip)

STATUS OF EMPLOYMENT

CHECK ONE: <input checked="" type="checkbox"/> WORKING <input type="checkbox"/> NOT WORKING <input type="checkbox"/> SOUGHT EMPLOYMENT AT	NAME OF EMPLOYER
--	------------------

TYPE OF BUSINESS	DATES OF EMPLOYMENT FROM: TO: WHEN EMPLOYMENT WAS SOUGHT FROM: TO:
------------------	---

POSITION TITLE	DEPARTMENT
----------------	------------

ADDRESS (Number, street, city, state, zip)

- 24. No deviations with dress code.
- 25. I never seen the Charging Party presenting as a female.
- 26. Never heard any third hand knowledge of CP presenting as female nor heard any gossip. People had no idea This was something not commonly known at work at all.
- 27. Basic employees no communications this has not been discussed here. Spoke with Mgrs about this and they had no idea then spoke w/ Atty and decided to make the cut.



EXHIBIT 17

EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME Shannon Kish	TELEPHONE NUMBER (Give area code) HOME: _____ WORK: _____
-----------------------------	--

ADDRESS (Number, street, city, state, zip)
15251 Harper Ave Detroit, MI 48224

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS (Number, street, city, state, zip)

STATUS OF EMPLOYMENT

CHECK ONE: <input checked="" type="checkbox"/> WORKING	<input type="checkbox"/> NOT WORKING	NAME OF EMPLOYER RG + GR Harris Funeral
<input type="checkbox"/> SOUGHT EMPLOYMENT AT		

TYPE OF BUSINESS Funeral Home	DATES OF EMPLOYMENT	FROM:	TO:
	WHEN EMPLOYMENT WAS SOUGHT	FROM:	TO:

POSITION TITLE Business Office Mgr.	DEPARTMENT
---	------------

ADDRESS (Number, street, city, state, zip)

1. Business office Mgr.
2. Almost 26 years I've been employed here. When I first started I was a receptionist then moved to business office. I work with with 7 or 8 others, Maintenance person, Lady who does cleaning, sometimes summer help, a driver, an admin. Assistant.
3. I pay bills, I collect on bills, I take care of each case. I would oversee other employees. I'm sort of what a Human Resources.
4. In ~~Detroit~~ Detroit office. I do not work with the clientel much. I do more contact on phone if at all with clients.
5. I'm the person who does payroll or I answer general business question. I've spoke with all the employees at one time or another.
6. I generally ^{don't} make any employment decisions such as hiring, firing, and discipline.
7. This last month has been very busy. The industry goes in trends sometimes its busy and sometimes its not. Right now business is relatively good but there is some downward turn due to cremations.

- 8. We take a strong pride to do the best in the industry. We are family owned which is not as common. We take pride in consulting with the process of grief we try to educate the client. Very important that we help them the best we can help them thats why I'm proud to work for this company. We truly care
- 9. Local church members use our facilities. Livonia Clientel over more cities then here in Garden City We work w/ rotary, hospitals, churches. We are very word of mouth reccomended or you were in the family beforehand
- 10. We do get In family before - its very common to get this repeat business.
- 11. I believe we have ^{about} 32 employees last I counted, it may be even lower than that. We don't have much of a turn over. We may see a young part-timer just getting started in the industry leave but we have a lot of employees who have been here a very long time.
- 12. We have put ~~ads~~ in the paper from what I understand. Tom, I, or the facility Mgr's would do this depending on job. I would hire ~~for business office only~~ for business office only. The facility that has opening, the Mgr would select + hire. For funeral Director/Embalmer Tom + Mgrs would select.

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

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
------	----------------------	----------------------------------	---------

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EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME	TELEPHONE NUMBER (Give area code) HOME: WORK:
------	--

ADDRESS (Number, street, city, state, zip)

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS (Number, street, city, state, zip)

STATUS OF EMPLOYMENT

CHECK ONE: <input checked="" type="checkbox"/> WORKING <input type="checkbox"/> SOUGHT EMPLOYMENT AT	<input type="checkbox"/> NOT WORKING	NAME OF EMPLOYER
--	--------------------------------------	------------------

TYPE OF BUSINESS	DATES OF EMPLOYMENT WHEN EMPLOYMENT WAS SOUGHT	FROM: FROM:	TO: TO:
------------------	---	----------------	------------

POSITION TITLE	DEPARTMENT
----------------	------------

ADDRESS (Number, street, city, state, zip)

13/14 There is Licence Funeral Director / Embalmer, Receptionist, Business office help, Drivers, Maintenance that take care grounds, Inside there are Cleaners. In Garden City She does both. But in Detroit + Livonia different people doing outside grounds maintenance and cleaning inside

15. I've worked long enough to know. They do funerals, doctors signature, cremation permits, removals, preparing remains, transportation to church and/or cemetery, meeting with families. I believe they are the core job, they meet with the community the most. This is sometimes first impressions ~~use~~ of business with the families. It is the most important job.

16. Tom and the Mgrs usually hire for funeral Director / Embalmer position.

17. The Dress Code is a suit provided by a company, a tie provided, white shirt provided, shoes polished, fraternity pin very impercable. Its the first impression people are going to get when they meet w/ funeral Directors/Embalmers

The only people people not in suits is Maintenance and Cleaning
Every one meeting w/public needs to ~~be~~ adhere to dress code
I gave you the MENS, for women its a dress
and suitcoat. Nails done, groomed, hairdone, nothing
flashy in jewelry, understated colors, not wedding
attire. We want people to know we are there but not
stand out. Dress code is set out we never had to
reprimand people or discipline people. You either
adhere or you don't work here. Its disrespectful to
dress as if you are going to a party.

19. We've had in the past ~~inter~~ female ~~relationships~~
interns, but this has been some time ago. I cant
recall having had any females apply for the job.
Tom or Mgr would advertise in the paper for positions or
through internships.

21. Yes I know who Anthony Stephens is.

22. He was a Embalmer / Funeral Director for us. I'd see
him and his wife at holiday functions. I seen him
and say Hi a handful of times.

23. He was a very good embalmer I knew of no performance
problems.

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

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
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PRIVACY ACT STATEMENT: (This form is covered by the Privacy Act of 1974, Public Law 93-579. Authority for requesting and uses of the personal data are given below.)

1. FORM NUMBER/TITLE/DATE: EEOC FORM 133, EEOC AFFIDAVIT, December 1993.
2. AUTHORITY: 42 USC 2000e(9), 29 USC 201, 29 USC 621, 42 U.S.C. 12117.
3. PRINCIPAL PURPOSES. Provides a standardized format for obtaining sworn statements of information relevant to a charge of discrimination.
4. ROUTINE USES. These affidavits are used to: (1) make an official determination regarding the validity of the charge of discrimination; (2) guide the Commission's investigatory activity; and (3) in Commission litigation, to impeach or substantiate a witness's testimony.
5. WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION: Voluntary. Failure to provide an affidavit has no effect upon the jurisdiction of the Commission to process a charge. However, sworn statements submitted by the parties, are, of course, relied upon more heavily than unsworn statements in making a determination as to the existence of unlawful discrimination.



EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME	TELEPHONE NUMBER (Give area code)	
	HOME:	WORK:

ADDRESS (Number, street, city, state, zip)

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS (Number, street, city, state, zip)

STATUS OF EMPLOYMENT

CHECK ONE:	<input type="checkbox"/> NOT WORKING	NAME OF EMPLOYER
<input checked="" type="checkbox"/> WORKING	<input type="checkbox"/> SOUGHT EMPLOYMENT AT	

TYPE OF BUSINESS	DATES OF EMPLOYMENT	FROM:	TO:
	WHEN EMPLOYMENT WAS SOUGHT	FROM:	TO:

POSITION TITLE	DEPARTMENT
----------------	------------

ADDRESS (Number, street, city, state, zip)

24. I was only given the general outline of what was going on. I do not make the decisions. I was given paper work to file regarding this. He was discharged because he was not going to wear our dress code any longer. He was supposed to wear a suit and to my knowledge he did not want to wear the company provided suit, tie, shirt.

The women at one time provided uniforms 10 or 15 yrs ago. Much smoother now, we bickered because we are all different sizes or shapes but we do have to adhere to a dress code.

25. We have a standard we are out in the community and it could have been disruptive and if you have a uniform you wear it.

26. ^{The dress code,} I think this is an important issue and this was the only reason was discharged

27. I never seen changing party present as female.

28. I hear a lot of things due to ~~my~~ my job but I cannot be bent with gossip or hearsay.

I did not know about the Changing Parties intentions prior to ~~Tom's~~ letter. Anthony's letter to Tom.

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

DATE 3-25-14	SIGNATURE OF WITNESS <i>Gannon J. Hush</i>	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
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EXHIBIT 18

EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME George Crawford TELEPHONE NUMBER (Give area code)
HOME: WORK:

ADDRESS (Number, street, city, state, zip)

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS (Number, street, city, state, zip)

STATUS OF EMPLOYMENT

CHECK ONE: NOT WORKING NAME OF EMPLOYER
 WORKING SOUGHT EMPLOYMENT AT

TYPE OF BUSINESS DATES OF EMPLOYMENT FROM: TO:
WHEN EMPLOYMENT WAS SOUGHT FROM: TO:

POSITION TITLE Funeral Director Mgr. - Garden City Location DEPARTMENT

ADDRESS (Number, street, city, state, zip)

1. ~~1.~~ I am the Manager of the Garden City Chapel
2. I've been employed for 7 yrs as Mgr. I once owned a funeral home and have been a funeral director for 45 yrs
3. I meet with families, responsible for Maintenance of facility & General Mgmt duties.
4. This is my primary location but I go to all the facilities
- 5/6. I make some employment decisions - mostly non-mgmt for this facility.
8. ~~7.~~ Respondent not unique in any specific way but is a well ran company - As funeral home adheres to some standards and policy
10. I have repeat families come back time and again; this is common. Most clients come by referral.
11. I supervise 4 or 5 and there has been very little turnover
12. I would advertise job openings - professional-trade publications, but clerical publications/news Ads and some word of mouth.

15. A typical day would be ~~come~~ in check what has happened in night, Scheduling App~~s~~, meet with families, My role is primary meeting with families. Subordinate Funeral Director does technical duties, does not meet with families, Transportation from hospital or nursing homes. They do the actual physical jobs that needs doing. If residence or Nursing facility or a person of size we send two people. If hospital we have equipment to aide and we send one person. CP would do some job duties dealing with public, Parkings cars, greeting public - not just in preperation room.
17. The Dress Code - for men we have uniform suits (2) and 2 ties neatgrooming required. Women have different dress code its a conservative dress code no slacks.
19. I know there have been some - I have dont know who. I knew of one at my former Employer on the Eastside.
22. Anthony worked out of this office. I was his supervisor. He was an Embalmer. Essentially I'd ask him to different tasks here or another location

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

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
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EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME		TELEPHONE NUMBER (Give area code)	
		HOME:	WORK:
ADDRESS (Number, street, city, state, zip)			
THE FOLLOWING PERSON CAN ALWAYS CONTACT ME			
NAME AND TELEPHONE NUMBER			
ADDRESS (Number, street, city, state, zip)			
STATUS OF EMPLOYMENT			
CHECK ONE:		NAME OF EMPLOYER	
<input checked="" type="checkbox"/> WORKING	<input type="checkbox"/> NOT WORKING		
<input type="checkbox"/> SOUGHT EMPLOYMENT AT			
TYPE OF BUSINESS		DATES OF EMPLOYMENT	FROM: TO:
		WHEN EMPLOYMENT WAS SOUGHT	FROM: TO:
POSITION TITLE		DEPARTMENT	
ADDRESS (Number, street, city, state, zip)			

23. CP had 3 ^{months} ~~months~~ prior to leaving had attitude issues I tried to resolve and had difficulties with. He was lazy, I would ask him to do something he would backtalk or resist and ask what other co-workers were doing. We fingerprint every body and once he gave me flack about that. initially he has no issues but over time once he became comfortable his attitudes changed. I tried to sit down and discuss things with him but did not discipline. He did not have a good positive attitude.
24. I have no knowledge about CP's discharge and I was off that day and when I ~~to~~ returned I discovered he ~~had~~ left.
- ~~CP had~~

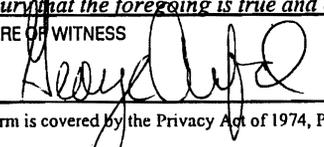
26. I never read a letter but know others received but I wasn't one. I was blindsided out his explanations. I discussed things with Tom about Anthony's ~~letter~~ departure After he left. Dress code was not discussed except why Anthony had left. after his having left. I did speak with Tom about other issues prior to CP leaving in regards to the attitude problems.

After discussing this with Tom, Tom said he'd speak with Anthony and it did appear to work well. ~~and~~ I thought it really was working he tried to be a better employee

There were no other concerns regarding CP's job performance.

27. I never seen the Charging Party present as female I did see a Halloween costume photo of CP dressed as a female maid but it was taken as a joke for Halloween. I never heard any references towards anything else.

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

DATE 3-25-14	SIGNATURE OF WITNESS 	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF
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EXHIBIT 19

Sep. 23. 2013 10:50AM

The R.G. & G.R. Harris Funeral Home

A Tradition Of Trust

Employee Manual 1998

Sep. 23. 2013 10:50AM

No. 8170 P. 2

DRESS CODE

September 1998

For All Staff:

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

MEN

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

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

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

TIES As selected by company, or very similar.

SOCKS PLAIN BLACK OR DARK BLUE SOCKS.

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

Sep. 23. 2013 10:51AM

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.

Uniformity creates a good impression and good impressions are vitally important for both your own personal image and that of our Company. Our visitors should always associate us with clean, neat and immaculately attired men and women.

Sep. 23. 2013 10:51AM

HOLIDAY PAY POLICY

Our policy of paying Holiday Pay is summarized as follows:

Full time employees work 4 days and get paid for 5 days.

OR depending on the need of each location;

Full time employees work 5 days and get paid for 6 days. *

* Please note that NO overtime will result from Holiday Hours.

If the Holiday falls on a Saturday, the paid day off will be worked out with the effective manager. If the Holiday falls on a Sunday, we will recognize the following Monday as the Legal Holiday, but Sunday work will get Premium Pay. Please note that Managers' and Licensed men's schedules are pre-determined regarding holidays.

PAY IS AS FOLLOWS:

	working	not
working		
salaried	n/a	n/a
licensed	double time	straight time
full time	double time	straight time
part time	time and 1/2	n/a

Paid Holidays include:

New Years Day, Memorial Day, 4th Of July, Labor Day, Thanksgiving Day and Christmas Day.

Sep. 23. 2013 10:51AM

SICK PAY POLICY

The new employee (working 30 or more hours) will be given one day's pay of eight (8) hours for each two months the person is employed, starting from the day of employment through twenty months of employment.

After twenty months of employment, we will give ten (10) sick days per year. You can accumulate unused sick time up to ten (10) days per year. One half at full salary and one half at half salary to a maximum of 130 days at full salary and 130 days at half salary. (This is one full working year). The sick days of the current year a person is qualified for are at full salary. Only accumulated time is split.

There will be no sick pay based upon this accumulation at termination of employment for any reason.

Sep. 23. 2013 10:51AM

No. 0170 P. 6

BLUE CROSS - BLUE SHIELD

Medical insurance is provided for full-time employees. We have contracted with Blue Cross - Blue Shield to provide this coverage.

The employee will pay 100% of their premium for the first six months of employment. The Company will provide 50% of an individual, single premium for the second six months of employment. From the first year to the second year of continuous employment, the Company will provide 100% of the individual, single premium. After the second year of continuous employment, the Company will provide 100% of the premium applicable to the full time employee.

MEDICAL REIMBURSEMENT

Medical reimbursement is provided for full-time employees to cover some medical expenses up to an amount of \$1000.00 per year. It is reimbursed quarterly to the individual. It is for dental, eye care, or other medical expenses incurred by the family. It is phased in beginning after one (1) year of continual employment.

\$150.00 1st year of program.

\$100.00 added each year to the maximum of \$1000.00

Sep. 23. 2013 10:51AM

SOURCE OF CALL INCENTIVE

Incentives are given to staff who are the "Source Of Call" for a service. In order for an employee to be entitled the family must give your name as their reason for calling us. A second call in a family you've sent does not qualify.

The following awards are given:

First Call	\$100.00
Second Call	100.00
Third Call	100.00
Fourth Call	400.00

Fifth Call	\$100.00
Sixth Call	100.00
Seventh Call	100.00
Eighth Call	2000.00

This awarding systems allows a possible \$3000.00 total for 8 calls in one calendar year. (No carry overs). It only applies to fully priced adult services (casket and service.)

On the lower cost discounted services (unit priced), we will give \$50.00 each. Two of these will count as one regular adult service.

For baby funerals, we will give \$25.00 each and these will not number toward the full service awards.

The awards will only be counted and paid when the bill is paid in full.

As you talk to friends, relatives, church people, stores, etc., if you keep telling people in a positive way that you work or are associated with us, it should be easy to get the first \$700.00. The balance to \$3000.00 should be attainable.

Statistics show that a man going into business can bring in an average of 20 calls the first year. GOOD LUCK!!

Sep. 23. 2013 10:52AM

No. 8170 P. 0

FUNERAL POLICY FOR EMPLOYEES AND THEIR FAMILIES

1. Employee, spouse, and unmarried children living at home.
 - a. One year or less - 1/2 off retail price of casket plus current service charges.
 - b. After one year - 1/2 off retail price of casket and deduct 5% of current service charges per full year of service to a maximum of 50%.

All other charges in full.

No cash discount.
2. Employee's family - children, grandparents, parents, sisters, brothers and their spouses.
10% off retail price of casket and services plus normal cash discount. All other charges in full.
3. Retired employee (who has not worked for competitive Funeral Home) and family.
Same as 1. above or 2. above.
4. Part-time Employee - Active or Retired (who has not worked for competitive Funeral Home) and spouse.

1/2 off retail price of casket plus current service charges. After one year of service, 1/2 off retail price of casket and deduct 2.5% of current service charges per year of service to a maximum of 25%.

All other charges in full.

No cash discount.
5. Part-time Employee's family (family defined same as #2 above)

5.0% off retail price of casket and services plus normal cash discount. All other charges in full.

When discounts are paid, there is not payment of any sort to those who send the service to us.

Rev. 08/06/84

EXHIBIT 20

Dear Friends and Co-Workers:

I have known many of you for some time now, and I count you all as my friends. What I must tell you is very difficult for me and is taking all the courage I can muster. I am writing this both to inform you of a significant change in my life and to ask for your patience, understanding, and support, which I would treasure greatly.

I have a gender identity disorder that I have struggled with my entire life. I have managed to hide it very well all these years. It all started when I was about five years old. I knew something was different about me, but I could not have told you what it was then. When I was about ten years old, I started to ask my Mom questions. Mom related to me that all the signs pointed out that she was going to have a baby girl. Mom was so sure that I was going to be a girl that everything she bought was for a girl. So for the first few months of my life I was dressed in girl clothes, because they could not afford to go and buy all new clothes. Perhaps the signs were not wrong after all.

I know this has nothing to do with my condition. It is a birth defect that needs to be fixed. I have been in therapy for nearly four years now and have been diagnosed as a transsexual. I have felt imprisoned in a body that does not match my mind, and this has caused me great despair and loneliness. With the support of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have lived with. Toward that end, I intend to have sex reassignment surgery. The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee Australia Stephens, in appropriate business attire.

I realize that some of you may have trouble understanding this. In truth, I have had to live with it every day of my life and even I do not fully understand it myself. I have tried hard all my life, to please everyone around me, to do the right thing and not rock the boat. As distressing as this is sure to be to my friends and some of my family, I need to do this for myself and for my own peace of mind and to end the agony in my soul. Through it all, I have learned that life is an adventure, and I would like to believe that the best is yet to come. I hope we can enjoy it together. It is my wish that I can continue my work at R.G. & G.R. Harris Funeral Homes doing what I have always done, which is my best!

Sincerely,



Anthony Stephens



Amiee A. Stephens

If you should have questions or need guidance in this, please contact my therapist, Cecelia Hanchon. She has indicated that she would gladly offer assistance to anyone who has questions and can answer questions much better than I. I have enclosed her business card.

Thanks



Cecelia M. Hanchon, LMSW

2035 Hogback Road #210
Ann Arbor, Michigan 48105
(734) 358-5258

AASECT-Diplomat Certified Sex Therapist
Individuals - Couples

*I am a fee for service clinician, I do not take insurance.
A paid statement will be provided. Some insurance companies will
reimburse; I do not guarantee this.*

EXHIBIT 21

EXHIBIT 22

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

DETROIT DISTRICT OFFICE
2013 SEP 31 P 1:05
EEOC

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.*

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.

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

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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.

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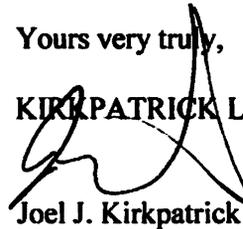
Since it is an undisputable fact that Mr. Stephens is a male – not a female – he cannot claim his employment was terminated *on account of his being female*.

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.

A handwritten signature in black ink, appearing to read 'Joel J. Kirkpatrick', is written over the typed name. The signature is stylized and cursive.

Joel J. Kirkpatrick

EXHIBIT 23



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: ~~Aggravation~~ (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

that when he began working the business was only 5% cremations that now its 50%. He further said that he believed it was a reflection of the culture and the devaluing 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

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

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

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 he 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

employees. Ms. Kish answered that she's the person who does pay for 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

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

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

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 suits, 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 she 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

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

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

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

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 wear scrubs or such. He said some embalmers in their suits but that he was not comfortable doing so. I asked if R provides 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 possibly 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

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

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 24

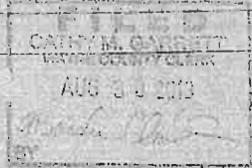
OR to (2014)
ABC 8/30/13

Approved, SCAO
STATE OF MICHIGAN
Third JUDICIAL CIRCUIT - FAMILY DIVISION
WAYNE COUNTY
ORDER FOLLOWING HEARING ON PETITION TO CHANGE NAME
Hon. Arthur J. Lombard
13-105869-NC
05/21/2013

In the matter of the name change of William Anthony Beasley Stephens
Present first name(s), middle name(s), and last name(s) (type or print)

to Aimee Australia Stephens
Requested new first name(s), middle name(s), and last name(s) (type or print)

1. Date of Hearing: AUG 30 2013 Judge: Arthur J. Lombard



THE COURT FINDS:

- 2. A petition for name change has been filed.
- 3. Notice of hearing was given by publication.
- 4. Each person for whom a name change is sought has been a resident of the county for at least one year.
- 5. The court has received the required criminal record report(s) from the Michigan Department of State Police.
- 6. _____ has a criminal record.
Name(s) (type or print)
- 7. a. The request for name change of _____ is
made with fraudulent intent. Name(s) (type or print)
- b. The request for name change of William Anthony Beasley Stephens is not
made with fraudulent intent. Name(s) (type or print)
- 8. The petitioner, having legal custody, requests the name change of a minor. The noncustodial parent has consented to the name change.
- 9. The petitioner requests the name change of a minor. The custodial parent has consented to the name change. The noncustodial parent was given notice of the hearing.
 - a. The noncustodial parent has had the ability to visit, contact, or communicate with the minor but has regularly and substantially failed or neglected to do so for the past two years, and
 - a support order has been entered, and the noncustodial parent has failed to substantially comply with the order for a period of two years or more before the filing of the petition for name change. or
 - a support order has not been entered and the noncustodial parent, having the ability to support or assist in supporting the child, has failed or neglected to provide regular and substantial support for two years or more before the filing of the petition for name change.
 - b. The noncustodial parent has been convicted of child abuse (MCL 750.136b), criminal sexual conduct (MCL 750.520b, 750.520c, 750.520d, or 750.520e), or assault with intent to commit criminal sexual conduct (MCL 750.520g), and the child or a sibling of the child was the victim.
- 10. The minor(s) under the age of 14 has/have stated a preference to a name change.
- 11. The minor(s) were not of sufficient age to express a preference to a name change.

(PLEASE SEE OTHER SIDE)

Do not write below this line - For court use only

ORDER FOLLOWING HEARING ON PETITION TO CHANGE NAME

MCL 333.2872, MCL 711.1, MCR 6.761

IT IS ORDERED:

12. The name(s) of the following person(s) is/are changed:

FROM	TO	DATE OF BIRTH
William Anthony Hensley Stephens	Aimee Australia Stephens	month, day, year 12/07/1966
		month, day, year

13. The State Registrar shall create a new live birth certificate for Aimee Australia Stephens that does not disclose the name at birth and shall seal the original certificate.

14. The request to change the name of _____ is denied.

15. The request is denied and the petition is dismissed.

AUG 30 2013

ARTHUR J. LOWBARO

Date

Judge

Attorney name (type or print)

Bar no.

Address

City, state, zip

Telephone no.

Arthur J. Lowbaro
CLERK OF COURT
DETOIT, MICHIGAN

NOTE TO PETITIONER: You must provide this order to the State Registrar if you want to change your birth certificate.

Note to Clerk: Pursuant to MCL 7.11.1(3), if the court enters an order to change the name of a person who has a criminal record, the court shall forward the order to the Criminal Records Division of the Michigan State Police and to one or more of the following:

DATE

CERTIFIED COPY — "LAW"

I, CATHY M. GARRETT, Clerk of Wayne County, and Clerk of the Circuit Court for the County of Wayne, do hereby certify that the above and the foregoing is a true and correct copy of _____

Order Following Hearing on

Petition to Change Name

entered in the above entitled cause by said Court, as appears of record in my office. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this day of August 30, A.D. 20 13

CATHY M. GARRETT, Clerk

Cathy M. Garrett, Deputy Clerk

used

on of

EXHIBIT 25

Interrogatory No. 1: State the current full legal name of the person you identified in your Amended Complaint as “Aimee Stephens.”

REPLY: Aimee Australia Stephens.

Interrogatory No. 2: State whether Stephen’s name has ever been legally changed and, if so, state each change made and the date each change was made.

REPLY: Stephens’s name was changed from William Anthony Beasley Stephens on August 30, 2013.

Interrogatory No. 3: State in detail and with specificity what you mean, in paragraph 10 of your Amended Complaint, when you state that “Stephens” is a “transgender woman.”

REPLY:

Transgender refers generally to gender nonconforming individuals, especially those whose gender identity (i.e., inner sense of being male or female) or gender expression (i.e., outward appearance, behavior, and other such characteristics that are culturally associated with masculinity and femininity) is different from the sex assigned to the person at birth. Stephens is a transgender woman because her gender identity, female, is different than the sex assigned to her at birth, male.

Interrogatory No. 4: State whether Stephens is the natural/biological father of any offspring and, if so, state the name, sex, and date of birth of each such offspring.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 5: State whether Stephens has ever been married to a woman and, if so, identify Stephens’ wife or wives and the dates of such marriage(s), and the current status of such marriage(s).

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 6: State whether Stephens was born a biological male.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 7: State whether Stephens currently has male sexual organs, including but not limited to, a penis and testicles.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 8: State whether Stephens has had any surgery performed to remove or modify any male sexual organs or has had any “sex reassignment surgery.” If so state the date(s) any such surgery was performed, the location where it was performed, and the names of all medical doctors, medical personnel, and other persons performing or assisting with such surgery.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 9: Prior to August 2013, state whether Stephens informed any employee of the Defendant of any intention of altering Stephens’ physical appearance and “presenting” as a woman as expressed in the August 2013 letter? (attached hereto) If so identify the employee(s), the manner of the communication, the date of the communication, the substance of the communication, and any other information relating directly or indirectly to this Interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 10: Prior to August 2013, state whether Stephens ever “presented” as a woman at defendant’s place of business while employed by Defendant? If Yes, identify the date(s) when Stephens did so, any witnesses to the presentation, describe any alleged reaction, adverse or otherwise from Defendant, and any other information relating directly or indirectly to this Interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 11: Prior to August 2013, state whether Stephens ever “presented” as a woman in public? If so, describe with specificity Stephens’ habits of “presenting” as a woman in public, the frequency, the date(s), the location(s), and any other information relating directly or indirectly to this Interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 12: Prior to August 2013, state whether Stephens confided in, informed, or in any way communicated to any member(s) of his family, including but not limited to, his wife, his children, his parents, or any other relative, that Stephens was a “transgender woman” as stated in paragraph 10 of your Amended Complaint? If so, identify each such person to whom Stephens communicated, the date(s) of such communication(s), the substance of the communication(s), and any other information relating directly or indirectly to this Interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 13: State with specificity the nature and amount of any and all damages you are claiming against the Defendant in this proceeding, including how you calculated such amount, any nonmonetary relief that you seek, and the facts you claim support such damages and nonmonetary relief.

REPLY: Plaintiff described the nature and method for calculating damages in its June 5, 2015, Rule 26 initial disclosures. Additionally, the EEOC seeks injunctive and equitable relief regarding the financial difficulties and feelings of humiliation caused by RGGR. This case is in the early stages of discovery, and a specific damage calculation is not available at this time. The Commission will supplement this response as discovery progresses.

Interrogatory No. 14: State whether Stephens has undergone any hormone treatment or therapy on account of or in furtherance of Stephens’ claim that Stephens is a “transgender woman,” whether for the purpose of creating, enhancing, or exhibiting any “female” physical traits or characteristics. If so state the nature of all such treatment(s) or therapy(ies), the date(s) any such hormone treatment(s) or therapy(ies) was performed, the location(s) where it was performed, and the name(s) of all medical doctors, medical personnel, and other persons performing or assisting with such treatment or therapy.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 15: Identify each and every doctor, psychologist, psychiatrist, health care professional, and any other person who evaluated, assessed or treated Stephens for any of Stephens’ claimed conditions (including but not limited to transgenderism, gender dysphoria, or gender identity disorder) that form the basis of your Amended Complaint and the contents of the August 2013 letter (attached hereto). Identify each individual by name, address, professional title, contact information, and any other information relative to this interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

Interrogatory No. 16: In the August 2013 letter authored by Stephens (attached hereto), Stephens states “with the support of my loving wife, I have decided to become the person that my mind already is.” State with specificity what “support” Stephens is referring to, whether Stephens’ wife still supports this decision, and the current state of Stephens’ marriage to his wife, and any other information relating to this Interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Provide all medical, counseling, therapeutic, and other professional records relating to Stephens’ diagnosis of, treatment for, and gender-transition on account of, gender identity disorder, gender dysphoria, transgenderism, or any other condition related directly or indirectly to your or Stephens’ claim that Stephens is a “transgender woman” and was “undergoing a gender transition from male to female.”

REPLY: The Commission objects to this request for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

2. Provide all documents, including pleadings, petitions, court orders, and other public records, relating directly or indirectly to any change of Stephens’ legal name.

REPLY: See No. 471-2013-02147 (EEOC002816-EEOC0002817).

3. Provide Stephens’ Birth Certificate(s), including any pleadings, petitions, court orders, or other public records amending or modifying any of Stephens’ Birth Certificate(s).

REPLY: The Commission objects to this request for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

4. Provide all marriage licenses and certificates of marriage to which Stephens has ever been a party.

REPLY: The Commission objects to this request for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

5. Provide all pleadings, petitions, court orders, or other public records related directly or indirectly to any dissolution of a marriage to which Stephens has ever been a party.

REPLY: The Commission objects to this request for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

6. Provide all EEOC records related, directly or indirectly, to the EEOC's consideration, investigation, and prosecution of the claims asserted in the EEOC's Amended Complaint.

REPLY: On June 5, 2014, the EEOC produced non-privileged documents located in administrative charge file No. 471-2013-02147 (EEOC000001-EEOC0002815). Additionally, the EEOC produced a privilege log, and hereby incorporates those privilege objections, which identified and described the documents or redactions withheld.

7. Provide all EEOC records, including but not limited to, internal memos, letters, press releases, telephone and electronic records, and other records related directly or indirectly to the EEOC's decisions to prosecute transgender complaints under Title VII's "sex" discrimination provisions.

REPLY: Plaintiff objects to this request as it is overly broad, vague, ambiguous, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and seeks privileged information.

The EEOC objects that this request seeks matters wholly unrelated to the claims or defenses pertaining to whether R.G. & G.R. Harris maintained a discriminatory clothing allowance or fired Ms. Stephens because of sex.

Plaintiff objects to the extent that this document request seeks the legal reasoning and, therefore attorney work product regarding the theories of plaintiff's case.

The Commission asserts the protection of the attorney-client privilege for communications between Commission attorneys and EEOC personnel. These communications contain legal advice sought and given with respect to the initiation of litigation, made in confidence between Commission attorneys and their clients.

“In the governmental context, the ‘client’ may be the agency and the attorney may be an agency lawyer.” *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). *See also In re Lindsey*, 148 F.3d 1100, 1104 (D.C. Cir. 1998) (“[c]ourts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts”). *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (the privilege applies to governmental communications if “the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors”). *Cf. Upjohn Co. v. United States*, 449 U.S. 383, 394, 101 S. Ct. 677, 685, 66 L. Ed. 2d 584 (1981) (privilege exists for communications between attorneys and corporate employees, where communications were made to provide legal advice to the corporation involving matters within the scope of the employees’ duties).

Finally, the EEOC objects to the extent that this request seeks material protected by the deliberative-process privilege. These documents reflect the opinions and mental impressions of the Commission, including the discussions between and among the legal and leadership personnel at the Commission, and if revealed would reveal the internal deliberative-process between Commission personnel which occurred during the investigation and pre-litigation decisional process.

The deliberative process privilege “rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.” *Dept. of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8-9 (2001). Thus, the privilege is intended to “enhance ‘the quality of agency decisions,’ by protecting open and frank discussion among those who make them within the Government.” *Id.* at 9, 121 S. Ct. at 1066 (quoting *Sears*, 421 U.S. at 151, 95 S. Ct. 1504); *See also Norwood v. FAA*, 993 F.2d 570, 577 (6th Cir. 1993) (quoting *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)) (the deliberative process privilege applies when “the disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions”).

8. Provide all correspondence, written and oral, including but not limited to, emails, letters, electronic correspondence, notes, between Stephens and any employee of defendant from January 2010 to the present.

REPLY: See EEOC000040-EEOC000045.

9. Provide all documents, records, and communications, written and oral, including but not limited to, emails, letters, electronic correspondence, medical or other files, and notes, of the individual identified as Cecelia M. Hanchon, LMSW, relating directly or indirectly to Stephens, from January 2010 to the present.

REPLY: Plaintiff objects to this request to the extent it seeks discovery of areas in the Commission's July 14, 2015, Motion for a Protective Order. Discovery regarding those areas is irrelevant, annoying, embarrassing, and oppressive.

Subject to this objection, see EEOC0002818-EEOC0002837.

10. Provide all documents, records, and communications, written and oral, including but not limited to, emails, letters, electronic correspondence, medical or other files, and notes, of any health care professionals, other than Cecelia M. Hanchon, relating directly or indirectly to Stephens, from January 2010 to the present.

REPLY: Plaintiff objects to this request to the extent it seeks discovery of areas in the Commission's July 14, 2015, Motion for a Protective Order. Discovery regarding those areas is irrelevant, annoying, embarrassing, and oppressive.

Subject to this objection, the Commission is in the process of gathering relevant medical records and will supplement this response accordingly.

REQUEST FOR ADMISSIONS

1. Admit that at all times during the year 2013, including August 15, 2013, Stephens was anatomically a male – that is, that Stephens was chromosomally a male and had male genitalia.

REPLY: The Commission objects to this request for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

2. Admit that at all times during Stephens' employment with R.G. & G.R. Funeral Homes, Inc., Stephens accepted the clothing allowance the Funeral Homes provided and either purchased or received professional male clothing with such clothing allowance.

REPLY: Admitted.

3. Admit that, during Stephens' employment with Defendant, Stephens never dressed or "presented" as a woman.

REPLY: The Commission objects to this request for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

4. Admit that, prior to the letter Stephens authored in August 2013 Stephens never asked the Defendant for permission or leave to deviate from the Defendant's male dress or grooming code.

REPLY: Admit.

5. Admit that, in this proceeding, the EEOC is contending that "transgender" is a protected class under Title VII, irrespective of whether gender- or sexual-stereotyping has occurred or not.

REPLY: Plaintiff objects that this request pertains to a question of law and is therefore not a proper subject for an admission. Further, Plaintiff alleges that Defendant violated Title VII when it fired Stephens for not conforming to RGGR's "sex- or gender-based preferences, expectations, or stereotypes" because she is transgender. Dkt. 21, Amended Complaint at 4-5; ECF No. 12, Opinion & Order Denying Defendant's Motion to Dismiss at 2.

6. Admit that in this action, the EEOC considers Stephens to be a female and not a male for purposes of determining whether discrimination on the basis of "sex" has occurred under Title VII.

REPLY: Denied. This request is confusing. Plaintiff alleges that Defendant violated Title VII when it fired Stephens for not conforming to RGGR's "sex- or gender-based preferences, expectations, or stereotypes" because she is transgender. Dkt. 21, Amended Complaint at 4-5; ECF No. 12, Opinion & Order Denying Defendant's Motion to Dismiss at 2.

7. Admit that, while working for Defendant prior to August 2013, Stephens never received any comment from Defendant management regarding Stephens' dress or grooming.

REPLY: Admit that Stephens never received a negative comment about her dress or clothing from Defendant's management, though Stephens received positive accolades from time to time.

Respectfully submitted,

Dated: July 21, 2015

/s/ Miles Shultz
MILES SHULTZ (P73555)
Trial Attorney

EQUAL EMPLOYMENT
OPORTUNITY COMMISSION
DETROIT FIELD OFFICE
477 Michigan Ave, Room 865
Detroit, MI 48226
Miles.Shultz@EEOC.GOV
313-226-6217

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic mail to

Counsel for Defendant on July 21, 2015:

Joel Kirkpatrick, Esq.
843 Penniman Ave, Ste 201
Plymouth, MI 48170

/s/ Miles Shultz
MILES SHULTZ (P73555)

EXHIBIT 26

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

Equal Employment Opportunity,)	
Commission,)	
Plaintiff,)	Case No. 14-13710
)	
v.)	HON. SEAN F. COX
)	
R.G. & G.R. Harris)	
Funeral Homes, Inc.,)	
Defendant.)	
_____)	

**PLAINTIFF'S FIRST SUPPLEMENTAL RESPONSE TO
DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC. FIRST SET OF
INTERROGATORIES, REQUEST FOR DOCUMENTS AND ADMISSIONS**

General Objections

Plaintiff objects to Defendant's general instructions and definitions to the extent that they may be construed as placing an obligation or responsibility upon Plaintiff beyond that required by the Federal Rules of Civil Procedure.

Plaintiff objects to Defendant's First Set of Interrogatories, Request for Documents and Admissions to the extent that they request information that is equally available to the Defendant. Plaintiff responds that all answers are based upon information presently available after diligent investigation. Plaintiff reserves the right to supplement or amend its answers should additional information become available at a later point. In addition, answers will be supplemented by lists of witnesses, lists of exhibits, depositions, and other pleadings and letters.

INTERROGATORIES

Interrogatory No. 9: Prior to August 2013, state whether Stephens informed any employee of the Defendant of any intention of altering Stephens' physical appearance and "presenting" as a woman as expressed in the August 2013 letter? (attached hereto) If so identify the employee(s), the manner of the communication, the date of the communication, the substance of the communication, and any other information relating directly or indirectly to this Interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

By way of further response, and pursuant to the September 24, 2015, *Order Granting in Part and Denying in Part EEOC's Motion for Protective Order*, the Commission states as follows: Stephens informed employees of her intent to present consistent with her gender identity, female, after returning from vacation in August 2013. To the best of Stephens's present recollection, these employees include: Dolly Nemeth, Sharon Hassett, Michelle Peterson, Gary Gasiorowski, Tia Macklin, Delores Smith, Summer (last name unknown), William Condron, Wendy McKee, David Kowalewski, and Thomas Rost. These communications were all initiated when Stephens showed them the same letter she gave to Rost and that Defendant attached to its first set of discovery requests. Some employees engaged Stephens in verbal communications after reading the letter. Stephens does not recall the specific substance of these communications except that most of the employees seemed supportive of her. These communications began in June 2013 and lasted until the end of July 2013. Stephens presented Rost the letter on or about July 31, 2013, but Stephens does not remember the specific dates she showed the letter to the other employees.

Interrogatory No. 10: Prior to August 2013, state whether Stephens ever "presented" as a woman at defendant's place of business while employed by Defendant? If Yes, identify the date(s) when Stephens did so, any witnesses to the presentation, describe any alleged reaction, adverse or otherwise from Defendant, and any other information relating directly or indirectly to this Interrogatory.

REPLY: The Commission objects to this interrogatory for the reasons articulated in its July 14, 2015, Motion for a Protective Order. This request is irrelevant, annoying, embarrassing, and oppressive.

By way of further response, and pursuant to the September 24, 2015, *Order Granting in Part and Denying in Part EEOC's Motion for Protective Order*, the Commission states as follows: no, prior to her termination, Stephens

never presented consistent with her gender identity, female, when she was at Defendant's place of business.

Respectfully submitted,

Dated: October 15, 2015

/s Miles Shultz
MILES SHULTZ (P73555)
Trial Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
DETROIT FIELD OFFICE
477 Michigan Ave, Room 865
Detroit, MI 48226
Miles.Shultz@EEOC.GOV
313-226-6217

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic mail to

Counsel for Defendant on October 15, 2015:

Joel Kirkpatrick
843 Penniman Ave, Ste 201
Plymouth, MI 48170
joel@joelkirkpatrick.com

Joseph Infranco
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 85260
jinfranco@alliancedefendingfreedom.org

Dated: October 15, 2015

/s Miles Shultz
MILES SHULTZ (P73555)
Trial Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
DETROIT FIELD OFFICE
477 Michigan Ave, Room 865
Detroit, MI 48226
Miles.Shultz@EEOC.GOV
313-226-6217

EXHIBIT 27

**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

LAURIE A. YOUNG
KENNETH BIRD
DALE PRICE (P55578)
MILES SHULTZ
EMPLOYMENT
OPPORTUNITY COMMISSION
Attorneys for Plaintiff
477 Michigan Ave., Room 865
Detroit, MI 48226
(313) 226-7808
Dale.Price@eeoc.gov

JOEL J. KIRKPATRICK
JOEL J. KIRKPATRICK, P.C.
Attorney for Defendant
843 Penniman Ave. Ste. 201
Plymouth, MI 48170
(734) 404-5170
Joel@JoelKirkpatrick.com

**DEFENDANT R.G. & G.R. FUNERAL HOMES, INC.'S ANSWERS TO PLAINTIFF'S
FIRST SET OF DISCOVERY REQUESTS**

Defendant R.G. & G.R. Funeral Homes, Inc. answers Plaintiff's First Set of Discovery Requests, including Interrogatories, Requests for Production of Documents, and Requests for Admissions, as follows:

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's instructions and definitions to the extent they seek disclosure

of information protected by the attorney client-privilege and/or the attorney work product doctrine. Furthermore, Defendant objects to the interrogatories to the extent they request information from any and all agents, attorneys, investigators, consultants, experts, and other representatives Defendant has retained.

2. Defendant objects to each and every interrogatory to the extent they call for information to which Plaintiff has equal or greater access than Defendant.

3. Defendant objects to each and every interrogatory to the extent they require Defendant to obtain and compile information from third parties.

4. Defendant objects to Plaintiff's definition of "you" and "your" to the extent Plaintiff seeks to obtain information outside Plaintiff's personal knowledge and/or seeks information protected by the attorney client privilege and or work product doctrine.

5. Defendant objects to Plaintiff's interrogatories to the extent they purport to impose duties and obligations which exceed or are different than those imposed by the Federal Rules of Civil Procedure or Court orders in this action.

Defendant objects to the several pages of instructions to the extent they create burdens going well beyond those required by the Federal Rules of Civil Procedure governing discovery. Defendant further objects to the scope and reach of the instructions as applied to the Interrogatories, Request for Documents, and/or Requests for Admissions to the extent such creates burdens beyond those generally accepted in discovery practice. Defendant objects to those portions of the instructions which render null and void the plain meaning of the English language and which seek to shift the burden of clarity in communication from the proponent of the Interrogatories to the respondent. Defendant also objects to the requirement of Plaintiff to sign the declaration under oath for the requests for admissions, which is not contemplated by

either the Federal Rules of Civil Procedure 36 or the MSPB regulations. Without waiving any objection, and in the interest of cooperation, the following responses are tendered:

DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

1. Identify all persons who prepared or assisted in the preparation of Defendant's responses to these interrogatories, document requests, and request for admissions. For each person provide:
 - a. Official title;
 - b. Business address and telephone number; and
 - c. Which interrogatories, document requests, and/or request for admission the person(s) prepared or assisted in preparing.

ANSWER: Tom Rost, President and Owner of Defendant of R.G. & G.R. Funeral Homes, Inc., 31551 Ford Road Garden City, MI 48135 (734) 425-9200. Mr. Rost assisted counsel of record with responding to all requests.

2. Identify all persons who prepared or assisted in the preparation of the following documents provided to the Commission regarding Charge No. 471-2013-03381: Defendant's Position Statement (undated but received by the EEOC on September 31, 2013), and Defendant's January 10, 2014, Response to Request for Information. For each person provide:
 - a. Official Title;
 - b. Business address and telephone number; and
 - c. Which letter or portion of the letter each person(s) prepared or assisted in preparing, or which information each person(s) provided.

ANSWER: Tom Rost, president and owner of defendant, whose business address and telephone number are provided above. Mr. Rost assisted Attorney Joel Kirkpatrick.

3. Identify all of the reasons Defendant terminated Stephens, when the decision was made, and identify by name and job title all persons who made or were consulted in this decision. For each person identified, state the role he/she played in the process, provide his/her current employment status, and, if no longer employed, provide his/her last known address, phone number and Social Security number.

ANSWER: Thomas F. Rost, President of R.G. & G.R. Funeral Homes, Inc., made the decision to terminate Stephens from employment. The decision was made shortly prior to the date of termination. Stephens was terminated for his anticipatory refusal to comply with the Defendant's male dress/grooming policy, which is, for legitimate business reasons,

applied to and imposed upon all the Defendant's male employees. Stephens unwillingness to comply with company policy would have had a deleterious financial impact on Defendant's business operation and would have been contrary to the funeral home industry standard for conducting funeral services and related business activities. Stephens intentions also violated Mr. Ross's sincerely held religious beliefs.

4. Identify all of the reasons why Stephens was not allowed to present as a woman at work.

ANSWER: please see response to interrogatory # 3.

5. State in dollar amounts Defendant's:

- a. Year-end net and gross revenue for each year from 2012-2015 and continuing through trial;
- b. Year-end operating expense for each year from 2012-2015 and continuing through trial;
- c. Identify the individual(s) who can testify to sub-parts (a) and (b) of this interrogatory, and identify the job title of each person identified.

ANSWER: Defendant incorporates his general objections. The Defendant objects to this interrogatory to the extent it is overly broad, not properly limited in time or scope, and seeks information not relevant to the claims or defenses of either party or reasonably calculated to lead to the discovery of admissible evidence. Moreover, this interrogatory is premature and unduly burdensome for the defendant.

6. Describe in detail the functions performed by funeral home directors/embalmers.

ANSWER: A funeral director is one whose profession is assisting surviving families and friends with the planning and carrying out of all aspects of caring for a decedent and the decedent's family, including removal of remains, embalming and cremation, making funeral and memorial arrangements, making sure funerals and memorial services are carried out in accordance with the decedents' and survivors' desires, and assisting survivors through the emotional distress that accompanies the loss of a loved one. The Funeral director helps safeguard the mental and emotional health of the survivors and the living. Therefore, at the time of a family crisis, through death, the Funeral Director needs to be able to function as a supportive counselor concerning coping with grief, helping on funerals, handling arrangements, legal documents, etc. The Funeral Director is always prepared to respond immediately in bringing the deceased to the funeral home where embalming may take place, or the remains are placed in a temperature controlled facility. The Funeral Director is responsible for initiating and coordinating the many details of these arrangements. These responsibilities include making the removal/transfer of the

remains to our care from where death has occurred whether it be from a residence, hospital, nursing home and/or hospice facility. The Funeral Director is responsible for meeting with the next of kin, completing obituary notices, assisting survivors with the selecting of funeral services and merchandise, processing death certificates, filing for insurance, union benefits, and social security benefits, arranging the details of funeral and memorial services, appearing at funeral and memorial services, and accompanying families and friends of the deceased to and at burials.

Throughout all the time the Funeral Director spends with the bereaved, the Funeral Director must be sensitive to their needs and perceptive enough to sense their unspoken concerns. The Funeral Director must be discreet as well as helpful. Funeral Directors – in both appearance and behavior - must perform their professional duties without drawing undue attention to themselves or causing the survivors any more stress than absolutely necessary. Indeed, the Funeral Director's job is, to the extent possible, to lessen and protect the survivors from unnecessary stress. This time is about the grieving survivors, and it is our responsibility to assist them in all aspects of arrangements. The Funeral Director needs to be respectful of all religious facilities at which services are conducted. Assistance is also given to families for final disposition, to which end we are often called upon to make appropriate arrangements with cemeteries, churches, and crematories.

Funeral Directors must be knowledgeable in explaining death to children, coping with grief and many aspects of loss through death. The Funeral Director also must have the knowledge, training and attitude to advise and provide resources for people in times of grief. All of the funeral service must involve care for the deceased and also a genuine concern for life and the living.

7. Describe in detail the complete compensation package for funeral home directors/embalmers, including but not limited to pay, insurance, retirement plans, leave, etc.

ANSWER: We provide a very competitive wage or salary. Health Insurance is provided for full time employees. We also provide life Insurance, and a Simple IRA package is offered for their contribution. We also provide vacation pay and compensated sick days. A Funeral Director's salary range is generally between \$35,000 and \$50,000 annually.

8. To the extent not in writing, describe in detail Defendant's dress code policy.

ANSWER: See attached employee handbook for the policy. (Bates pages 2-3)

9. Identify all complaints lodged against the Defendant from January 1, 2010, to present, including but not limited to lawsuits or charges, verbal or written, regarding Equal

Employment Opportunity laws, including but not limited the Civil Rights Act of 1964 as amended, the Americans With Disabilities Act of 1990 as amended, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, the Genetic Information Nondiscrimination Act of 2008, Elliot-Larsen Civil Rights Act of 1976 as amended, and any local municipal or county ordinances.

- a. For each, identify the complaining party, the allegation, and the resolution.

ANSWER: None

10. Identify all training programs given by the Defendant from January 1, 2010, to present regarding Equal Employment Opportunity laws, including but not limited the Civil Rights Act of 1964 as amended, the Americans With Disabilities Act of 1990 as amended, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, the Genetic Information Nondiscrimination Act of 2008, Elliot-Larsen Civil Rights Act of 1976 as amended, and any local municipal or county ordinances.

- a. For each program list the date, who conducted the training, and who attended the training.

ANSWER: None

11. To the extent you deny, in whole or in part, any of the requests for admission below, provide a detailed description of the facts upon which you base that denial, including an identification of the Bates number of any documents that support each denial.

ANSWER: Defendant incorporates its general objections herein. Defendant specifically objects to any request that exceeds the requirements of the Federal Rules of Civil Procedure. The Federal rules require only three responses for requests for admissions.

12. Identify by position and gender all employees who Defendant has given a clothing allowance since January 1, 2010.

ANSWER: See attached document (Bates pages 17-18)

13. For each such person identified in response to Interrogatory 12, calculate the total dollar value of clothing allowances given since January 1, 2010.

ANSWER: See attached document (Bates pages 17-18)

**DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF REQUEST FOR THE
PRODUCTION OF DOCUMENTS**

1. Provide any and all documents relied upon or used in answering the interrogatories and requests for admissions, and identify which Interrogatory or Request for Admission the document relates to.

ANSWER: See attached documents (Bates pages 1-18)

2. Produce all communications, including but not limited to all memorandums and electronic mail, regarding Stephens's request to present as a woman.

ANSWER: Defendant incorporates its general objections herein. The Defendant objects to this Request on the grounds of attorney-client privilege. The Defendant objects to this request to the extent it is overly broad, not properly limited in time or scope, and seeks information not relevant to the claims or defenses of either party or reasonably calculated to lead to the discovery of admissible evidence. Moreover, this Request is unduly burdensome for the Defendant.

3. Produce all communications, including but not limited to all memorandums and electronic mail, regarding Defendant's termination of Stephens.

ANSWER: Defendant incorporates his general objections herein. The Defendant objects to this Request on the grounds of attorney-client privilege. The Defendant objects to this request to the extent it is overly broad, not properly limited in time or scope, and seeks information not relevant to the claims or defenses of either party or reasonably calculated to lead to the discovery of admissible evidence. Moreover, this Request is unduly burdensome for the Defendant.

4. Produce a copy of all operative employee handbooks from January 1, 2010, to present.

ANSWER: See attached documents (Bates pages 1-8)

5. Produce all job descriptions for Stephens's position and for all other funeral director and/or embalmer positions.

ANSWER: See response to interrogatory #6. There are no written job descriptions for Stephens positions. Defendant relies on the industry standard for job description.

6. Produce any and all advertisements for Stephens's position and for all other Funeral Director/Embalmer positions at Defendant from January 1, 2010, to present.

ANSWER: None

7. Provide a full copy, with all attachments, of the most recent corporate federal tax return by Defendant and all federal tax returns filed by Defendant through the date of trial.

ANSWER: Defendant incorporates his general objections hereto. The Defendant objects to this request to the extent it is overly broad, not properly limited in time or scope, and seeks information not relevant to the claims or defenses of either party or reasonably calculated to lead to the discovery of admissible evidence. Moreover, this Request is unduly burdensome for the Defendant.

8. Produce the complete personnel and medical files for Stephens.

ANSWER: Please see attached documents.(Bates pages 9-16)

9. Produce all documents that support the denial of any of the Requests for Admissions.

ANSWER: Defendant incorporates its general objections herein. Defendant specifically objects to any request that exceeds the requirements of the Federal Rules of Civil Procedure. .

10. Produce all Defendant's operative dress code policies from January 1, 2010 to present.

ANSWER: Please see attached documents. (Bates pages 2-3)

11. To the extent not already provided, produce complete unredacted copies of all personnel files for each current or former employee of Defendant identified in the Commission's Rule 26 Disclosures.

ANSWER: Defendant incorporates its general objections herein. The Defendant objects that this Request violates the privacy act and the privacy rights of employees. The Defendant objects to this Request to the extent it is overly broad, not properly limited in time or scope, and seeks information not relevant to the claims or defenses of either party

or reasonably calculated to lead to the discovery of admissible evidence. Moreover, this Request is unduly burdensome for the defendant.

12. Produce the Defendant's clothing allowance policy.

ANSWER: Please see attached documents. (Bates pages 17-18)

13. Produce documents pertaining to the operation of the Defendant's clothing allowance policy, including receipts, reimbursement documents and the like.

ANSWER: Defendant incorporates its general objections hereto. This Request is unduly burdensome. Without waiving said objection, please see attached documents. (Bates pages 17-18) Defendant continues to search for responsive documents and will supplement this Request should any further documents responsive to this Request be discovered.

DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS

1. Admit that all conditions precedent to the institution of this lawsuit have been fulfilled.

ANSWER: Objection. This request seeks a conclusion of law and is vague. To the extent that a response is required, this Request for Admission is denied.

2. Admit that Defendant employed between 15 and 100 employees in the United States in years 2011, 2012, and 2013.

ANSWER: Admit.

3. Admit that Defendant fired Stephens because she intended to present as a female at work.

ANSWER: Denied.

4. Admit that Defendant provides male employees a clothing allowance but not female employees.

ANSWER: Denied.

5. Admit that Defendant has never employed a female funeral director or embalmer.

ANSWER: Admit.

AS TO ALL LEGAL OBJECTIONS

JOEL J. KIRKPATRICK, P.C..

/s/ Joel J. Kirkpatrick

JOEL J. KIRKPATRICK, P.C.

/s/ Joel J. Kirkpatrick

JOEL J. KIRKPATRICK(P 62851)

Attorney for Defendant

843 Penniman Ave., Ste. 201

Plymouth, MI 48170

Tel. (734)404-5170

Joel@JoelKirkpatrick.com

ALLIANCE DEFENDING FREEDOM

/s/ Joseph P. Infranco

JOSEPH P. INFRANCO
15100 N. 90th Street
Scottsdale, AZ85260
Tel. No. (480) 444-0020
JInfranco@alliancedefendingfreedom.org

Dated: June 19, 2015

CERTIFICATE OF SERVICE

The undersigned has certified that *Defendant R.G. & G.R. Harris Funeral Home, Inc.'s Answers to Plaintiff's First Set of Discovery Requests* has been served on Plaintiff via first class and electronic mail on June 19, 2015, at the address set forth above.

Respectfully submitted,

/s/ Joel J. Kirkpatrick

EXHIBIT 28

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

LAURIE A. YOUNG
KENNETH BIRD
DALE PRICE (P55578)
MILES SHULTZ
EMPLOYMENT
OPPORTUNITY COMMISSION
Attorneys for Plaintiff
477 Michigan Ave., Room 865
Detroit, MI 48226
(313) 226-7808
Dale.Price@eeoc.gov

JOEL J. KIRKPATRICK
JOEL J. KIRKPATRICK, P.C.
Attorney for Defendant
843 Penniman Ave. Ste. 201
Plymouth, MI 48170
(734) 404-5170
Joel@JoelKirkpatrick.com

**DEFENDANT R.G. & G.R. FUNERAL HOMES, INC.'S RESPONSE TO PLAINTIFF'S
SECOND SET OF DISCOVERY REQUESTS**

Defendant R.G. & G.R. Funeral Homes, Inc. answers specific requests from Plaintiff's
Second Set of Discovery Requests, as follows:

the Interrogatories to the respondent. Defendant also objects to the requirement of Plaintiff to sign the declaration under oath for the requests for admissions, which is not contemplated by either the Federal Rules of Civil Procedure 36 or the MSPB regulations. Without waiving any objection, and in the interest of cooperation, the following responses are tendered:

PLAINTIFF'S SECOND INTERROGATORIES

14. Describe in detail RGGR's process for implementing the female clothing allowance, including:

ANSWER:

a. When the policy was changed or implemented;

The clothing allowance for employees consists of funeral Directors receiving provided "uniforms" at company expense of business suits and ties (see employee manual previously provided) that are for both male and female funeral Directors. Female funeral Directors receive appropriate female business attire corresponding to the male funeral director suit. The company attempted to create a "uniform" for all female employees with the input and participation of its female employees several years ago. The female employees could not reach consensus on a specific "uniform" that were similarly required of funeral Directors. The company then instituted guidance that its female employees would wear appropriate conservative formal dress for all its female employees. The company began to provide monetary remuneration to its female employees that were not funeral Directors in 2014.

b. When the first clothing allowance checks were issued;

October 15, 2014

**PLAINTIFF'S SECOND SET OF REQUESTS FOR THE PRODUCTION
OF DOCUMENTS**

14. Provide any and all documents regarding Karl Jennings, to include any presentations, training materials, guides, posters, hand-outs Jennings created or otherwise provided to RGGR, and to include any invoices, bills, or other documents regarding RGGR's payment for any of these Jennings materials or presentations.

ANSWER:

The defendant has withdrawn Karl Jennings as its expert witness. There are no documents responsive to this request.

15. Provide all documents relied upon or used in answering interrogatory 14, to include copies of all clothing allowance checks issued by RGGR.

ANSWER:

See attached documents Bates 144-183

16. Provide all invoices or bills RGGR has received or paid in obtaining suit and ties for its male employees from January 1, 2012 to present.

See attached documents Bates 144-183

ANSWER:

17. Provide complete copies of the insurance policies for health benefits offered to RGGR employees from January 1, 2007 to the present, including exclusions from coverage.

ANSWER:

There are no complete copies of individual policies for health benefits. Each full time employee's policies are the same. Blue Cross/Blue Shield was the original provided until the company switched providers to United Health Care.

CERTIFICATE OF SERVICE

The undersigned has certified that *Defendant R.G. & G.R. Harris Funeral Home, Inc. 's Answers to Plaintiff's Second Set of Discovery Requests* has been served on Plaintiff via electronic mail on December 22, 2015, at the address set forth above.

DALE PRICE (P55578)
MILES SHULTZ
EMPLOYMENT
OPPORTUNITY COMMISSION
Attorneys for Plaintiff
477 Michigan Ave., Room 865
Detroit, MI 48226
(313) 226-7808
Dale.Price@eoc.gov

Respectfully submitted,

/s/ Joel J. Kirkpatrick

EXHIBIT 29

 KeyCite Yellow Flag - Negative Treatment

Distinguished by [Hayden ex rel. A.H. v. Greensburg Community School Corp.](#), 7th Cir.(Ind.), February 24, 2014

549 F.2d 400

United States Court of Appeals,
Sixth Circuit.

William BARKER, Plaintiff-Appellant,

v.

TAFT BROADCASTING
COMPANY, Defendant-Appellee.

No. 75-2397.

|
Argued Oct. 7, 1976.

|
Decided Feb. 11, 1977.

Discharged employee brought action against former employer alleging that his discharge because of his hair length constituted sex discrimination. The United States District Court for the Southern District of Ohio, David S. Porter, J., dismissed plaintiff's complaint for failure to state claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals, Engel, Circuit Judge, held that employer's grooming code which limited manner in which hair of men could be cut and limited manner in which hair of women could be styled did not violate civil rights statute prohibiting sex discrimination in employment.

Affirmed.

McCree, Circuit Judge, dissented and filed opinion.

West Headnotes (2)

[1] Civil Rights

 **Personal Appearance; Hair and Grooming**

Employer's grooming code which limited manner in which hair of men could be cut and limited manner in which hair of women could be styled did not violate civil rights statute prohibiting sex discrimination in employment. Civil Rights Act of 1964, § 703, [42 U.S.C.A. § 2000e-2](#).

[34 Cases that cite this headnote](#)

[2] Civil Rights

 **Sex Discrimination in General**

Prohibition of sex discrimination contained in Civil Rights Act of 1964 must be interpreted in light of purpose and intent of Congress in enacting such Act. Civil Rights Act of 1964, § 703, [42 U.S.C.A. § 2000e-2](#).

[4 Cases that cite this headnote](#)

Attorneys and Law Firms

***401** Arnold L. Bortz, Cincinnati, Ohio, for plaintiff-appellant.

Lawrence D. Walker, Cincinnati, Ohio, for defendant-appellee.

Before McCREE, LIVELY and ENGEL, Circuit Judges.

Opinion

ENGEL, Circuit Judge.

The issue on appeal is whether an employer's grooming code which mandates a shorter hair length for men than for women constitutes a prima facie violation of the Civil Rights Act of 1964, [42 U.S.C. s 2000e-2](#). Plaintiff contends that his discharge from employment by defendant because of his hair length is sex discrimination because female employees were permitted to wear long hair. Plaintiff had been employed as an "artist-craftsman" since November 1972 by defendant's Kings Island Division, which operates a recreation and amusement park. The district court dismissed plaintiff's complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

[1] Considered in the light most favorable to the plaintiff the complaint in this case charges that the employer maintained a grooming code for men and women employees which limited the manner in which the hair of the men could be cut and limited the manner in which the hair of women could be styled; and that the plaintiff was discharged for failing to comply with the code provision relating to hair length. There is no allegation that women employees who failed to comply with the code provisions relating to hair style were not discharged. Nor is there any allegation that the employer

refused to hire men who did not comply with the code, but did hire women who were not in compliance. We conclude that the complaint does not state a cause of action under Title VII for discrimination on the basis of sex within the traditional meaning of that term.

In so holding we are in agreement with the other courts of appeals that have considered this question. *Dodge v. Giant Food, Inc.*, 160 U.S.App.D.C. 9, 488 F.2d 1333 (1973); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc), rev'g 482 F.2d 535 (5th Cir. 1973); *Knott v. Missouri Pacific Railway Co.*, 527 F.2d 1249 (8th Cir. 1975); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2nd Cir. 1976); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976). We agree with the Second Circuit in *Longo v. Carlisle DeCoppet*, supra, that “without necessarily adopting all of the reasoning of those opinions, we are content to abide by this unanimous result.”

[2] The prohibition of sex discrimination must be interpreted in light of the purpose and intent of Congress in enacting the Civil Rights Act of 1964. Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act.

When Congress makes it unlawful for an employer to “discriminate . . . on the basis of . . . sex . . .”, without further explanation of its meaning, we should not readily infer that it meant something different than what the *402 concept of discrimination has traditionally meant. *General Electric v. Gilbert*, 429 U.S. 125, 145, 97 S.Ct. 401, 413, 50 L.Ed.2d 343 (1976)

Affirmed.

McCREE, Circuit Judge (dissenting).

I respectfully dissent. William Barker appeals from the dismissal of his complaint against Taft Broadcasting Company (Taft). The complaint alleged that Barker had been employed as an “artist-craftsman” since November 1972 by the defendant's Kings Island Division (Kings Island), which operated a recreation and amusement park. It further alleged that Kings Island adopted a grooming code that explicitly permitted female employees to wear long hair but forbade male employees to do so. The complaint alleged that Kings Island discharged Barker and two other plaintiffs because

their hair was longer than the code permitted even though their hair was of comparable length at time of hire, and that their discharge was an intentional violation of s 703 of the Civil Rights Act of 1964, 42 U.S.C. s 2000e-2, and of Ohio Rev.Code s 4112.02. Plaintiffs sought reinstatement, back pay, compensatory damages, and attorney's fees and costs.

Instead of filing an answer, Taft filed a motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint for failure to state a claim upon which relief can be granted. Defendant urged that employee hair length regulations cannot constitute sex discrimination under Title VII of the Civil Rights Act of 1964, or under Ohio Rev.Code s 4112.02, and that plaintiffs had neither a “private right of action (n)or standing to sue” under the Ohio statute.

The district court concluded as a matter of law that a code that discriminates between men and women with respect to permissible hair length does not violate Title VII, and that there was no basis for federal jurisdiction over the state claim once the federal claim had been determined to be inadequate. It therefore dismissed the complaint.

On appeal, Barker contends that the dismissal of the federal claim was erroneous. The majority opinion concludes that the complaint does not state a prima facie violation of s 703(a) (1), 42 U.S.C. s 2000e-2(a)(1), and it affirms the judgment of dismissal. I would reverse because I believe that a prima facie violation is stated.

Because we are considering an appeal from a dismissal for failure to state a claim upon which relief can be granted, we must accept each allegation of the complaint as true. If upon any view the allegations would constitute a violation, the dismissal must be reversed.

On its face, the statute appears to forbid defendant's hair length policy. Section 703(a)(1) provides,

(a) It shall be an unlawful employment practice for an employer

(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ;

Defendant's grooming code permits a female employee, but not a male employee, to wear long hair. It accordingly “discriminate(s) against (Barker) with respect to his terms (and) conditions of . . . employment, because of (his) sex.”

Defendant would not have fired a woman whose hair was as long as appellant's. Accordingly, it "discharge(d) (Barker) because of (his) sex." Although the employer may be able affirmatively to raise successful defenses, the complaint, taken as true, states a literal violation of the statute.

Nonetheless, every other circuit that has considered this question has concluded that employer hair regulations that prescribe different lengths or styles for men and women do not, prima facie, violate Title VII.¹ Within our own circuit, the district *403 courts have disagreed on this issue. Compare *Bujel v. Borman Food Stores, Inc.*, 384 F.Supp. 141 (E.D.Mich.1974), with *Roberts v. General Mills, Inc.*, 337 F.Supp. 1055 (N.D.Ohio 1971). The Equal Employment Opportunity Commission has repeatedly ruled that hair regulations that differ for men and women are unlawful unless justified as a bona fide occupational qualification. See, e. g., *E.E.O.C. Decision No. 72-1380*, 4 F.E.P. Cases 846, 847 (1972). Because the E.E.O.C. is charged with the administration of Title VII, its interpretation of the statute is entitled to "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Our own court has not previously addressed this issue.

The courts that have considered this question have advanced two theories to justify their exclusion of hair regulations from the purview of Title VII.² Some courts have suggested that Title VII forbids only discrimination on the basis of immutable characteristics.³ *Fagan v. National Cash Register Co.*, 157 U.S.App.D.C. 15, 481 F.2d 1115, 1125 (1973); *Baker v. Calif. Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974); *Bujel v. Borman Food Stores, Inc.*, 384 F.Supp. 141, 145 (E.D.Mich.1974).

However, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971), the Court considered a policy under which women with pre-school-age children would not be hired, but men with pre-school-age children would be hired. The Court vacated summary judgment for the employer, holding that a prima facie violation of s 703(a) had been pleaded:

The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men each having pre-school-age children. 400 U.S. at 544, 91 S.Ct. at 498.

Because having custody of pre-school-age children is obviously not an immutable *404 characteristic, the Fagan construction cannot be correct.

The Fourth and Fifth Circuits, however, have attempted to distinguish Phillips by reasoning that Title VII forbids discrimination either where it is based on an immutable characteristic or where it affects a fundamental right. Apparently, they would distinguish Phillips by regarding the right to have children in the home as a fundamental right, like the right to marry and the right to procreate. *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

Fundamental rights analysis has developed as an aspect of the protection which the Fourteenth Amendment affords to private action against governmental invasion. See, e. g., *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). But there appears to be no justification for limiting an employee's statutory rights against a private employer to the circumstances in which a person enjoys constitutional protection against government action. The Supreme Court has stated in *Washington v. Davis*, 426 U.S. 229, 245, 96 S.Ct. 2040, 2050, 48 L.Ed.2d 597 (1976), that employment discrimination is subject to "more probing judicial review" under Title VII than under the Fourteenth Amendment.

The Willingham and Earwood courts apparently regard some discriminations as either de minimis or impliedly permitted by the statute. But in Phillips, the Court did not look to the importance, the significance, the mutability, or the fundamental nature of the characteristic that the employer sought to regulate. The Supreme Court limited its inquiry to whether there was different treatment of male and female employees. The Earwood and Willingham courts, by attempting to exclude from the protection of the Act certain discriminations that they regard as relatively insubstantial impingements on employees, do not follow the analysis used in Phillips.

Nor does the legislative history afford support for the immutable characteristic fundamental right limitation on s 703.⁴ The courts have relied upon Supreme Court dictum in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430, 91 S.Ct. 849, 853, 28 L.Ed.2d 758 (1971):

The objective of Congress . . . was to achieve equality of employment opportunities and remove barriers that have

operated in the past to favor an identifiable group of white employees over other employees.

Quoted in [Willingham, 507 F.2d at 1084](#), and [Baker, 507 F.2d at 897](#).

They have also cited [House Report No. 92-238](#), which discussed the need for the 1972 Amendments to Title VII.⁵ Both authorities *405 are said to show that Congress was concerned only to promote equal employment opportunity. Because it is entirely within the power of employees to alter their hairstyles, and because some courts have regarded such alterations as an insignificant sacrifice, employers' hair length regulations are said not to affect the opportunity of an individual to obtain employment.

However, both of these authorities are cited out of context. In [Griggs](#), the Court considered an employment practice that was neutral on its face, but discriminatory in effect against black persons. The Court ruled that because Congress intended to promote employment opportunity, the fact that use of intelligence tests was neutral on its face did not avoid liability of the employer where the tests were discriminatory in effect: "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." 401 U.S. at 432, 91 S.Ct. at 854 (emphasis in last phrase supplied). In this case, however, the employment practice discriminates by its very terms between men and women. Because both the consequences and the explicit intent of the hair length regulations are to establish different "terms (and) conditions" of employment for men than for women, it is unnecessary to look to Congressional intent to decide whether s 703(a) has been violated.

The 1972 Amendments, with few exceptions, were procedural in nature. They did not, for the most part, affect the substantive rights of employees against private employers. No changes in s 703(a)(1) were even considered. Therefore the general comments in the House Report should not be construed to narrow the scope of s 703.⁶

But even if the unambiguous words of the statute should be regarded as limited by the ambiguous language in the legislative history, a prima facie violation would still be stated by the complaint, because hair regulations do affect the opportunity of individuals to obtain employment on the same "terms (and) conditions" of employment without regard to sex. The prohibition of long hair unquestionably imposes a term or condition on employment.

Because an individual chooses to wear his hair in a particular way instead of in an alternative way, that hairstyle must have some value to him.⁷ If an employer requires a particular hairstyle as a condition of employment, he reduces the value of the job just as surely as if he had imposed a *406 grooming code which was financially more onerous for employees of one sex.

For example, if a grooming code allowed male bank tellers with poor vision to wear eyeglasses, but forbade female bank tellers with poor vision to wear eyeglasses, the women would be required to spend more money for contact lenses. However, they would not have been deprived of the opportunity to obtain a job; therefore the approach of the majority would apparently permit that regulation without even a showing that it was a bona fide occupational qualification.

Similarly, suppose that an employer established a policy which required employees in a clerical or secretarial pool to sign out if they expect to be away from their desks. Suppose further that the policy required men to sign out only if they expected to be away from their desks for more than thirty minutes, but women to sign out whenever they would be away from their desks for more than fifteen minutes. Surely neither the fact that the discriminatory policy was enforced "equally" against male and female employees who violated its terms, nor the fact that the policy would not deprive women of an opportunity to obtain a job, would negate the discriminatory character of the policy, nor exclude the policy from the purview of Title VII.

If an employer established a discriminatory eyeglass or signout policy similar to the ones discussed above, I have little doubt that a prima facie violation of s 703(a) would be apparent. In the case of hair regulation, as in the cases of sex-based eyeglass or signout policies, the condition of employment constitutes a prima facie violation of s 703(a). In all three cases, the employer must prove that its regulation establishes a bona fide occupational qualification to avoid offending the statute. See, e. g., [Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 \(5th Cir. 1971\)](#).

The majority opinion implies that the Supreme Court's recent decision in [General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 \(1976\)](#), supports the result it reaches in this case.

In [Gilbert](#), the Opinion of the Court, which was limited by two concurring opinions and rejected by three dissenters,

recognized that a prima facie violation of Title VII may be established in a case in which there would be no prima facie violation of the Equal Protection Clause by a public defendant. At 133, [97 S.Ct. at 407](#). However, the Court stated that cases applying the Equal Protection Clause may be a “useful starting point” in interpreting the language of Title VII. At 133, [97 S.Ct. at 407](#). The Court concluded that the exclusion of pregnancies from the disability benefits considered in Gilbert was neither “discrimination based on sex” nor a “simple pretext for discriminating against women.” At 136, [97 S.Ct. at 408](#). Finally, the Court pointed out that the plaintiffs in Gilbert “have not attempted to meet the burden of demonstrating a gender-based discriminatory effect” At 137, [97 S.Ct. at 409](#).

In this case, however, Taft's discrimination is admittedly “based on sex,” but Taft urges that Congress did not intend to

forbid discrimination based on sex unless other conditions are fulfilled. This argument is unsupported by legislative history and contradicted by established Title VII analysis.

I express no view about whether Taft would be able to demonstrate that its particular hair length regulation implements a bona fide occupational qualification as provided by s 703(e). I would hold only that Barker's complaint states a prima facie violation of s 703(a), and that to avoid liability Taft should be required either to rebut the allegations or to prove a valid defense.

All Citations

549 F.2d 400, 14 Fair Empl.Prac.Cas. (BNA) 697, 13 Empl. Prac. Dec. P 11,548

Footnotes

- 1 [Longo v. Carlisle DeCoppet & Co.](#), 537 F.2d 685 (2d Cir. 1976) (per curiam); [Earwood v. Continental Southeastern Lines, Inc.](#), 539 F.2d 1349 (4th Cir. 1976) (divided court); [Willingham v. Macon Telegraph Pub. Co.](#), 507 F.2d 1084 (5th Cir. 1975) (en banc), rev'g. 482 F.2d 535 (5th Cir. 1973); [Knott v. Missouri Pac. Ry. Co.](#), 527 F.2d 1249 (8th Cir. 1975); [Baker v. Calif. Land Title Co.](#), 507 F.2d 895 (9th Cir. 1974).
But see [Doyle v. Buffalo Sidewalk Cafe, Inc.](#), 4 F.E.P. Cases 1140 (1972), in which the New York Supreme Court for Erie County applied s 296 of the New York Human Rights Act, which is similar to Title VII and has been construed as setting the same employment standards as Title VII. The court there concluded that the statute was violated by a refusal to hire a busboy because of a sexually discriminatory hair policy.
In [Fagan v. National Cash Register Co.](#), 157 U.S.App.D.C. 15, 481 F.2d 1115 (1973) (divided court), a panel of the D. C. Circuit discussed the question whether hair regulations could be a prima facie violation of Title VII, and indicated that it might be persuaded that there could be no such violation. However, the court relied on the determination that the employer in that case had established a bona fide occupational qualification (BFOQ) defense under s 703(e). [481 F.2d at 1126](#). In [Dodge v. Giant Food, Inc.](#), 160 U.S.App.D.C. 9, 488 F.2d 1333 (1973), another panel, in a per curiam opinion, relied on Fagan as settling the law in that circuit that there is no prima facie violation.
However, in a recent case, the District Court of the District of Columbia ruled that a regulation which forbade female employees to wear eyeglasses, but allowed male employees to wear them, was a violation of s 703(a). [Laffey v. Northwest Airlines](#), 366 F.Supp. 763, 790 (D.C.1973). The court later enjoined that practice, [374 F.Supp. 1382, 1388 \(D.C.1974\)](#), aff'd other grounds, Nos. 74-1791 and 75-1334 (D.C.Cir. Oct. 20, 1976), see slip op. at 17 n. 81. It is difficult to understand what the principled difference between an eyeglass policy and a hair-length policy might be for the purposes of finding a prima facie violation.
- 2 The majority opinion does not choose either rationale in supporting its holding. Instead, it merely “abide(s) by th(e) unanimous result” of the other circuits which have considered the issue, “without necessarily adopting all of the reasoning of those opinions” The majority opinion also asserts that hair regulations “bear . . . a negligible relation to the purposes of Title VII,” but it does not state what those purposes are and how hair regulations differ from the “intended” targets of Title VII. The majority opinion thereby fails to establish a standard according to which a sex-based grooming code does not “discriminate . . . because of . . . sex”
- 3 It is difficult to understand how such a limitation could be consistent with the proscription, also within s 703(a), of discrimination because of an employee's religion. An employee's religion is certainly not immutable.
- 4 At the outset, we question the usefulness of the general remarks in the introduction of the House Report on the 1972 Amendments, infra at n. 5, because the remarks were tangential at best and were not intended to apply to the problem at hand. Reliance would be particularly troubling because the statute itself is so clear on its face.

The provision on sex discrimination in employment reportedly was added at the last moment by opponents of the prohibitions of race discrimination, in an unsuccessful attempt to sink the bill by overloading it with unpopular provisions. See *Developments in the Law Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1167 (1971). It is therefore doubtful that many members of Congress who spoke on the original bill in 1964 had any intentions one way or another with respect to the forms of sex discrimination.

5 [House Report No. 92-238](#) states:

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

This Committee believes that women's rights are not judicial diversions. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities.

U.S.Code Cong. & Admin.News, pp. 2140-41 (1972).

Quoted in [Knott](#), 527 F.2d at 1251 n. 2, and [Baker](#), 507 F.2d at 896 n. 2.

6 The quoted portions of the House Report stress the effect of employment discrimination on women. Yet it is settled law that men, as well as women, are protected by s 703(a) against sex discrimination. See [Diaz v. Pan Am. World Airways, Inc.](#), 442 F.2d 385 (5th Cir. 1971).

In addition to the passages quoted by the other circuits which have discussed this question, the House Report also contains the following discussion:

(T)he courts have done much to create a body of law clearly disapproving of sex discrimination in employment. 1 Despite the efforts of the courts and the (Equal Employment Opportunity) Commission, discrimination against women continues to be widespread.

1972 U.S.Code Cong. and Admin.News, p. 2141.

The procedural improvements of the 1972 Amendments were designed to increase the effects of that developed law on concrete work situations.

One of the examples of the improvements in substantive law which was cited by the House Report at n. 1 was *Phillips*, which adopted the analysis which we have used in this opinion. Thus the legislative history supports our conclusion that exclusion of a male where the employer would employ a similarly situated female, simply because they both have long hair, constitutes a prima facie violation of s 703(a).

7 Indeed, the persistence of Title VII and constitutional litigation concerning the permissibility of hair regulations imposed by public and private defendants suggests that to many individuals that value is quite high. Although the majority opinion asserts that grooming codes "bear . . . a negligible relation to the purposes of Title VII . . .," it can hardly be contended that the subject matter of the hair regulation suits is de minimis.

EXHIBIT 30



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Michigan Catholic Conference and Catholic Family Services v. Burwell, 6th Cir.(Mich.), August 21, 2015

134 S.Ct. 2751

Supreme Court of the United States

Sylvia BURWELL, Secretary of Health and Human Services, et al., Petitioners

v.

HOBBY LOBBY STORES, INC., et al.

Conestoga Wood Specialties

Corporation et al., Petitioners

v.

Sylvia Burwell, Secretary of Health and Human Services, et al.

Nos. 13–354, 13–356.

|

Argued March 25, 2014.

|

Decided June 30, 2014.

Synopsis

Background: In first case, for-profit closely held corporations, and individuals who owned or controlled the corporations, brought action against Secretary of Health and Human Services (HHS) and other government officials and agencies, seeking declaratory and injunctive relief regarding regulations issued under Patient Protection and Affordable Care Act (ACA), based on allegations that the preventive services coverage mandate for employers violated constitutional and statutory protections of religious freedom by forcing them to provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling. The United States District Court for the Western District of Oklahoma, Joe Heaton, J., 870 F.Supp.2d 1278, denied plaintiffs' motion for preliminary injunction. Plaintiffs appealed. The United States Court of Appeals for the Tenth Circuit, en banc, Tymkovich, Circuit Judge, 723 F.3d 1114, reversed and remanded. In second case, for-profit closely held corporation and its shareholders brought similar claims for declaratory and injunctive relief against federal officials and agencies. The United States District Court for the Eastern District of Pennsylvania, Mitchell S. Goldberg, J., 917 F.Supp.2d 394, denied plaintiffs' motion for preliminary injunction. Plaintiffs appealed. After denial of stay pending appeal, 2013 WL 1277419, the United

States Court of Appeals for the Third Circuit, Cowen, Circuit Judge, 724 F.3d 377, affirmed. Certiorari was granted in each case and cases were consolidated.

Holdings: The Supreme Court, Justice Alito, held that:

[1] "person," within meaning of RFRA's protection of a person's exercise of religion, includes for-profit corporations, abrogating Autocam Corp. v. Sebelius, 730 F.3d 618;

[2] the HHS contraceptives mandate, as applied to for-profit closely held corporations, substantially burdened the exercise of religion, for purposes of RFRA; and

[3] the HHS contraceptives mandate did not satisfy RFRA's least-restrictive-means requirement.

Affirmed in first case; reversed and remanded in second case.

Justice Kennedy filed a concurring opinion.

Justice Ginsburg filed a dissenting opinion, which Justice Sotomayor joined, and Justices Breyer and Kagan joined except for one part.

Justices Breyer and Kagan filed a dissenting opinion.

West Headnotes (19)

[1] Civil Rights

Particular cases and contexts

By enacting RFRA, which includes a least-restrictive means test, Congress did more than merely restore the balancing test used in the Sherbert line of Free Exercise Clause cases; it provided even broader protection for religious liberty than was available under those decisions. U.S.C.A. Const.Amend. 1; Religious Freedom Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb-1(b).

6 Cases that cite this headnote

[2] Civil Rights

Particular cases and contexts

Civil Rights

Liability of Federal Government and Its Agencies and Officers

As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

1 Cases that cite this headnote

[3] **Civil Rights**

Particular cases and contexts

"Exercise of religion," under RFRA, must be given the same broad meaning that applies under RLUIPA. Religious Freedom Restoration Act of 1993, § 5(4), 42 U.S.C.A. § 2000bb-2(4); Religious Land Use and Institutionalized Persons Act of 2000, §§ 5(g), 8(7)(A), 42 U.S.C.A. §§ 2000cc-3(g), 2000cc-5(7)(A).

11 Cases that cite this headnote

[4] **Corporations and Business Organizations**

Status of Corporation in General

When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of people, including shareholders, officers, and employees, who are associated with a corporation in one way or another.

4 Cases that cite this headnote

[5] **Civil Rights**

Persons Aggrieved, and Standing in General

"Person," within meaning of RFRA's protection of a person's exercise of religion, includes for-profit corporations; abrogating *Autocam Corp. v. Sebelius*, 730 F.3d 618. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b).

Cases that cite this headnote

[6] **Civil Rights**

Particular cases and contexts

Constitutional Law

Free Exercise of Religion

The "exercise of religion," for purposes of the Free Exercise Clause and RFRA, involves not only belief and profession, but the performance of, or abstention from, physical acts that are engaged in for religious reasons. U.S.C.A. Const.Amend. 1; Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b).

8 Cases that cite this headnote

[7] **Civil Rights**

Contracts, trade, and commercial activity

A law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion, for purposes of RFRA. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b).

10 Cases that cite this headnote

[8] **Corporations and Business Organizations**

Scope of Corporate Power in General

Modern corporate law allows for-profit corporations to perpetuate religious values.

Cases that cite this headnote

[9] **Statutes**

Prior or existing law in general

When Congress wants to link the meaning of a statutory provision to a body of the Supreme Court's case law, it knows how to do so.

2 Cases that cite this headnote

[10] **Civil Rights**

Religion

Civil Rights

Contracts, trade, and commercial activity

To qualify for RFRA's protection, an asserted religious belief must be sincere, and a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

4 Cases that cite this headnote

[11] **Abortion and Birth Control**

➔ Contraceptives and Birth Control

Insurance

➔ Family Planning Services

Insurance

➔ Abortion

Labor and Employment

➔ Regulatory supervision

Department of Health and Human Services' (HHS) contraceptives mandate, implementing Patient Protection and Affordable Care Act's (ACA) general requirement that an employer's group health insurance provide coverage for preventive care and screenings for women without any cost sharing requirements, substantially burdened the exercise of religion, for purposes of RFRA, to extent that for-profit closely held corporations were required to provide their employees with insurance coverage for four contraceptive methods that violated the sincerely held religious beliefs of corporations' owners; owners believed that their compliance with the HHS contraceptives mandate would facilitate abortions, while non-compliance would expose them to substantial economic consequences. Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg-13(a)(4); Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b); 45 C.F.R. § 147.130(a)(1)(iv).

25 Cases that cite this headnote

[12] **Federal Courts**

➔ Presentation of Questions Below or on Review; Record; Waiver

Supreme Court does not generally entertain arguments that were not raised below and are not advanced in the Supreme Court by any party.

1 Cases that cite this headnote

[13] **Amicus Curiae**

➔ Powers, functions, and proceedings

Federal Courts

➔ Presentation of Questions Below or on Review; Record; Waiver

Supreme Court would not entertain argument by amici supporting Department of Health and Human Services (HHS), which was not raised below and was not advanced in the Supreme Court by HHS, that per-employee penalty under Patient Protection and Affordable Care Act (ACA), for failing to comply with HHS mandate to provide employees with group health insurance coverage for contraceptives, would be less than the average cost of providing health insurance, so that corporations could readily eliminate any substantial burden on exercise of religion by forcing their employees to obtain insurance in government exchanges; Court did not even know what government's position might be with respect to amici's intensely empirical argument, and corporations and their owners had never had an opportunity to respond to this novel claim. Patient Protection and Affordable Care Act, § 1001(a)(4), 42 U.S.C.A. § 300gg-13(a)(4); Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b).

8 Cases that cite this headnote

[14] **Civil Rights**

➔ Religion

Courts have no business addressing whether sincerely held religious beliefs asserted in a RFRA case are reasonable. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

11 Cases that cite this headnote

[15] **Civil Rights**

➔ Particular cases and contexts

In RFRA cases, when determining whether a substantial burden on the exercise of religion is in furtherance of a compelling governmental interest, the court must look beyond broadly formulated interests and scrutinize the asserted harm of granting specific exemptions to particular religious claimants. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b).

31 Cases that cite this headnote

[16] **Abortion and Birth Control**

🔑 **Contraceptives and Birth Control**

Women and men have a constitutional right to obtain contraceptives.

1 Cases that cite this headnote

[17] **Civil Rights**

🔑 **Particular cases and contexts**

RFRA's least-restrictive-means standard, for substantial burdens on the exercise of religion, is exceptionally demanding. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b).

31 Cases that cite this headnote

[18] **Insurance**

🔑 **Family Planning Services**

Labor and Employment

🔑 **Regulatory supervision**

Assuming that Department of Health and Human Services' (HHS) contraceptives mandate, that employers provide group health insurance coverage for contraceptives without cost sharing, furthered a compelling governmental interest, the HHS mandate was not the least restrictive means of furthering that interest, for purposes of RFRA; government could simply assume the cost of providing the contraceptives to any women unable to obtain them under their health insurance coverage, or could adopt an approach similar to the accommodation given to nonprofit organizations with religious objections to contraceptives. Religious Freedom

Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb-1(b); 45 C.F.R. § 147.130(a)(1)(iv).

37 Cases that cite this headnote

[19] **Civil Rights**

🔑 **Particular cases and contexts**

In applying RFRA, courts must take adequate account of the burdens a requested accommodation of religious beliefs may impose on nonbeneficiaries, and that consideration will often inform the analysis of the government's compelling interest and the availability of a less restrictive means of advancing that interest, but it cannot reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb-1(a, b).

24 Cases that cite this headnote

West Codenotes

Held Invalid

26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv)

Prior Version Recognized as Unconstitutional

42 U.S.C.A. § 2000bb-2

2754 Syllabus

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the “Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§ 2000bb-1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA

covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” § 2000cc-5(7)(A).

At issue here are regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act of 2010(ACA), which, as relevant here, requires specified employers' group health plans to furnish “preventive care and screenings” for women without “any cost sharing requirements,” 42 U.S.C. § 300gg-13(a)(4). Congress did not specify what types of preventive care must be covered; it authorized the Health Resources and Services Administration, a component of HHS, to decide. *Ibid.* Nonexempt employers are generally required to provide coverage for the 20 contraceptive methods approved by the Food and Drug Administration, including the 4 that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate. HHS has also effectively exempted religious *2755 nonprofit organizations with religious objections to providing coverage for contraceptive services. Under this accommodation, the insurance issuer must exclude contraceptive coverage from the employer's plan and provide plan participants with separate payments for contraceptive services without imposing any cost-sharing requirements on the employer, its insurance plan, or its employee beneficiaries.

In these cases, the owners of three closely held for-profit corporations have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. In separate actions, they sued HHS and other federal officials and agencies (collectively HHS) under RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for the four objectionable contraceptives. In No. 13-356, the District Court denied the Hahns and their company—Conestoga Wood Specialties—a preliminary injunction. Affirming, the Third Circuit held that a for-profit corporation could not “engage in religious exercise” under RFRA or the First Amendment, and that the mandate imposed no requirements on the Hahns in their personal capacity. In No. 13-354, the Greens, their children, and their companies—Hobby Lobby Stores and Mardel—were also denied a preliminary injunction, but the Tenth Circuit reversed. It held that the Greens' businesses are “persons” under RFRA, and that the corporations had established a likelihood of success on their RFRA claim because the contraceptive mandate

substantially burdened their exercise of religion and HHS had not demonstrated a compelling interest in enforcing the mandate against them; in the alternative, the court held that HHS had not proved that the mandate was the “least restrictive means” of furthering a compelling governmental interest.

Held : As applied to closely held corporations, the HHS regulations imposing the contraceptive mandate violate RFRA. Pp. 2761 – 2785.

(a) RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby Lobby, and Mardel. Pp. 2761 – 2775.

(1) HHS argues that the companies cannot sue because they are for-profit corporations, and that the owners cannot sue because the regulations apply only to the companies, but that would leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations. RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice. It employed the familiar legal fiction of including corporations within RFRA's definition of “persons,” but the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them. Pp. 2761 – 2768.

(2) HHS and the dissent make several unpersuasive arguments. Pp. 2768 – 2775.

(i) Nothing in RFRA suggests a congressional intent to depart from the Dictionary Act definition of “person,” which “include[s] corporations, ... as well as individuals.” 1 U.S.C. § 1. The Court has entertained RFRA and free-exercise claims brought by nonprofit corporations. See, e.g., *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017. *2756 And HHS's concession that a nonprofit corporation can be a “person” under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of “person” includes natural persons and nonprofit corporations, but not for-profit corporations. Pp. 2768 – 2769.

(ii) HHS and the dissent nonetheless argue that RFRA does not cover Conestoga, Hobby Lobby, and Mardel because they cannot “exercise ... religion.” They offer no persuasive explanation for this conclusion. The corporate form alone cannot explain it because RFRA indisputably protects nonprofit corporations. And the profit-making objective of the corporations cannot explain it because the Court has entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants. *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563. Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the “exercise of religion” that this Court set out in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876. Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law. States, including those in which the plaintiff corporations were incorporated, authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners' religious principles. Pp. 2769 – 2772.

(iii) Also flawed is the claim that RFRA offers no protection because it only codified pre-*Smith* Free Exercise Clause precedents, none of which squarely recognized free-exercise rights for for-profit corporations. First, nothing in RFRA as originally enacted suggested that its definition of “exercise of religion” was meant to be tied to pre-*Smith* interpretations of the First Amendment. Second, if RFRA's original text were not clear enough, the RLUIPA amendment surely dispels any doubt that Congress intended to separate the definition of the phrase from that in First Amendment case law. Third, the pre-*Smith* case of *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536, suggests, if anything, that for-profit corporations can exercise religion. Finally, the results would be absurd if RFRA, a law enacted to provide very broad protection for religious liberty, merely restored this Court's pre-*Smith* decisions in ossified form and restricted RFRA claims to plaintiffs who fell within a category of plaintiffs whose claims the Court had recognized before *Smith*. Pp. 2772 – 2774.

(3) Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because of the difficulty of ascertaining the “beliefs” of large, publicly traded corporations, but HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights,

and numerous practical restraints would likely prevent that from occurring. HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. That disputes among the owners of corporations might arise is not a problem unique to this context. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes. Pp. 2774 – 2775.

*2757 (b) HHS's contraceptive mandate substantially burdens the exercise of religion. Pp. 2775 – 2779.

(1) It requires the Hahns and Greens to engage in conduct that seriously violates their sincere religious belief that life begins at conception. If they and their companies refuse to provide contraceptive coverage, they face severe economic consequences: about \$475 million per year for Hobby Lobby, \$33 million per year for Conestoga, and \$15 million per year for Mardel. And if they drop coverage altogether, they could face penalties of roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel. Pp. 2775 – 2776.

(2) *Amici* supporting HHS argue that the \$2,000 per-employee penalty is less than the average cost of providing insurance, and therefore that dropping insurance coverage eliminates any substantial burden imposed by the mandate. HHS has never argued this and the Court does not know its position with respect to the argument. But even if the Court reached the argument, it would find it unpersuasive: It ignores the fact that the plaintiffs have religious reasons for providing health-insurance coverage for their employees, and it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Pp. 2776 – 2777.

(3) HHS argues that the connection between what the objecting parties must do and the end that they find to be morally wrong is too attenuated because it is the employee who will choose the coverage and contraceptive method she uses. But RFRA's question is whether the mandate imposes a substantial burden on the objecting parties' ability to conduct business in accordance with *their religious beliefs*. The belief of the Hahns and Greens implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a

person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable. In fact, this Court considered and rejected a nearly identical argument in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624. The Court's "narrow function ... is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction," *id.*, at 716, 101 S.Ct. 1425, and there is no dispute here that it does. *Tilton v. Richardson*, 403 U.S. 672, 689, 91 S.Ct. 2091, 29 L.Ed.2d 790; and *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 248–249, 88 S.Ct. 1923, 20 L.Ed.2d 1060, distinguished. Pp. 2777 – 2779.

(c) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is a compelling governmental interest, but the Government has failed to show that the contraceptive mandate is the least restrictive means of furthering that interest. Pp. 2779 – 2785.

(1) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA. Pp. 2779 – 2780.

(2) The Government has failed to satisfy RFRA's least-restrictive-means standard. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion. The Government could, *e.g.*, assume the cost of providing the four contraceptives to women unable to obtain coverage due to their *2758 employers' religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs' religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion and it still serves HHS's stated interests. Pp. 2780 – 2783.

(3) This decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, *e.g.*, for [vaccinations](#) or [blood transfusions](#), must necessarily fall if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice. *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127, which upheld the payment

of Social Security taxes despite an employer's religious objection, is not analogous. It turned primarily on the special problems associated with a national system of taxation; and if *Lee* were a RFRA case, the fundamental point would still be that there is no less restrictive alternative to the categorical requirement to pay taxes. Here, there is an alternative to the contraceptive mandate. Pp. 2783 – 2785.

No. 13–354, 723 F.3d 1114, affirmed; No. 13–356, 724 F.3d 377, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to all but Part III–C–1. BREYER AND KAGAN, JJ., filed a dissenting opinion.

Attorneys and Law Firms

Paul D. Clement, Washington, DC, for the private parties.

Donald B. Verrilli, Jr., Solicitor General, for the federal government.

Paul D. Clement, Michael H. McGinley, Bancroft PLLC, Washington, DC, Peter M. Dobelbower, General Counsel and Chief Legal Officer, Hobby Lobby Stores, Inc., Oklahoma City, OK, S. Kyle Duncan, Counsel of Record, Eric C. Rassbach, Luke W. Goodrich, Hannah C. Smith, Mark L. Rienzi, Lori H. Windham, Adèle Auxier Keim, The Becket Fund for Religious Liberty, Washington, DC, Joshua D. Hawley, University of Missouri, Columbia, MO, counsel for Respondents.

Donald B. Verrilli, Jr., Solicitor General, Counsel of Record, Stuart F. Delery, Assistant Attorney General, Ian Heath Gershengorn, Edwin S. Kneedler, Deputy Solicitors General, Joseph R. Palmore, Assistant to the Solicitor General, Mark B. Stern, Alisa B. Klein, Washington, DC, for Petitioners.

Jordan W. Lorence, Steven H. Aden, Gregory S. Baylor, Matthew S. Bowman, Alliance Defending Freedom, Washington, DC, David A. Cortman, Counsel of Record, Kevin H. Theriot, Rory T. Gray, Alliance Defending Freedom, Lawrenceville, GA, Charles W. Proctor, III, Law Offices of Proctor, Lindsay & Dixon, Chadds Ford, PA, Randall L. Wenger, Independence Law Center, Harrisburg,

PA, for Petitioners Conestoga Wood Specialties Corporation et al.

Opinion

*2759 Justice [ALITO](#) delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, [42 U.S.C. § 2000bb et seq.](#), permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular

contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the *2760 HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” *Post*, at 2787 (opinion of GINSBURG, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose “disadvantages ... on others” or that require “the general public [to] pick up the tab.” *Post*, at 2787. And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby.” *Post*, at 2787.¹ The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

A

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U.S., at 408–409, 83 S.Ct. 1790. And in *Yoder*, the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years. 406 U.S., at 210–211, 234–236, 92 S.Ct. 1526.

In *Smith*, however, the Court rejected “the balancing test set forth in *Sherbert*.” 494 U.S., at 883, 110 S.Ct. 1595. *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause. 494 U.S., at 875, 110 S.Ct. 1595.

This Court then reversed, observing that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law “would open the prospect of constitutionally *2761 required religious exemptions from civic obligations of almost every conceivable kind.” 494 U.S., at 888, 110 S.Ct. 1595. The Court therefore held that, under the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling

governmental interest.” *City of Boerne v. Flores*, 521 U.S. 507, 514, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

[1] Congress responded to *Smith* by enacting RFRA. “[L]aws [that are] ‘neutral’ toward religion,” Congress found, “may burden religious exercise as surely as laws intended to interfere with religious exercise.” 42 U.S.C. § 2000bb(a)(2); see also § 2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that “Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.” § 2000bb–1(a).² If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government “demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” § 2000bb–1(b).³

[2] As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work,⁴ but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. 521 U.S., at 516–517, 117 S.Ct. 2157. In *City of Boerne*, however, we held that Congress had overstepped its Section 5 authority because “[t]he stringent test RFRA demands” “far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.” *Id.*, at 533–534, 117 S.Ct. 2157. See also *id.*, at 532, 117 S.Ct. 2157.

[3] Following our decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.* That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. See *Cutter v. Wilkinson*, 544 U.S. 709, 715–716, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). And, what is most relevant for present purposes, RLUIPA amended RFRA's definition of the “exercise of religion.” See § 2000bb–2(4) (importing RLUIPA definition). Before RLUIPA, RFRA's definition made reference to the First Amendment. See § 2000bb–2(4) (1994 ed.) (defining “exercise of religion” as “the exercise of religion under the First Amendment”). In RLUIPA, in an obvious *2762 effort to effect a complete

separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” § 2000cc–5(7)(A). And Congress mandated that this concept “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” § 2000cc–3(g).⁵

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010(ACA), 124 Stat. 119. ACA generally requires employers with 50 or more full-time employees to offer “a group health plan or group health insurance coverage” that provides “minimum essential coverage.” 26 U.S.C. § 5000A(f)(2); §§ 4980H(a), (c)(2). Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA's group-health-plan requirements, the employer may be required to pay \$100 per day for each affected “individual.” §§ 4980D(a)-(b). And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay \$2,000 per year for each of its full-time employees. §§ 4980H(a), (c)(1).

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish “preventive care and screenings” for women without “any cost sharing requirements.” 42 U.S.C. § 300gg–13(a)(4). Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. *Ibid.* The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require. See 77 Fed.Reg. 8725–8726 (2012).

In August 2011, based on the Institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines. See *id.*, at 8725–8726, and n. 1; online at <http://hrsa.gov/womensguidelines> (all Internet materials as visited June 26, 2014, and available in Clerk of Court's

case file). The Guidelines provide that nonexempt employers are generally required to provide “coverage, without cost sharing” for “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling.” 77 Fed.Reg. 8725 (internal quotation marks omitted). Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from *2763 developing any further by inhibiting its attachment to the uterus. See Brief for HHS in No. 13–354, pp. 9–10, n. 4;⁶ FDA, Birth Control: Medicines to Help You.⁷

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for “religious employers.” 45 CFR § 147.131(a). That category encompasses “churches, their integrated auxiliaries, and conventions or associations of churches,” as well as “the exclusively religious activities of any religious order.” See *ibid.* (citing 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii)). In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services. See <http://hrsa.gov/womensguidelines>.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as “eligible organizations,” from the contraceptive mandate. See 45 CFR § 147.131(b); 78 Fed.Reg. 39874 (2013). An “eligible organization” means a nonprofit organization that “holds itself out as a religious organization” and “opposes providing coverage for some or all of any contraceptive services required to be covered ... on account of religious objections.” 45 CFR § 147.131(b). To qualify for this accommodation, an employer must certify that it is such an organization. § 147.131(b)(4). When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. § 147.131(c).⁸ Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed.Reg. 39877.⁹

In addition to these exemptions for religious organizations, ACA exempts a great *2764 many employers from most of its coverage requirements. Employers providing “grandfathered health plans”—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act’s requirements, including the contraceptive mandate. 42 U.S.C. §§ 18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all. 26 U.S.C. § 4980H(c)(2).

All told, the contraceptive mandate “presently does not apply to tens of millions of people.” 723 F.3d 1114, 1143 (C.A.10 2013). This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. Brief for HHS in No. 13–354, at 53; Kaiser Family Foundation & Health Research & Educational Trust, Employer Health Benefits, 2013 Annual Survey 43, 221.¹⁰ The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers. See The Whitehouse, Health Reform for Small Businesses: The Affordable Care Act Increases Choice and Saving Money for Small Businesses 1.¹¹

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that “[t]he fetus in its earliest stages ... shares humanity with those who conceived it.”¹²

Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania law as a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business “in accordance with their religious beliefs and

moral principles.” 917 F.Supp.2d 394, 402 (E.D.Pa.2013). To that end, the company’s mission, as they see it, is to “operate in a professional environment founded upon the highest ethical, moral, and Christian principles.” *Ibid.* (internal quotation marks omitted). The company’s “Vision and Values Statements” affirms that Conestoga endeavors to “ensur[e] a reasonable profit in [a] manner that reflects [the Hahns’] Christian heritage.” App. in No. 13–356, p. 94 (complaint).

As explained in Conestoga’s board-adopted “Statement on the Sanctity of Human Life,” the Hahns believe that “human life begins at conception.” *2765 724 F.3d 377, 382, and n. 5 (C.A.3 2013) (internal quotation marks omitted). It is therefore “against [their] moral conviction to be involved in the termination of human life” after conception, which they believe is a “sin against God to which they are held accountable.” *Ibid.* (internal quotation marks omitted). The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients. *Id.*, at 382.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA’s contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg.¹³ These include two forms of emergency contraception commonly called “morning after” pills and two types of intrauterine devices.¹⁴

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that “it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.” *Ibid.* The District Court denied a preliminary injunction, see 917 F.Supp.2d, at 419, and the Third Circuit affirmed in a divided opinion, holding that “for-profit, secular corporations cannot engage in religious exercise” within the meaning of RFRA or the First Amendment. 724 F.3d, at 381. The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS “[m]andate does not impose any requirements on the Hahns” in their personal capacity. *Id.*, at 389.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. 723 F.3d, at 1122. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David's sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. *Ibid.* Mardel is also organized as a for-profit corporation under Oklahoma law.

Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. *Ibid.* David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO. See Brief for Respondents in No. 13–354, p. 8. ¹⁵

***2766** Hobby Lobby's statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.” App. in No. 13–354, pp. 134–135 (complaint). Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. 723 F.3d, at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. *Id.*, at 1122; App. in No. 13–354, at 136–137. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to “know Jesus as Lord and Savior.” *Ibid.* (internal quotation marks omitted).

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. 723 F.3d, at 1122. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. *Id.*, at 1125. Although their group-health-insurance plan predates the enactment of ACA, it is

not a grandfathered plan because Hobby Lobby elected not to retain grandfathered status before the contraceptive mandate was proposed. *Id.*, at 1124.

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause. ¹⁶ The District Court denied a preliminary injunction, see 870 F.Supp.2d 1278 (W.D.Okla.2012), and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens' two for-profit businesses are “persons” within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. 723 F.3d, at 1140–1147. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between “compromis[ing] their religious beliefs” and paying a heavy fee—either “close to \$475 million more in taxes every year” if they simply refused to provide coverage for the contraceptives at issue, or “roughly \$26 million” annually if they “drop[ped] health-insurance benefits for all employees.” *Id.*, at 1141.

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens' businesses and, in the alternative, that HHS had failed to prove that enforcement of the mandate was the “least restrictive means” of furthering the Government's asserted interests. *Id.*, at 1143–1144 (emphasis deleted; internal quotation marks omitted). After concluding that the companies had “demonstrated irreparable harm,” the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test. *Id.*, at 1147. ¹⁷

***2767** We granted certiorari. 571 U.S. —, 134 S.Ct. 678, 187 L.Ed.2d 544 (2013).

III

A

RFRA prohibits the “Government [from] substantially burden[ing] a *person's* exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added). The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS's argument would have dramatic consequences.

Consider this Court's decision in *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion). In that case, five Orthodox Jewish merchants who ran small retail businesses in Philadelphia challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. Because of their faith, these merchants closed their shops on Saturday, and they argued that requiring them to remain shut on Sunday threatened them with financial ruin. The Court entertained their claim (although it ruled against them on the merits), and if a similar claim were raised today under RFRA against a jurisdiction still subject to the Act (for example, the District of Columbia, see 42 U.S.C. § 2000bb–2(2)), the merchants would be entitled to be heard. According to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.¹⁸ Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of *2768

RFRA's text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

[4] As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of “persons.” But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

In holding that Conestoga, as a “secular, for-profit corporation,” lacks RFRA protection, the Third Circuit wrote as follows:

“General business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees*, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.” 724 F.3d, at 385 (emphasis added).

All of this is true—but quite beside the point. Corporations, “separate and apart from” the human beings who own, run, and are employed by them, cannot do anything at all.

B

1

[5] As we noted above, RFRA applies to “a person's” exercise of religion, 42 U.S.C. §§ 2000bb–1(a), (b), and RFRA itself does not define the term “person.” We therefore

look to the Dictionary Act, which we must consult “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.” 1 U.S.C. § 1.

Under the Dictionary Act, “the wor[d] ‘person’ ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” *Ibid.*; see *FCC v. AT & T Inc.*, 562 U.S. —, —, 131 S.Ct. 1177, 1182–1183, 179 L.Ed.2d 132 (2011) (“We have no doubt that ‘person,’ in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear”). Thus, unless there is something about the RFRA context that “indicates otherwise,” the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. We have entertained RFRA and free-exercise claims brought by nonprofit corporations, see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (RFRA); *2769 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. —, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) (Free Exercise); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Free Exercise), and HHS concedes that a nonprofit corporation can be a “person” within the meaning of RFRA. See Brief for HHS in No. 13–354, at 17; Reply Brief in No. 13–354, at 7–8.¹⁹

This concession effectively dispatches any argument that the term “person” as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term “person” includes *some* but not all corporations. The term “person” sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.²⁰ Cf. *Clark v. Martinez*, 543 U.S. 371, 378, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (“To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one”).

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term “person,” but on the phrase “exercise of religion.” According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious “autonomy ... often furthers individual religious freedom as well.” *Post*, at 2794 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (Brennan, J., concurring in judgment)). But this principle applies equally to for-profit corporations: Furthering their religious freedom also “furthers individual religious freedom.” In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.²¹

[6] [7] If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their *2770 claims. As the Court explained in a later case, the “exercise of religion” involves “not only belief and profession but the performance of (or abstention from) physical acts” that are “engaged in for religious reasons.” *Smith*, 494 U.S., at 877, 110 S.Ct. 1595. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that “operates so as to make the practice of ... religious beliefs more expensive” in the context of business activities imposes a burden on the exercise of religion. *Braunfeld*, *supra*, at 605, 81 S.Ct. 1144; see *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (recognizing that “compulsory participation in the social security system interferes with [Amish employers’] free exercise rights”).

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim,²² why can’t Hobby Lobby, Conestoga, and Mardel do the same?

[8] Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money.²³ This argument flies in the face of modern corporate law. “Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act *2771 for *any lawful purpose* or business.” 1 J. Cox & T. Hazen, *Treatise of the Law of Corporations* § 4:1, p. 224 (3d ed. 2010) (emphasis added); see 1A W. Fletcher, *Cyclopedia of the Law of Corporations* § 102 (rev. ed. 2010). While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.²⁴ In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the “benefit corporation,” a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.²⁵

In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—

Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue “any lawful purpose” or “act,” including the pursuit of profit in conformity with the owners' religious principles. 15 Pa. Cons.Stat. § 1301 (2001) (“Corporations may be incorporated under *2772 this subpart for any lawful purpose or purposes”); Okla. Stat., Tit. 18, §§ 1002, 1005 (West 2012) (“[E]very corporation, whether profit or not for profit” may “be incorporated or organized ... to conduct or promote any lawful business or purposes”); see also § 1006(A)(3); Brief for State of Oklahoma as *Amicus Curiae* in No. 13–354.

3

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the “exercise of religion” within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

[9] First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase “exercise of religion under the First Amendment” was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment. When first enacted, RFRA defined the “exercise of religion” to mean “the exercise of religion under the First Amendment”—not the exercise of religion as recognized only by then-existing Supreme Court precedents. 42 U.S.C. § 2000bb–2(4) (1994 ed.). When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (authorizing habeas relief from a state-court decision that “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”).

Second, if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior reference to the First Amendment, see 42 U.S.C. § 2000bb–2(4) (2000 ed.) (incorporating § 2000cc–5), and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise

cases. Moreover, as discussed, the amendment went further, providing that the exercise of religion “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” § 2000cc–3(g). It is simply not possible to read these provisions as restricting the concept of the “exercise of religion” to those practices specifically addressed in our pre-*Smith* decisions.

Third, the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In *Gallagher v. Crown Kasher Super Market of Mass., Inc.*, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961), the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked “standing” to assert a free-exercise claim,²⁶ but not one member of the Court expressed agreement with that argument. The plurality opinion for four Justices rejected the First Amendment claim on the *2773 merits based on the reasoning in *Braunfeld*, and reserved decision on the question whether the corporation had “standing” to raise the claim. See 366 U.S., at 631, 81 S.Ct. 1122. The three dissenters, Justices Douglas, Brennan, and Stewart, found the law unconstitutional as applied to the corporation and the other challengers and thus implicitly recognized their right to assert a free-exercise claim. See *id.*, at 642, 81 S.Ct. 1122 (Brennan, J., joined by Stewart, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 578–579, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (Douglas, J., dissenting as to related cases including *Gallagher*). Finally, Justice Frankfurter’s opinion, which was joined by Justice Harlan, upheld the Massachusetts law on the merits but did not question or reserve decision on the issue of the right of the corporation or any of the other challengers to be heard. See *McGowan*, 366 U.S., at 521–522, 81 S.Ct. 1101. It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected simply because in *Gallagher*—the only pre-*Smith* case in which the issue was raised—a majority of the Justices did not find it necessary to decide whether the kosher market’s corporate status barred it from raising a free-exercise claim.

Finally, the results would be absurd if RFRA merely restored this Court’s pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought

a free-exercise claim that this Court entertained in the years before *Smith*. For example, we are not aware of any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident noncitizen. Are such persons also beyond RFRA’s protective reach simply because the Court never addressed their rights before *Smith*?

Presumably in recognition of the weakness of this argument, both HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. By contrast, HHS contends, statutes like Title VII, 42 U.S.C. § 2000e–19(A), expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. See Brief for HHS in No. 13–356, p. 26. In making this argument, however, HHS did not call to our attention the fact that some federal statutes *do* exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. See, e.g., 42 U.S.C. § 300a–7(b)(2); § 238n(a).²⁷ If Title VII and similar *2774 laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere “beliefs” of a corporation. HHS goes so far as to raise the specter of “divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric.” Brief for HHS in No. 13–356, at 30.

[10] These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA’s applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of

a single family, and no one has disputed the sincerity of their religious beliefs.²⁸

HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims. RLUIPA applies to "institutionalized persons," a category that consists primarily of prisoners, and by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented.²⁹ Nevertheless, after our decision in *City of Boerne*, Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases. And if, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations, see, Reply Brief in No. 13–354, at 7–8, what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?

HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about *2775 the conduct of business. 1 Treatise of the Law of Corporations § 14:11. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. See, e.g., *ibid*; *id.*, § 3:2; *Del.Code Ann., Tit. 8, § 351* (2011) (providing that certificate of incorporation may provide how "the business of the corporation shall be managed"). Courts will turn to that structure and the underlying state law in resolving disputes.

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.³⁰

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. 42 U.S.C. § 2000bb–1(a). We have little trouble concluding that it does.

A

[11] As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13–354, at 9, n. 4, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. 26 U.S.C. § 4980D. For Hobby Lobby, the bill could amount to \$1.3 million per day or *2776 about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of \$2,000 per employee each year. § 4980H. These penalties would amount to roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel.

B

[12] [13] Although these totals are high, *amici* supporting HHS have suggested that the \$2,000 per-employee penalty

is actually less than the average cost of providing health insurance, see Brief for Religious Organizations 22, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, see *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n. 2, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Bell v. Wolfish*, 441 U.S. 520, 532, n. 13, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Knetsch v. United States*, 364 U.S. 361, 370, 81 S.Ct. 132, 5 L.Ed.2d 128 (1960), and there are strong reasons to adhere to that practice in these cases. HHS, which presumably could have compiled the relevant statistics, has never made this argument—not in its voluminous briefing or at oral argument in this Court nor, to our knowledge, in any of the numerous cases in which the issue now before us has been litigated around the country. As things now stand, we do not even know what the Government's position might be with respect to these *amici's* intensely empirical argument.³¹ For this same reason, the plaintiffs have never had an opportunity to respond to this novel claim that—contrary to their longstanding practice and that of most large employers—they would be better off discarding their employer insurance plans altogether.

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees. See App. to Pet. for Cert. in No. 13–356, p. 11g; App. in No. 13–354, at 139.

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to *2777 purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers. See App. in No. 13–354, at 153.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. 26 U.S.C. § 106(a). Likewise, employers can deduct the cost of providing health insurance, see § 162(a)(1), but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.³²

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. Brief for HHS in 13–354, pp. 31–34; *post*, at 2798 – 2799. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.³³ *Ibid.*

*2778 [14] This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and

instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.³⁴ Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. See, e.g., *Smith*, 494 U.S., at 887, 110 S.Ct. 1595 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim”); *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969).

Moreover, in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. In *Thomas*, a Jehovah's Witness was initially employed making sheet steel for a variety of industrial uses, but he was later transferred to a job making turrets for tanks. *Id.*, at 710, 101 S.Ct. 1425. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that he found morally objectionable (helping to make the weapons themselves). This Court, however, held that “it is not for us to say that the line he drew was an unreasonable one.” *Id.*, at 715, 101 S.Ct. 1425.³⁵

*2779 Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our “narrow function ... in this context is to determine” whether

the line drawn reflects “an honest conviction,” *id.*, at 716, 101 S.Ct. 1425, and there is no dispute that it does.

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. See *Tilton v. Richardson*, 403 U.S. 672, 689, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (plurality); *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 248–249, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers never articulated a *religious* objection to the subsidies. As we put it in *Tilton*, they were “unable to identify any coercion directed at the practice or exercise of their religious beliefs.” 403 U.S., at 689, 91 S.Ct. 2091 (plurality opinion); see *Allen*, *supra*, at 249, 88 S.Ct. 1923 (“[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion”). Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb–1(b).

A

[15] HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting “public health” and “gender equality.” Brief for HHS in No. 13–354, at 46, 49. RFRA, however, contemplates a “more focused” inquiry: It “requires the Government to demonstrate that the compelling interest test is satisfied through application of

the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *O Centro*, 546 U.S., at 430–431, 126 S.Ct. 1211 (quoting § 2000bb–1(b)). This requires us to “loo[k] beyond broadly formulated interests” and to “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants”—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. *O Centro*, *supra*, at 431, 126 S.Ct. 1211.

[16] In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. See Brief for HHS in No. 13–354, at 14–15, 49; see Brief for HHS in No. 13–356, at 10, 48. Under our *2780 cases, women (and men) have a constitutional right to obtain contraceptives, see *Griswold v. Connecticut*, 381 U.S. 479, 485–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and HHS tells us that “[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services.” Brief for HHS in No. 13–354, at 50 (internal quotation marks omitted).

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required “to comply with a subset of the Affordable Care Act’s health reform provisions” that provide what HHS has described as “particularly significant protections.” 75 Fed.Reg. 34540 (2010). But the contraceptive mandate is expressly excluded from this subset. *Ibid*.

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the

four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is “the least restrictive means of furthering that compelling governmental interest.” § 2000bb–1(b)(2).

B

[17] [18] The least-restrictive-means standard is exceptionally demanding, see *City of Boerne*, 521 U.S., at 532, 117 S.Ct. 2157, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§ 2000bb–1(a), (b) (requiring the Government to “demonstrat[e] that application of [a substantial] burden to *the person* ... is the least restrictive means of furthering [a] compelling governmental interest” (emphasis added)).

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections. This would certainly be less restrictive of the plaintiffs’ religious liberty, and HHS has not shown, see § 2000bb–1(b)(2), that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. See Birth Control: Medicines to Help You, online at <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm>. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such *2781 statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office’s most recent forecasts, ACA’s insurance-coverage provisions will cost the Federal Government more than \$1.3 trillion through the next decade. See CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014, p. 2.³⁶ If, as HHS tells us, providing all women with cost-free access to all FDA-

approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.

[19] HHS contends that RFRA does not permit us to take this option into account because “RFRA cannot be used to require creation of entirely new programs.” Brief for HHS in 13–354, at 15.³⁷ But we see nothing in RFRA that supports this argument, and drawing the line between the “creation of an entirely new program” and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. § 2000cc–3(c) (RLUIPA: “[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded *2782 program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. See *supra*, at 2763 – 2764, and nn. 8–9. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§ 147.131(b)(4), (c)(1); 26 CFR §§ 54.9815–2713A(a)(4), (b). If the organization makes such a certification, the organization's insurance issuer or third-party administrator must “[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan” and “[p]rovide separate payments for any contraceptive services required to be covered” without imposing “any cost-sharing requirements ... on the eligible organization, the group health plan, or plan participants or beneficiaries.” 45 CFR § 147.131(c)(2); 26 CFR § 54.9815–2713A(c)(2).³⁸

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.³⁹ At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.⁴⁰

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none.⁴¹ Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to “face minimal logistical and administrative obstacles,” *post*, at 2802 (internal quotation marks omitted), because their employers' insurers would be responsible for providing information and coverage, see, e.g., 45 CFR §§ 147.131(c)-(d); cf. *2783 26 CFR §§ 54.9815–2713A(b), (d). Ironically, it is the dissent's approach that would “[i]mped[e] women's receipt of benefits by ‘requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,’ ” *post*, at 2802, because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed “scarcely what Congress contemplated.” *Ibid*.

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as [vaccinations](#) and [blood transfusions](#), but HHS has made no effort to substantiate this prediction.⁴² HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to

provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, [third-trimester abortions](#) or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

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

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these *2784 cases are quite different. Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation. We noted that “[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes.” 455 U.S., at 260, 102 S.Ct. 1051. Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: “If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.” *Ibid.* We observed that “[t]he tax system could not function if denominations were allowed to challenge the tax system

because tax payments were spent in a manner that violates their religious belief.” *Ibid.*; see *O Centro*, 546 U.S., at 435, 126 S.Ct. 1211.

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. And contrary to the principal dissent's characterization, the employers' contributions do not necessarily funnel into “undifferentiated funds.” *Post*, at 2799. The accommodation established by HHS requires issuers to have a mechanism by which to “segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.” 45 CFR § 147.131(c)(2)(ii). Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.⁴³

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. See *post*, at 2804 – 2806. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith*. 494 U.S., at 888–889, 110 S.Ct. 1595 (applying the *Sherbert* test to all free-exercise claims “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”). But Congress, in enacting RFRA, took the position that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U.S.C. § 2000bb(a)(5). The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written,

and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

* * *

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

The judgment of the Tenth Circuit in No. 13–354 is affirmed; the judgment of the Third Circuit in No. 13–356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice **KENNEDY**, concurring.

It seems to me appropriate, in joining the Court's opinion, to add these few remarks. At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. [42 U.S.C. § 2000bb et seq.](#) It is to ensure that interests in religious freedom are protected. *Ante*, at 2760 – 2761; *post*, at 2790 – 2791 (GINSBURG, J., dissenting).

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. See *Cantwell v. Connecticut*, [310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 \(1940\)](#). It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations. They claim protection under RFRA, the federal statute discussed with care and in detail in the Court's opinion.

As the Court notes, under our precedents, RFRA imposes a “ ‘stringent test.’ ” *Ante*, at 2761 (quoting *City of Boerne v. Flores*, [521 U.S. 507, 533, 117 S.Ct. 2157, 138 L.Ed.2d 624 \(1997\)](#)). The Government must demonstrate that the application of a substantial burden to a person's exercise of religion “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” [§ 2000bb–1\(b\)](#).

As to RFRA's first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of ***2786** female employees, coverage that is significantly more costly than for a male employee. *Ante*, at 2779; see, e.g., Brief for HHS in No. 13–354, pp. 14–15. There are many medical conditions for which pregnancy is contraindicated. See, e.g., *id.*, at 2784. It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees. *Ante*, at 2780.

But the Government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases. *Ante*, at 2763 – 2764, and n. 9, 2781 – 2782.

The means the Government chose is the imposition of a direct mandate on the employers in these cases. *Ante*, at 2762 – 2763. But in other instances the Government has allowed the same contraception coverage in issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. See *ante*, at 2763 – 2764, and n. 9, 2781 – 2782. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs. See *ante*, at 2782.

On this record and as explained by the Court, the Government has not met its burden of showing that it cannot

accommodate the plaintiffs' similar religious objections under this established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.

The parties who were the plaintiffs in the District Courts argue that the Government could pay for the methods that are found objectionable. Brief for Respondents in No. 13–354, p. 58. In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. *Ante*, at 2780 – 2782. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government's interest, and in fact the mechanism for doing so is already in place. *Ante*, at 2781 – 2782.

“[T]he American community is today, as it long has been, a rich mosaic of religious faiths.” *Town of Greece v. Galloway*, 572 U.S. —, —, 134 S.Ct. 1811, 1849, 188 L.Ed.2d 835 (2014) (KAGAN, J., dissenting). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that *2787 same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. *Ante*, at 2782 – 2783.

For these reasons and others put forth by the Court, I join its opinion.

Justice GINSBURG, with whom Justice Sotomayor joins, and with whom Justice BREYER and Justice KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See *ante*, at 2767 – 2785. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i.e.*, the general public, can pick up the tab. See *ante*, at 2780 – 2782.¹

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. See *infra*, at 2789 – 2791. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

I

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *2788 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts,

promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court's resolution of these cases.

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary.² Particular services were to be recommended by the U.S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, however; it left out preventive services that “many women's health advocates and medical professionals believe are critically important.” 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women's Health Amendment, which added to the ACA's minimum coverage requirements a new category of preventive services specific to women's health.

Women paid significantly more than men for preventive care, the amendment's proponents noted; in fact, cost barriers operated to block many women from obtaining needed care at all. See, e.g., *id.*, at 29070 (statement of Sen. Feinstein) (“Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.”); *id.*, at 29302 (statement of Sen. Mikulski) (“copayments are [often] so high that [women] avoid getting [preventive and screening services] in the first place”). And increased access to contraceptive services, the sponsors comprehended, would yield important public health gains. See, e.g., *id.*, at 29768 (statement of Sen. Durbin) (“This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured].... This expanded access will reduce unintended pregnancies.”).

As altered by the Women's Health Amendment's passage, the ACA requires new insurance plans to include coverage without cost sharing of “such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)],” a unit of HHS. 42 U.S.C. § 300gg-13(a)(4). Thus charged, the HRSA developed recommendations in consultation with the Institute of Medicine (IOM). See 77 Fed.Reg. 8725-8726 (2012).³ The IOM convened a group of independent experts, including

“specialists in disease prevention [and] women's health”; those experts prepared a report *2789 evaluating the efficacy of a number of preventive services. IOM, Clinical Prevention Services for Women: Closing the Gaps 2 (2011) (hereinafter IOM Report). Consistent with the findings of “[n]umerous health professional associations” and other organizations, the IOM experts determined that preventive coverage should include the “full range” of FDA-approved contraceptive methods. *Id.*, at 10. See also *id.*, at 102–110.

In making that recommendation, the IOM's report expressed concerns similar to those voiced by congressional proponents of the Women's Health Amendment. The report noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. See, e.g., *id.*, at 19 (“[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving ... medical tests and treatments and to filling prescriptions for themselves and their families.”); *id.*, at 103–104, 107 (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, pulmonary hypertension, and Marfan syndrome, and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); *id.*, at 103 (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face “increased odds of preterm birth and low birth weight”).

In line with the IOM's suggestions, the HRSA adopted guidelines recommending coverage of “[a]ll [FDA-] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁴ Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations requiring group health plans to include coverage of the contraceptive services recommended in the HRSA guidelines, subject to certain exceptions, described *infra*, at 2800 – 2801.⁵ This opinion refers to these regulations as the contraceptive coverage requirement.

B

While the Women's Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called “conscience amendment,” which would have enabled any employer or insurance provider to deny coverage

based on its asserted “religious beliefs or moral convictions.” 158 Cong. Rec. S539 (Feb. 9, 2012); see *id.*, at S1162–S1173 (Mar. 1, 2012) (debate and vote).⁶ That amendment, Senator Mikulski observed, would have “pu[t] the personal opinion of employers and insurers over the practice of medicine.” *Id.*, at S1127 (Feb. 29, 2012). Rejecting the “conscience amendment,” Congress left health care decisions—including the choice among contraceptive *2790 methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga⁷ might assert is foreclosed by this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith*, two members of the Native American Church were dismissed from their jobs and denied unemployment benefits because they ingested peyote at, and as an essential element of, a religious ceremony. Oregon law forbade the consumption of peyote, and this Court, relying on that prohibition, rejected the employees’ claim that the denial of unemployment benefits violated their free exercise rights. The First Amendment is not offended, *Smith* held, when “prohibiting the exercise of religion ... is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision.” *Id.*, at 878, 110 S.Ct. 1595; see *id.*, at 878–879, 110 S.Ct. 1595 (“an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”). The ACA’s contraceptive coverage requirement applies generally, it is “otherwise valid,” it trains on women’s well being, not on the exercise of religion, and any effect it has on such exercise is incidental.

Even if *Smith* did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.⁸

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations’ employees and covered dependents. It would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure.

See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 527, 565, 10 Cal.Rptr.3d 283, 85 P.3d 67, 93 (2004) (“We are unaware of any decision in which ... [the U.S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested *2791 exemption would detrimentally affect the rights of third parties.”). In sum, with respect to free exercise claims no less than free speech claims, “‘[y]our right to swing your arms ends just where the other man’s nose begins.’” Chafee, *Freedom of Speech in War Time*, 32 Harv. L.Rev. 932, 957 (1919).

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that application of the burden is “the least restrictive means” to further a “compelling governmental interest.” 42 U.S.C. § 2000bb–1(a), (b)(2). In RFRA, Congress “adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*.” *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

RFRA’s purpose is specific and written into the statute itself. The Act was crafted to “restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” § 2000bb(b)(1).⁹ See also § 2000bb(a)(5) (“[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”); *ante*, at 2785 (agreeing that the pre-*Smith* compelling interest test is “workable” and “strike[s] sensible balances”).

The legislative history is correspondingly emphatic on RFRA’s aim. See, e.g., S.Rep. No. 103–111, p. 12 (1993) (hereinafter Senate Report) (RFRA’s purpose was “only to overturn the Supreme Court’s decision in *Smith*,” not to

“unsettle other areas of the law.”); 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was “designed to restore the compelling interest test for deciding free exercise claims.”). In line with this restorative purpose, Congress expected courts considering RFRA claims to “look to free exercise cases decided prior to *Smith* for guidance.” Senate Report 8. See also H.R.Rep. No. 103–88, pp. 6–7 (1993) (hereinafter House Report) (same). In short, the Act reinstates the law as it was prior to *Smith*, without “creat[ing] ... new rights for any religious practice or for any potential litigant.” 139 Cong. Rec. 26178 (statement of Sen. Kennedy). Given the Act’s moderate purpose, it is hardly surprising that RFRA’s enactment in 1993 provoked little controversy. See Brief for Senator Murray et al. as *Amici Curiae* 8 (hereinafter Senators Brief) (RFRA was approved by a 97–to–3 vote in the Senate and a voice vote in the House of Representatives).

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-***2792** *Smith* jurisprudence. See *ante*, at 2761, n. 3, 2761 – 2762, 2767, 2771 – 2773. To support its conception of RFRA as a measure detached from this Court’s decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, which altered RFRA’s definition of the term “exercise of religion.” RFRA, as originally enacted, defined that term to mean “the exercise of religion under the First Amendment to the Constitution.” § 2000bb–2(4) (1994 ed.). See *ante*, at 2761 – 2762. As amended by RLUIPA, RFRA’s definition now includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” § 2000bb–2(4) (2012 ed.) (cross-referencing § 2000cc–5). That definitional change, according to the Court, reflects “an obvious effort to effect a complete separation from First Amendment case law.” *Ante*, at 2761 – 2762.

The Court’s reading is not plausible. RLUIPA’s alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise. See *Rasul v. Myers*, 563 F.3d 527, 535 (C.A.D.C.2009) (Brown, J., concurring) (“There is no doubt that RLUIPA’s

drafters, in changing the definition of ‘exercise of religion,’ wanted to broaden the scope of the kinds of practices protected by RFRA, not increase the universe of individuals protected by RFRA.”); H.R.Rep. No. 106–219, p. 30 (1999). See also *Gilardi v. United States Dept. of Health and Human Servs.*, 733 F.3d 1208, 1211 (C.A.D.C.2013) (RFRA, as amended, “provides us with no helpful definition of ‘exercise of religion.’ ”); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (C.A.D.C.2001) (“The [RLUIPA] amendments did not alter RFRA’s basic prohibition that the [g]overnment shall not substantially burden a person’s exercise of religion.”)¹⁰

Next, the Court highlights RFRA’s requirement that the government, if its action substantially burdens a person’s religious observance, must demonstrate that it chose the least restrictive means for furthering a compelling interest. “[B]y imposing a least-restrictive-means test,” the Court suggests, RFRA “went beyond what was required by our pre-*Smith* decisions.” *Ante*, at 2767, n. 18 (citing *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). See also *ante*, at 2761, n. 3. But as RFRA’s statements of purpose and legislative history make clear, Congress intended only to restore, not to scrap or alter, the balancing test as this Court had applied it pre-*Smith*. See *supra*, at 2790 – 2791. See also Senate Report 9 (RFRA’s “compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*.”); House Report 7 (same).

The Congress that passed RFRA correctly read this Court’s pre-*Smith* case law as including within the “compelling interest test” a “least restrictive means” requirement. See, e.g., Senate Report 5 (“Where [a substantial] burden is placed ***2793** upon the free exercise of religion, the Court ruled [in *Sherbert*], the Government must demonstrate that it is the least restrictive means to achieve a compelling governmental interest.”). And the view that the pre-*Smith* test included a “least restrictive means” requirement had been aired in testimony before the Senate Judiciary Committee by experts on religious freedom. See, e.g., Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 78–79 (1993) (statement of Prof. Douglas Laycock).

Our decision in *City of Boerne*, it is true, states that the least restrictive means requirement “was not used in the pre-*Smith* jurisprudence RFRA purported to codify.” See *ante*, at 2761, n. 3, 2767, n. 18. As just indicated, however, that statement does not accurately convey the Court’s pre-*Smith* jurisprudence. See *Sherbert*, 374 U.S., at 407, 83 S.Ct. 1790

(“[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights.”); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”). See also Berg, *The New Attacks on Religious Freedom Legislation and Why They Are Wrong*, 21 *Cardozo L.Rev.* 415, 424 (1999) (“In *Boerne*, the Court erroneously said that the least restrictive means test ‘was not used in the pre-*Smith* jurisprudence.’”).¹¹

C

With RFRA's restorative purpose in mind, I turn to the Act's application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among “person[s]” who “exercise ... religion”? Assuming that they do, does the contraceptive coverage requirement “substantially burden” their religious exercise? If so, is the requirement “in furtherance of a compelling government interest”? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA's compelling interest test, as noted, see *supra*, at 2790, applies to government actions that “substantially burden a person's exercise of religion.” 42 U.S.C. § 2000bb-1(a) (emphasis added). This reference, the Court submits, incorporates the definition of “person” found in the Dictionary Act, 1 U.S.C. § 1, which extends to “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” See *ante*, at 2768. The Dictionary Act's definition, however, controls only where “context” does not “indicat[e] otherwise.” § 1. Here, context does so indicate. RFRA speaks of “a person's exercise of religion.” 42 U.S.C. § 2000bb-1(a) (emphasis added). See

also §§ 2000bb-2(4), *2794 2000cc-5(7)(a).¹² Whether a corporation qualifies as a “person” capable of exercising religion is an inquiry one cannot answer without reference to the “full body” of pre-*Smith* “free-exercise caselaw.” *Gilardi*, 733 F.3d, at 1212. There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA.¹³ The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819). Corporations, Justice Stevens more recently reminded, “have no consciences, no beliefs, no feelings, no thoughts, no desires.” *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 466, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (opinion concurring in part and dissenting in part).

The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations.¹⁴ “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community,” and “furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (Brennan, J., concurring in judgment). The Court's “special solicitude to the rights of religious organizations,” *2795 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. —, —, 132 S.Ct. 694, 706, 181 L.Ed.2d 650 (2012), however, is just that. No such solicitude is traditional for commercial organizations.¹⁵ Indeed, until today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.” *Amos*, 483 U.S., at 337, 107 S.Ct. 2862.¹⁶

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by

law, no religion-based criterion can restrict the work force of for-profit corporations. See 42 U.S.C. §§ 2000e(b), 2000e-1(a), 2000e-2(a); cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80–81, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) (Title VII requires reasonable accommodation of an employee's religious exercise, but such accommodation must not come “at the expense of other[employees]”). *2796 The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention.¹⁷ One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (Congress does not “hide elephants in mouseholes”). The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1169 (C.A.10 2013) (Briscoe, C.J., concurring in part and dissenting in part) (legislative record lacks “any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations”). See also Senators Brief 10–13 (none of the cases cited in House or Senate Judiciary Committee reports accompanying RFRA, or mentioned during floor speeches, recognized the free exercise rights of for-profit corporations).

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. See *ante*, at 2769 – 2772. See also *ante*, at 2786 (KENNEDY, J., concurring) (criticizing the Government for “distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation”).¹⁸ Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court's side. Recognition of the discrete characters of “ecclesiastical and lay” corporations dates back to Blackstone, see 1 W. Blackstone, *Commentaries on the Laws of England* 458 (1765), and was reiterated by this Court centuries before

the enactment of the Internal Revenue Code. See *Terrett v. Taylor*, 9 Cranch 43, 49, 3 L.Ed. 650 (1815) (describing religious corporations); *Trustees of Dartmouth College, 4 Wheat.*, at 645 (discussing “eleemosynary” corporations, including those “created for the promotion of religion”). To reiterate, “for- *2797 profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers].” *Gilardi*, 733 F.3d, at 1242 (Edwards, J., concurring in part and dissenting in part) (emphasis deleted).

Citing *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), the Court questions why, if “a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can't ... do the same?” *Ante*, at 2770 (footnote omitted). See also *ante*, at 2767 – 2768. But even accepting, *arguendo*, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court's conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation. In any event, *Braunfeld* is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits.

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.¹⁹ Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA “person[s],” to gain an exemption, they must demonstrate that the contraceptive coverage requirement *2798 “substantially burden[s] [their] exercise of religion.”

42 U.S.C. § 2000bb–1(a). Congress no doubt meant the modifier “substantially” to carry weight. In the original draft of RFRA, the word “burden” appeared unmodified. The word “substantially” was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See 139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court’s pre-*Smith* case law, “does not require the Government to justify every action that has some effect on religious exercise.” *Ibid*.

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens’ and Hahns’ “belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” *Ante*, at 2778.²⁰ I agree with the Court that the Green and Hahn families’ religious convictions regarding contraception are sincerely held. See *Thomas*, 450 U.S., at 715, 101 S.Ct. 1425 (courts are not to question where an individual “dr[aws] the line” in defining which practices run afoul of her religious beliefs). See also 42 U.S.C. §§ 2000bb–1(a), 2000bb–2(4), 2000cc–5(7)(A).²¹ But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between “factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,” which a court must accept as true, and the “legal conclusion ... that [plaintiffs’] religious exercise is substantially burdened,” an inquiry the court must undertake. *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (C.A.D.C.2008).

That distinction is a facet of the pre-*Smith* jurisprudence RFRA incorporates. *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), is instructive. There, the Court rejected a free exercise challenge to the Government’s use of a Native American child’s Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father’s religious belief that “use of [his daughter’s Social Security] number may harm [her] spirit,” the Court concluded that the Government’s internal uses of that number “place[d] [no] restriction on what [the father] may believe or what he may do.” *Id.*, at 699, 106 S.Ct. 2147. Recognizing that the father’s “religious views may not accept” the position that the challenged uses concerned only the Government’s internal affairs, the Court explained that “for the adjudication of a constitutional claim, the Constitution, rather than an individual’s religion, must *2799 supply the frame of reference.” *Id.*, at 700–701, n. 6, 106 S.Ct. 2147.

See also *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (distinguishing between, on the one hand, “question[s] [of] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds,” and, on the other, “whether the alleged burden imposed [by the challenged government action] is a substantial one”). Inattentive to this guidance, today’s decision elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see *supra*, at 2788 – 2790, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.” *Grote v. Sebelius*, 708 F.3d 850, 865 (C.A.7 2013) (Rovner, J., dissenting). It is doubtful that Congress, when it specified that burdens must be “substantia[l],” had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. See IOM Report 102–107. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 14–15. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain [cancers](#), [menstrual disorders](#), and pelvic pain. Brief for Ovarian Cancer National Alliance et al. as *Amici Curiae* 4, 6–7, 15–16; [78 Fed.Reg. 39872 \(2013\)](#); IOM Report 107.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved ***2800** contraceptives does not lessen these compelling interests. Notably, the corporations exclude [intrauterine devices](#) (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. See *id.*, at 105.²² Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38–39 (counsel for Hobby Lobby acknowledged that his “argument ... would apply just as well if the employer said ‘no contraceptives’ ” (internal quotation marks added)).

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. See *ante*, at 2780.²³ It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage, Brief for Guttmacher Institute et al. as *Amici Curiae* 16; that almost one-third of women would change their contraceptive method if costs were not a factor, Frost & Darroch, *Factors Associated With Contraceptive Choice and Inconsistent Method Use, United States, 2004*, 40 *Perspectives on Sexual & Reproductive Health* 94, 98 (2008); and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be, Garipey, Simon, Patel, Creinin, & Schwarz, *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women With Private Insurance*, 84 *Contraception* e39, e40 (2011). See also Eisenberg, *supra*, at S60 (recent

study found that women who face out-of-pocket IUD costs in excess of \$50 were “11–times less likely to obtain an IUD than women who had to pay less than \$50”); Postlethwaite, Trussell, Zoolakis, Shabear, & Petitti, *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 *Contraception* 360, 361–362 (2007) (when one health system eliminated patient cost sharing for IUDs, use of this form of contraception more than doubled).

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions. See *ante*, at 2779 – 2780.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, e.g., Family and Medical Leave Act of 1993, [29 U.S.C. § 2611\(4\)\(A\)\(i\)](#) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, [29 U.S.C. § 630\(b\)](#) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now ***2801** governs employers with 20 or more employees); Americans With Disabilities Act, [42 U.S.C. § 12111\(5\)\(A\)](#) (applicable to employers with 15 or more employees); Title VII, [42 U.S.C. § 2000e\(b\)](#) (originally exempting employers with fewer than 25 employees, see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505, n. 2, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), the statute now governs employers with 15 or more employees).

The ACA's grandfathering provision, [42 U.S.C. § 18011](#), allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. See [45 CFR § 147.140\(g\)](#). Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby's counsel explained that the “grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing.” App. in No. 13–354, pp. 39–40. Counsel acknowledged that, “just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time.” *Id.*, at 40.²⁴ The percentage of employees in grandfathered plans is steadily

declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Foundation & Health Research & Educ. Trust, Employer Benefits 2013 Annual Survey 7, 196. In short, far from ranking as a categorical exemption, the grandfathering provision is “temporary, intended to be a means for gradually transitioning employers into mandatory coverage.” *Gilardi*, 733 F.3d, at 1241 (Edwards, J., concurring in part and dissenting in part).

The Court ultimately acknowledges a critical point: RFRA's application “*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” *Ante*, at 2781, n. 37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005); emphasis added). No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. Cf. *supra*, at 2790 – 2791; *Prince v. Massachusetts*, 321 U.S. 158, 177, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (Jackson, J., dissenting) (“[The] limitations which of necessity bound religious freedom ... begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”).

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees *2802 receive, at no cost to them, the preventive care needed to safeguard their health and well being. A “least restrictive means” cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets. See *supra*, at 2790 – 2791, 2801.²⁵

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. “The most straightforward [alternative],” the Court asserts, “would be for the Government to assume the cost of providing ... contraceptives ... to any women who are unable to obtain

them under their health-insurance policies due to their employers' religious objections.” *Ante*, at 2780. The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance “so that [employees] face minimal logistical and administrative obstacles.” 78 Fed.Reg. 39888. Impeding women's receipt of benefits “by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit” was scarcely what Congress contemplated. *Ibid*. Moreover, Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*, “is the nation's only dedicated source of federal funding for safety net family planning services.” Brief for National Health Law Program et al. as *Amici Curiae* 23. “Safety net programs like Title X are not designed to absorb the unmet needs of ... insured individuals.” *Id.*, at 24. Note, too, that Congress declined to write into law the preferential treatment Hobby Lobby and Conestoga describe as a less restrictive alternative. See *supra*, at 2789.

And where is the stopping point to the “let the government pay” alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985), or according women equal pay for substantially similar work, see *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (C.A.4 1990)? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?²⁶ Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. See *ante*, at 2759 – 2760, 2763 – 2764, 2781 – 2783. “At a minimum,” according to the Court, such an approach would not “impinge on [Hobby Lobby's and Conestoga's] religious belief.” *Ante*, at 2782. I have already discussed the “special solicitude” *2803 generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths. See *supra*, at 2794 – 2796.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. “We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims.” *Ante*, at 2782. Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether

the Court-proposed alternative was acceptable,²⁷ counsel responded: “We haven’t been offered that accommodation, so we haven’t had to decide what kind of objection, if any, we would make to that.” Tr. of Oral Arg. 86–87.

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. See Brief for Petitioners in No. 13–356, p. 64. A tax credit, of course, is one variety of “let the government pay.” In addition to departing from the existing employer-based system of health insurance, Conestoga’s alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish, *i.e.*, comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). *Lee*, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer’s share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with *Lee*’s religious beliefs, the burden was not unconstitutional. *Id.*, at 260–261, 102 S.Ct. 1051. See also *id.*, at 258, 102 S.Ct. 1051 (recognizing the important governmental interest in providing a “nationwide ... comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees”).²⁸ The Government *2804 urges that *Lee* should control the challenges brought by Hobby Lobby and Conestoga. See Brief for Respondents in No. 13–356, p. 18. In contrast, today’s Court dismisses *Lee* as a tax case. See *ante*, at 2783 – 2784. Indeed, it was a tax case and the Court in *Lee* homed in on “[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation.” 455 U.S., at 259, 102 S.Ct. 1051.

But the *Lee* Court made two key points one cannot confine to tax cases. “When followers of a particular sect enter into commercial activity as a matter of choice,” the Court observed, “the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.” *Id.*, at 261, 102 S.Ct. 1051. The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would “operat[e] to impose the employer’s religious faith on the employees.” *Ibid.*²⁹ No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door,³⁰ at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, *e.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 256 F.Supp. 941, 945 (D.S.C.1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), *aff’d* in relevant part and *rev’d* in part on other grounds, 377 F.2d 433 (C.A.4 1967), *aff’d* and modified on other grounds, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn.1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an “individua[l] living with but not married to a person of the opposite sex,” “a young, single woman working without her father’s consent or a married woman working without her husband’s consent,” and any person “antagonistic *2805 to the Bible,” including “fornicators and homosexuals” (internal quotation marks omitted)), appeal dismissed, 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); *Elane Photography, LLC v. Willock*, 2013–NMSC–040, — N.M. —, 309 P.3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple’s commitment ceremony based on the religious beliefs of the company’s owners), cert. denied, 572 U.S. —, 134 S.Ct. 1787, 188 L.Ed.2d 757

(2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume ... the plausibility of a religious claim"? *Ante*, at 2778.

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?³¹ According to counsel for Hobby Lobby, "each one of these cases ... would have to be evaluated on its own ... apply [ing] the compelling interest-least restrictive alternative test." Tr. of Oral Arg. 6. Not much help there for the lower courts bound by today's decision.

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." *Ante*, at 2783. But the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment.

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," *Lee*, 455 U.S., at 263, n.

2, 102 S.Ct. 1051 (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." *Ibid*. The Court, I fear, has ventured into a minefield, cf. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 730 (C.A.9 2010) (O'Scannlain, J., concurring), by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engage[d] primarily in carrying out that religious purpose," and not "engaged ... *2806 substantially in the exchange of goods or services for money beyond nominal amounts." See *id.*, at 748 (Kleinfeld, J., concurring).

* * *

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

Justice BREYER and Justice KAGAN, dissenting.

We agree with Justice GINSBURG that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III-C-1 of Justice GINSBURG's dissenting opinion.

All Citations

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 See also *post*, at 2790 ("The exemption sought by Hobby Lobby and Conestoga ... would deny [their employees] access to contraceptive coverage that the ACA would otherwise secure")
- 2 The Act defines "government" to include any "department" or "agency" of the United States. § 2000bb-2(1).
- 3 In *City of Boerne v. Flores*, 521 U.S., 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), we wrote that RFRA's "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify." *Id.*, at 509, 117 S.Ct. 2157.

On this understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.

4 See, e.g., *Hankins v. Lyght*, 441 F.3d 96, 108 (C.A.2 2006); *Guam v. Guerrero*, 290 F.3d 1210, 1220 (C.A.9 2002).

5 The principal dissent appears to contend that this rule of construction should apply only when defining the “exercise of religion” in an RLUIPA case, but not in a RFRA case. See *post*, at 2792, n. 10. That argument is plainly wrong. Under this rule of construction, the phrase “exercise of religion,” as it appears in RLUIPA, must be interpreted broadly, and RFRA states that the same phrase, as used in RFRA, means “religious exercis[e] as defined in [RLUIPA].” 42 U.S.C. § 2000bb–2(4). It necessarily follows that the “exercise of religion” under RFRA must be given the same broad meaning that applies under RLUIPA.

6 We will use “Brief for HHS” to refer to the Brief for Petitioners in No. 13–354 and the Brief for Respondents in No. 13–356. The federal parties are the Departments of HHS, Treasury, and Labor, and the Secretaries of those Departments.

7 Online at <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm>. The owners of the companies involved in these cases and others who believe that life begins at conception regard these four methods as causing abortions, but federal regulations, which define pregnancy as beginning at implantation, see, e.g., 62 Fed.Reg. 8611 (1997); 45 CFR § 46.202(f) (2013), do not so classify them.

8 In the case of self-insured religious organizations entitled to the accommodation, the third-party administrator of the organization must “provide or arrange payments for contraceptive services” for the organization’s employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. 78 Fed.Reg. 39893 (to be codified in 26 CFR § 54.9815–2713A(b)(2)). The regulations establish a mechanism for these third-party administrators to be compensated for their expenses by obtaining a reduction in the fee paid by insurers to participate in the federally facilitated exchanges. See 78 Fed.Reg. 39893 (to be codified in 26 CFR § 54.9815–2713A (b)(3)). HHS believes that these fee reductions will not materially affect funding of the exchanges because “payments for contraceptive services will represent only a small portion of total [exchange] user fees.” 78 Fed.Reg. 39882.

9 In a separate challenge to this framework for religious nonprofit organizations, the Court recently ordered that, pending appeal, the eligible organizations be permitted to opt out of the contraceptive mandate by providing written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators. See *Little Sisters of the Poor v. Sebelius*, 571 U.S. —, 134 S.Ct. 1022, 187 L.Ed.2d 867 (2014).

10 While the Government predicts that this number will decline over time, the total number of Americans working for employers to whom the contraceptive mandate does not apply is still substantial, and there is no legal requirement that grandfathered plans ever be phased out.

11 Online at http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

12 Mennonite Church USA, Statement on Abortion, online at <http://www.mennoniteusa.org/resource-center/resources/statements-and-resolutions/statement-on-abortion/>.

13 The Hahns and Conestoga also claimed that the contraceptive mandate violates the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. § 553, but those claims are not before us.

14 See, e.g., WebMD Health News, New Morning–After Pill Ella Wins FDA Approval, online at <http://www.webmd.com/sex/birth-control/news/20100813/new-morning-after-pill-ella-wins-fda-approval>.

15 The Greens operate Hobby Lobby and Mardel through a management trust, of which each member of the family serves as trustee. 723 F.3d 1114, 1122 (C.A.10 2013). The family provided that the trust would also be governed according to their religious principles. *Ibid*.

16 They also raised a claim under the Administrative Procedure Act, 5 U.S.C. § 553.

17 Given its RFRA ruling, the court declined to address the plaintiffs’ free-exercise claim or the question whether the Greens could bring RFRA claims as individual owners of Hobby Lobby and Mardel. Four judges, however, concluded that the Greens could do so, see 723 F.3d, at 1156 (Gorsuch, J., concurring); *id.*, at 1184 (Matheson, J., concurring in part and dissenting in part), and three of those judges would have granted plaintiffs a preliminary injunction, see *id.*, at 1156 (Gorsuch, J., concurring).

18 As discussed, n. 3, *supra*, in *City of Boerne* we stated that RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-*Smith* decisions. Although the author of the principal dissent joined the Court’s opinion in *City of Boerne*, she now claims that the statement was incorrect. *Post*, at 2793. For present purposes, it is unnecessary to adjudicate this dispute. Even if RFRA simply restored the status quo ante, there is no reason to believe, as HHS and the dissent seem to suggest, that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases. See *infra*, at 2771 – 2774.

- 19 Cf. Brief for Federal Petitioners in *O Centro*, O.T. 2004, No. 04–1084, p. II (stating that the organizational respondent was “a New Mexico Corporation”); Brief for Federal Respondent in *Hosanna–Tabor*, O.T. 2011, No. 10–553, p. 3 (stating that the petitioner was an “ecclesiastical corporation”).
- 20 Not only does the Government concede that the term “persons” in RFRA includes nonprofit corporations, it goes further and appears to concede that the term might also encompass other artificial entities, namely, general partnerships and unincorporated associations. See Brief for HHS in No. 13–354, at 28, 40.
- 21 Although the principal dissent seems to think that Justice Brennan’s statement in *Amos* provides a ground for holding that for-profit corporations may not assert free-exercise claims, that was not Justice Brennan’s view. See *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617, 642, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961) (dissenting opinion); *infra*, at 2772 – 2773.
- 22 It is revealing that the principal dissent cannot even bring itself to acknowledge that *Braunfeld* was correct in entertaining the merchants’ claims. See *post*, at 2797 (dismissing the relevance of *Braunfeld* in part because “[t]he free exercise claim asserted there was promptly rejected on the merits”).
- 23 See, e.g., 724 F.3d, at 385 (“We do not see how a for-profit, ‘artificial being,’ ... that was created to make money” could exercise religion); *Grote v. Sebelius*, 708 F.3d 850, 857 (C.A.7 2013) (Rovner, J. dissenting) (“So far as it appears, the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere”); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 626 (C.A.7 2013) (“Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as ‘persons’ under RFRA”); see also 723 F.3d, at 1171–1172 (Briscoe, C.J., dissenting) (“[T]he specific purpose for which [a corporation] is created matters greatly to how it will be categorized and treated under the law” and “it is undisputed that Hobby Lobby and Mardel are for-profit corporations focused on selling merchandise to consumers”).
- The principal dissent makes a similar point, stating that “[f]or-profit corporations are different from religious nonprofits in that they use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers.” *Post*, at 2797 (internal quotation marks omitted). The first half of this statement is a tautology; for-profit corporations do indeed differ from nonprofits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek “to perpetuate the religious values shared,” in these cases, by their owners. Conestoga’s Vision and Values Statement declares that the company is dedicated to operating “in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business.” App. in No. 13–356, p. 94. Similarly, Hobby Lobby’s statement of purpose proclaims that the company “is committed to ... Honoring the Lord in all we do by operating ... in a manner consistent with Biblical principles.” App. in No. 13–354, p. 135. The dissent also believes that history is not on our side because even Blackstone recognized the distinction between “ecclesiastical and lay” corporations. *Post*, at 2796. What Blackstone illustrates, however, is that dating back to 1765, there was no sharp divide among corporations in their capacity to exercise religion; Blackstone recognized that even what he termed “lay” corporations might serve “the promotion of piety.” 1 W. Blackstone, Commentaries on the Law of England 458–459 (1765). And whatever may have been the case at the time of Blackstone, modern corporate law (and the law of the States in which these three companies are incorporated) allows for-profit corporations to “perpetuat[e] religious values.”
- 24 See, e.g., M. Sanders, Joint Ventures Involving Tax–Exempt Organizations 555 (4th ed. 2013) (describing Google.org, which “advance[s] its charitable goals” while operating as a for-profit corporation to be able to “invest in for-profit endeavors, lobby for policies that support its philanthropic goals, and tap Google’s innovative technology and workforce” (internal quotation marks and alterations omitted)); cf. 26 CFR § 1.501(c)(3)–1(c)(3).
- 25 See Benefit Corp Information Center, online at <http://www.benefitcorp.net/state-by-state-legislative-status>; e.g., Va.Code Ann. §§ 13.1–787, 13.1–626, 13.1–782 (Lexis 2011) (“A benefit corporation shall have as one of its purposes the purpose of creating a general public benefit,” and “may identify one or more specific public benefits that it is the purpose of the benefit corporation to create.... This purpose is in addition to [the purpose of engaging in any lawful business].” “ ‘Specific public benefit’ means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation....”); S.C. Code Ann. §§ 33–38–300 (2012 Cum. Supp.), 33–3–101 (2006), 33–38–130 (2012 Cum. Supp.) (similar).
- 26 See Brief for Appellants in *Gallagher*, O.T. 1960 No. 11, pp. 16, 28–31 (arguing that corporation “has no ‘religious belief’ or ‘religious liberty,’ and had no standing in court to assert that its free exercise of religion was impaired”).
- 27 The principal dissent points out that “the exemption codified in § 238n(a) was not enacted until three years after RFRA’s passage.” *Post*, at 2795, n. 15. The dissent takes this to mean that RFRA did not, in fact, “ope[n] all statutory schemes

to religion-based challenges by for-profit corporations” because if it had “there would be no need for a statute-specific, post-RFRA exemption of this sort.” *Ibid.*

This argument fails to recognize that the protection provided by § 238n(a) differs significantly from the protection provided by RFRA. Section 238n(a) flatly prohibits discrimination against a covered healthcare facility for refusing to engage in certain activities related to abortion. If a covered healthcare facility challenged such discrimination under RFRA, by contrast, the discrimination would be unlawful only if a court concluded, among other things, that there was a less restrictive means of achieving any compelling government interest.

In addition, the dissent's argument proves too much. Section 238n(a) applies evenly to “any health care entity”—whether it is a religious nonprofit entity or a for-profit entity. There is no dispute that RFRA protects religious nonprofit corporations, so if § 238n(a) were redundant as applied to for-profit corporations, it would be equally redundant as applied to nonprofits.

28 To qualify for RFRA's protection, an asserted belief must be “sincere”; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. Cf., e.g., *United States v. Quaintance*, 608 F.3d 717, 718–719 (C.A.10 2010).

29 See, e.g., *Ochs v. Thalacker*, 90 F.3d 293, 296 (C.A.8 1996); *Green v. White*, 525 F.Supp. 81, 83–84 (E.D.Mo.1981); *Abate v. Walton*, 1996 WL 5320, *5 (C.A.9, Jan. 5, 1996); *Winters v. State*, 549 N.W.2d 819–820 (Iowa 1996).

30 The principal dissent attaches significance to the fact that the “Senate voted down [a] so-called ‘conscience amendment,’ which would have enabled any employer or insurance provider to deny coverage based on its asserted religious beliefs or moral convictions.” *Post*, at 2789. The dissent would evidently glean from that vote an intent by the Senate to prohibit for-profit corporate employers from refusing to offer contraceptive coverage for religious reasons, regardless of whether the contraceptive mandate could pass muster under RFRA's standards. But that is not the only plausible inference from the failed amendment—or even the most likely. For one thing, the text of the amendment was “written so broadly that it would allow any employer to deny any health service to any American for virtually any reason—not just for religious objections.” 158 Cong. Rec. S1165 (Mar. 1, 2012) (emphasis added). Moreover, the amendment would have authorized a blanket exemption for religious or moral objectors; it would not have subjected religious-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of a requirement on religious adherents, but also the government's interest and how narrowly tailored the requirement is. It is thus perfectly reasonable to believe that the amendment was voted down because it extended more broadly than the pre-existing protections of RFRA. And in any event, even if a rejected amendment to a bill could be relevant in other contexts, it surely cannot be relevant here, because any “Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law *explicitly excludes* such application by reference to [RFRA].” 42 U.S.C. § 2000bb–3(b) (emphasis added). It is not plausible to find such an explicit reference in the meager legislative history on which the dissent relies.

31 Indeed, one of HHS's stated reasons for establishing the religious accommodation was to “encourag[e] eligible organizations to *continue* to offer health coverage.” 78 Fed.Reg. 39882 (2013) (emphasis added).

32 Attempting to compensate for dropped insurance by raising wages would also present administrative difficulties. In order to provide full compensation for employees, the companies would have to calculate the value to employees of the convenience of retaining their employer-provided coverage and thus being spared the task of attempting to find and sign up for a comparable plan on an exchange. And because some but not all of the companies' employees may qualify for subsidies on an exchange, it would be nearly impossible to calculate a salary increase that would accurately restore the status quo ante for all employees.

33 This argument is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the very same religious objections as the Hahns and Greens and their companies. The connection between what these religious employers would be required to do if not exempted (provide insurance coverage for particular contraceptives) and the ultimate event that they find morally wrong (destruction of an embryo) is exactly the same. Nevertheless, as discussed, HHS and the Labor and Treasury Departments authorized the exemption from the contraceptive mandate of group health plans of certain religious employers, and later expanded the exemption to include certain nonprofit organizations with religious objections to contraceptive coverage. 78 Fed.Reg. 39871. When this was done, the Government made clear that its objective was to “protec[t]” these religious objectors “from having to contract, arrange, pay, or refer for such coverage.” *Ibid.* Those exemptions would be hard to understand if the plaintiffs' objections here were not substantial.

34 See, e.g., Oderberg, *The Ethics of Co-operation in Wrongdoing*, in *Modern Moral Philosophy* 203–228 (A. O'Hear ed. 2004); T. Higgins, *Man as Man: The Science and Art of Ethics* 353, 355 (1949) (“The general principles governing cooperation” in wrongdoing—*i.e.*, “physical activity (or its omission) by which a person assists in the evil act of another

who is the principal agent”—“present troublesome difficulties in application”); 1 H. Davis, *Moral and Pastoral Theology* 341 (1935) (Cooperation occurs “when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does”).

35 The principal dissent makes no effort to reconcile its view about the substantial-burden requirement with our decision in *Thomas*.

36 Online at <http://cbo.gov/publication/45231>.

37 In a related argument, HHS appears to maintain that a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties. Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals. It is certainly true that in applying RFRA “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (applying RLUIPA). That consideration will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. Otherwise, for example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants). By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless. In any event, our decision in these cases need not result in any detrimental effect on any third party. As we explain, see *infra*, at 2781 – 2782, the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers’ religious objections.

38 HHS has concluded that insurers that insure eligible employers opting out of the contraceptive mandate and that are required to pay for contraceptive coverage under the accommodation will not experience an increase in costs because the “costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women’s health.” 78 Fed.Reg. 39877. With respect to self-insured plans, the regulations establish a mechanism for the eligible employers’ third-party administrators to obtain a compensating reduction in the fee paid by insurers to participate in the federally facilitated exchanges. HHS believes that this system will not have a material effect on the funding of the exchanges because the “payments for contraceptive services will represent only a small portion of total [federally facilitated exchange] user fees.” *Id.*, at 39882; see 26 CFR § 54.9815–2713A(b)(3).

39 See n. 9, *supra*.

40 The principal dissent faults us for being “noncommittal” in refusing to decide a case that is not before us here. *Post*, at 2803. The less restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address.

41 In the principal dissent’s view, the Government has not had a fair opportunity to address this accommodation, *post*, at 2803, n. 27, but the Government itself apparently believes that when it “provides an exception to a general rule for secular reasons (or for only certain religious reasons), [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests.” Brief for the United States as *Amicus Curiae* in *Holt v. Hobbs*, No. 13–6827, p. 10, now pending before the Court.

42 Cf. 42 U.S.C. § 1396s (Federal “program for distribution of pediatric vaccines” for some uninsured and underinsured children).

43 HHS highlights certain statements in the opinion in *Lee* that it regards as supporting its position in these cases. In particular, HHS notes the statement that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” 455 U.S., at 261, 102 S.Ct. 1051. *Lee* was a free exercise, not a RFRA, case, and the statement to which HHS points, if taken at face value, is squarely inconsistent with the plain meaning of RFRA. Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.

1 The Court insists it has held none of these things, for another less restrictive alternative is at hand: extending an existing accommodation, currently limited to religious nonprofit organizations, to encompass commercial enterprises. See *ante*,

at 2759 – 2760. With that accommodation extended, the Court asserts, “women would still be entitled to all [Food and Drug Administration]-approved contraceptives without cost sharing.” *Ante*, at 2760. In the end, however, the Court is not so sure. In stark contrast to the Court’s initial emphasis on this accommodation, it ultimately declines to decide whether the highlighted accommodation is even lawful. See *ante*, at 2782 (“We do not decide today whether an approach of this type complies with RFRA....”).

- 2 See 42 U.S.C. § 300gg–13(a)(1)–(3) (group health plans must provide coverage, without cost sharing, for (1) certain “evidence-based items or services” recommended by the U.S. Preventive Services Task Force; (2) immunizations recommended by an advisory committee of the Centers for Disease Control and Prevention; and (3) “with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration”).
- 3 The IOM is an arm of the National Academy of Sciences, an organization Congress established “for the explicit purpose of furnishing advice to the Government.” *Public Citizen v. Department of Justice*, 491 U.S. 440, 460, n. 11, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (internal quotation marks omitted).
- 4 HRSA, HHS, Women’s Preventive Services Guidelines, available at <http://www.hrsa.gov/womensguidelines/> (all Internet materials as visited June 27, 2014, and available in Clerk of Court’s case file), reprinted in App. to Brief for Petitioners in No. 13–354, pp. 43–44a. See also 77 Fed.Reg. 8725–8726 (2012).
- 5 45 CFR § 147.130(a)(1)(iv) (2013) (HHS); 29 CFR § 2590.715–2713(a)(1)(iv) (2013) (Labor); 26 CFR § 54.9815–2713(a)(1)(iv) (2013) (Treasury).
- 6 Separating moral convictions from religious beliefs would be of questionable legitimacy. See *Welsh v. United States*, 398 U.S. 333, 357–358, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in result).
- 7 As the Court explains, see *ante*, at 2764 – 2767, these cases arise from two separate lawsuits, one filed by Hobby Lobby, its affiliated business (Mardel), and the family that operates these businesses (the Greens); the other filed by Conestoga and the family that owns and controls that business (the Hahns). Unless otherwise specified, this opinion refers to the respective groups of plaintiffs as Hobby Lobby and Conestoga.
- 8 See *Wisconsin v. Yoder*, 406 U.S. 205, 230, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (“This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985) (invalidating state statute requiring employers to accommodate an employee’s Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees). Notably, in construing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, the Court has cautioned that “adequate account” must be taken of “the burdens a requested accommodation may impose on nonbeneficiaries.” *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005); see *id.*, at 722, 125 S.Ct. 2113 (“an accommodation must be measured so that it does not override other significant interests”). A balanced approach is all the more in order when the Free Exercise Clause itself is at stake, not a statute designed to promote accommodation to religious beliefs and practices.
- 9 Under *Sherbert* and *Yoder*, the Court “requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.” *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 894, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (O’Connor, J., concurring in judgment).
- 10 RLUIPA, the Court notes, includes a provision directing that “[t]his chapter [*i.e.*, RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution.” 42 U.S.C. § 2000cc–3(g); see *ante*, at 2761 – 2762, 2772. RFRA incorporates RLUIPA’s definition of “exercise of religion,” as RLUIPA does, but contains no omnibus rule of construction governing the statute in its entirety.
- 11 The Court points out that I joined the majority opinion in *City of Boerne* and did not then question the statement that “least restrictive means ... was not used [*pre-Smith*].” *Ante*, at 2767, n. 18. Concerning that observation, I remind my colleagues of Justice Jackson’s sage comment: “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.” *Massachusetts v. United States*, 333 U.S. 611, 639–640, 68 S.Ct. 747, 92 L.Ed. 968 (1948) (dissenting opinion).
- 12 As earlier explained, see *supra*, at 2791 – 2792, RLUIPA’s amendment of the definition of “exercise of religion” does not bear the weight the Court places on it. Moreover, it is passing strange to attribute to RLUIPA any purpose to cover entities other than “religious assembl[ies] or institution[s].” 42 U.S.C. § 2000cc(a)(1). But cf. *ante*, at 2772. That law applies to land-use regulation. § 2000cc(a)(1). To permit commercial enterprises to challenge zoning and other land-

use regulations under RLUIPA would “dramatically expand the statute’s reach” and deeply intrude on local prerogatives, contrary to Congress’ intent. Brief for National League of Cities et al. as *Amici Curiae* 26.

13 The Court regards *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961), as “suggest [ing] ... that for-profit corporations possess [free-exercise] rights.” *Ante*, at 2772 – 2773. See also *ante*, at 2769, n. 21. The suggestion is barely there. True, one of the five challengers to the Sunday closing law assailed in *Gallagher* was a corporation owned by four Orthodox Jews. The other challengers were human individuals, not artificial, law-created entities, so there was no need to determine whether the corporation could institute the litigation. Accordingly, the plurality stated it could pretermitt the question “whether appellees ha[d] standing” because *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), which upheld a similar closing law, was fatal to their claim on the merits. 366 U.S., at 631, 81 S.Ct. 1122.

14 See, e.g., *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. —, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012); *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990).

15 Typically, Congress has accorded to organizations religious in character religion-based exemptions from statutes of general application. E.g., 42 U.S.C. § 2000e–1(a) (Title VII exemption from prohibition against employment discrimination based on religion for “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on ... of its activities”); 42 U.S.C. § 12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990). It can scarcely be maintained that RFRA enlarges these exemptions to allow Hobby Lobby and Conestoga to hire only persons who share the religious beliefs of the Greens or Hahns. Nor does the Court suggest otherwise. Cf. *ante*, at 2773.

The Court does identify two statutory exemptions it reads to cover for-profit corporations, 42 U.S.C. §§ 300a–7(b)(2) and 238n(a), and infers from them that “Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations,” *ante*, at 2774. The Court’s inference is unwarranted. The exemptions the Court cites cover certain medical personnel who object to performing or assisting with abortions. Cf. *ante*, at 2773, n. 27 (“the protection provided by § 238n(a) differs significantly from the protection provided by RFRA”). Notably, the Court does not assert that these exemptions have in fact been afforded to for-profit corporations. See § 238n(c) (“health care entity” covered by exemption is a term defined to include “an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions”); Tozzi, *Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?*, 48 J. Catholic Legal Studies 269, 296, n. 133 (2009) (“Catholic physicians, but not necessarily hospitals, ... may be able to invoke [§ 238n(a)]...”); cf. S. 137, 113th Cong., 1st Sess. (2013) (as introduced) (Abortion Non–Discrimination Act of 2013, which would amend the definition of “health care entity” in § 238n to include “hospital[s],” “health insurance plan[s],” and other health care facilities). These provisions are revealing in a way that detracts from one of the Court’s main arguments. They show that Congress is not content to rest on the Dictionary Act when it wishes to ensure that particular entities are among those eligible for a religious accommodation.

Moreover, the exemption codified in § 238n(a) was not enacted until three years after RFRA’s passage. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 515, 110 Stat. 1321–245. If, as the Court believes, RFRA opened all statutory schemes to religion-based challenges by for-profit corporations, there would be no need for a statute-specific, post-RFRA exemption of this sort.

16 That is not to say that a category of plaintiffs, such as resident aliens, may bring RFRA claims only if this Court expressly “addressed their [free-exercise] rights before *Smith*.” *Ante*, at 2773. Continuing with the Court’s example, resident aliens, unlike corporations, are flesh-and-blood individuals who plainly count as persons sheltered by the First Amendment, see *United States v. Verdugo–Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (citing *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945)), and *a fortiori*, RFRA.

17 I part ways with Justice KENNEDY on the context relevant here. He sees it as the employers’ “exercise [of] their religious beliefs within the context of their own closely held, for-profit corporations.” *Ante*, at 2785 (concurring opinion). See also *ante*, at 2782 – 2783 (opinion of the Court) (similarly concentrating on religious faith of employers without reference to the different beliefs and liberty interests of employees). I see as the relevant context the employers’ asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers’ religious beliefs.

18 According to the Court, the Government “concedes” that “nonprofit corporation[s]” are protected by RFRA. *Ante*, at 2768. See also *ante*, at 2769, 2771, 2774. That is not an accurate description of the Government’s position, which encompasses

only “churches,” “*religious* institutions,” and “*religious* non-profits.” Brief for Respondents in No. 13–356, p. 28 (emphasis added). See also Reply Brief in No. 13–354, p. 8 (“RFRA incorporates the longstanding and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.”).

19 The Court does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public. No need to speculate on that, the Court says, for “it seems unlikely” that large corporations “will often assert RFRA claims.” *Ante*, at 2774. Perhaps so, but as Hobby Lobby’s case demonstrates, such claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse. “Closely held” is not synonymous with “small.” Hobby Lobby is hardly the only enterprise of sizable scale that is family owned or closely held. For example, the family-owned candy giant Mars, Inc., takes in \$33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than \$136 billion in revenues and employs some 140,000 persons. See Forbes, America’s Largest Private Companies 2013, available at <http://www.forbes.com/largest-private-companies/>.

Nor does the Court offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations. The Court is satisfied that “[s]tate corporate law provides a ready means for resolving any conflicts,” *ante*, at 2775, but the authorities cited in support of that proposition are hardly helpful. See Del.Code Ann., Tit. 8, § 351 (2011) (certificates of incorporation may specify how the business is managed); 1 J. Cox & T. Hazen, *Treatise on the Law of Corporations* § 3:2 (3d ed. 2010) (section entitled “Selecting the state of incorporation”); *id.*, § 14:11 (observing that “[d]espite the frequency of dissension and deadlock in close corporations, in some states neither legislatures nor courts have provided satisfactory solutions”). And even if a dispute settlement mechanism is in place, how is the arbiter of a religion-based intracorporate controversy to resolve the disagreement, given this Court’s instruction that “courts have no business addressing [whether an asserted religious belief] is substantial,” *ante*, at 2778?

20 The Court dismisses the argument, advanced by some *amici*, that the \$2,000–per–employee tax charged to certain employers that fail to provide health insurance is less than the average cost of offering health insurance, noting that the Government has not provided the statistics that could support such an argument. See *ante*, at 2775 – 2777. The Court overlooks, however, that it is not the Government’s obligation to prove that an asserted burden is *insubstantial*. Instead, it is incumbent upon plaintiffs to demonstrate, in support of a RFRA claim, the substantiality of the alleged burden.

21 The Court levels a criticism that is as wrongheaded as can be. In no way does the dissent “tell the plaintiffs that their beliefs are flawed.” *Ante*, at 2778. Right or wrong in this domain is a judgment no Member of this Court, or any civil court, is authorized or equipped to make. What the Court must decide is not “the plausibility of a religious claim,” *ante*, at 2778 (internal quotation marks omitted), but whether accommodating that claim risks depriving others of rights accorded them by the laws of the United States. See *supra*, at 2790 – 2791; *infra*, at 2801.

22 IUDs, which are among the most reliable forms of contraception, generally cost women more than \$1,000 when the expenses of the office visit and insertion procedure are taken into account. See Eisenberg, McNicholas, & Peipert, Cost as a Barrier to Long–Acting Reversible Contraceptive (LARC) Use in Adolescents, 52 J. Adolescent Health S59, S60 (2013). See also Winner et al., Effectiveness of Long–Acting Reversible Contraception, 366 New Eng. J. Medicine 1998, 1999 (2012).

23 Although the Court’s opinion makes this assumption grudgingly, see *ante*, at 2779 – 2780, one Member of the majority recognizes, without reservation, that “the [contraceptive coverage] mandate serves the Government’s compelling interest in providing insurance coverage that is necessary to protect the health of female employees.” *Ante*, at 2785 – 2786 (opinion of KENNEDY, J.).

24 Hobby Lobby’s *amicus* National Religious Broadcasters similarly states that, “[g]iven the nature of employers’ needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the ‘grandfather’ exclusion is *de minimis* and transitory at best.” Brief for National Religious Broadcasters as *Amicus Curiae* in No. 13–354, p. 28.

25 As the Court made clear in *Cutter*, the government’s license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause. 544 U.S., at 720–722, 125 S.Ct. 2113. “[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference,” *Braunfeld*, 366 U.S., at 606, 81 S.Ct. 1144, a “rich mosaic of religious faiths,” *Town of Greece v. Galloway*, 572 U.S. —, —, 134 S.Ct. 1811, 1849, 188 L.Ed.2d 835 (2014) (KAGAN, J., dissenting). Consequently, one person’s right to free exercise must be kept in harmony with the rights

- of her fellow citizens, and “some religious practices [must] yield to the common good.” *United States v. Lee*, 455 U.S. 252, 259, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).
- 26 Cf. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine “whether the challenged regulation is the least restrictive means among *available*, effective alternatives” (emphasis added)).
- 27 On brief, Hobby Lobby and Conestoga barely addressed the extension solution, which would bracket commercial enterprises with nonprofit religion-based organizations for religious accommodations purposes. The hesitation is understandable, for challenges to the adequacy of the accommodation accorded religious nonprofit organizations are currently *sub judice*. See, e.g., *Little Sisters of the Poor Home for the Aged v. Sebelius*, — F.Supp.2d —, 2013 WL 6839900 (D.Colo., Dec. 27, 2013), injunction pending appeal granted, 571 U.S. —, 134 S.Ct. 1022, 187 L.Ed.2d 867 (2014). At another point in today’s decision, the Court refuses to consider an argument neither “raised below [nor] advanced in this Court by any party,” giving Hobby Lobby and Conestoga “[no] opportunity to respond to [that] novel claim.” *Ante*, at 2776. Yet the Court is content to decide this case (and this case only) on the ground that HHS could make an accommodation never suggested in the parties’ presentations. RFRA cannot sensibly be read to “requir[e] the government to ... refute each and every conceivable alternative regulation,” *United States v. Wilgus*, 638 F.3d 1274, 1289 (C.A.10 2011), especially where the alternative on which the Court seizes was not pressed by any challenger.
- 28 As a sole proprietor, Lee was subject to personal liability for violating the law of general application he opposed. His claim to a religion-based exemption would have been even thinner had he conducted his business as a corporation, thus avoiding personal liability.
- 29 Congress amended the Social Security Act in response to *Lee*. The amended statute permits Amish sole proprietors and partnerships (but not Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes only for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U.S.C. § 3127(a)(2), (b)(1). Thus, employers with sincere religious beliefs have no right to a religion-based exemption that would deprive employees of Social Security benefits without the employee’s consent—an exemption analogous to the one Hobby Lobby and Conestoga seek here.
- 30 Cf. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) (disallowing religion-based exemption that “would undoubtedly give [the commercial enterprise seeking the exemption] and similar organizations an advantage over their competitors”).
- 31 Religious objections to immunization programs are not hypothetical. See *Phillips v. New York*, — F.Supp.2d —, 2014 WL 2547584 (E.D.N.Y., June 5, 2014) (dismissing free exercise challenges to New York’s vaccination practices); Liberty Counsel, *Compulsory Vaccinations Threaten Religious Freedom* (2007), available at http://www.lc.org/media/9980/attachments/memo_vaccination.pdf.

EXHIBIT 31

 KeyCite Red Flag - Severe Negative Treatment
Disapproved of by [Christiansburg Garment Co. v. Equal Employment Opportunity Commission](#), U.S.Va., January 23, 1978

563 F.2d 439
 United States Court of Appeals,
 Sixth Circuit.

EQUAL EMPLOYMENT OPPORTUNITY
 COMMISSION, Plaintiff-Appellant,

v.

The BAILEY COMPANY, INC., Defendant-Appellee.

No. 76-1045.

Argued Feb. 15, 1977.

Decided Sept. 20, 1977.

Rehearing Denied Oct. 17, 1977.

The Equal Employment Opportunity Commission brought suit under Civil Rights Act of 1964 against employer on claim that employer had engaged in certain unlawful employment practices with respect to blacks and members of particular religious society. The United States District Court for the Middle District of Tennessee, L. Clure Morton, J., dismissed the suit for lack of jurisdiction and awarded attorney fees to employer, and Commission appealed. The Court of Appeals, John W. Peck, Circuit Judge, held that: (1) portion of complaint incorporating allegations of religious discrimination exceeded scope of Commission investigation of employer reasonably expected to grow out of employee's charge of sex and race discrimination, since Commission's reasonable cause determination, conciliation efforts, and lawsuit made allegations of religious discrimination based on evidence wholly apart from employee's experience, and thus district court was without jurisdiction over allegations of religious discrimination; (2) white female employee had standing to file charge with Equal Employment Opportunity Commission protesting alleged race discrimination against blacks by her employer, and thus Commission investigation of employer for race discrimination was proper and allegations of racial discrimination in Commission's complaint were properly before district court; (3) an award of attorney fees against Commission for simply bringing allegations of racial discrimination in its complaint was not proper; (4) district court may, in its discretion, award an attorney's fee to

employer if employer prevails, and (5) a finding of bad faith on part of losing plaintiff in a discrimination in employment case under Civil Rights Act of 1964 is not a necessary prerequisite to awarding attorney fees to a prevailing employer.

Affirmed in part and reversed in part.

West Headnotes (13)

[1] **Civil Rights**

 **Pleading**

Complaint of Equal Employment Opportunity Commission is limited to scope of Commission's investigation reasonably expected to grow out of the charge of discrimination. Civil Rights Act of 1964, §§ 701 et seq., 703(a) as amended [42 U.S.C.A. §§ 2000e et seq., 2000e-2\(a\)](#).

[58 Cases that cite this headnote](#)

[2] **Civil Rights**

 **Pleading**

Portion of complaint of Equal Employment Opportunity Commission incorporating allegations of religious discrimination exceeded scope of Commission investigation of employer reasonably expected to grow out of employee's charge of sex and race discrimination, since Commission's reasonable cause determination, conciliation efforts, and lawsuit made allegations of religious discrimination based on evidence wholly apart from employee's experience, and thus district court was without jurisdiction over allegations of religious discrimination in Commission's lawsuit against employer. Civil Rights Act of 1964, §§ 701 et seq., 703(a) as amended [42 U.S.C.A. §§ 2000e et seq., 2000e-2\(a\)](#).

[59 Cases that cite this headnote](#)

[3] **Civil Rights**

 **Charges and Investigations**

Procedure to be followed when instances of discrimination, of a kind other than that

raised by a charge filed by an individual party and unrelated to the individual party, come to attention of Equal Employment Opportunity Commission during the course of an investigation of private party's charge is for the filing of a charge by a member of the Commission and for a full Commission investigation of that charge. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 706(a) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a), 2000e-5(b).

[7 Cases that cite this headline](#)

[4] Constitutional Law

🔑 Employment Discrimination Laws

Requirement of timely notice to an employer of a charge filed with Equal Employment Opportunity Commission alleging employment discrimination embodies due process guarantees. Civil Rights Act of 1964, § 703 as amended 42 U.S.C.A. § 2000e-2; U.S.C.A.Const. Amend. 5.

[3 Cases that cite this headline](#)

[5] Civil Rights

🔑 Charges and Investigations

The scope of a complaint by Equal Employment Opportunity Commission is limited to scope of Commission investigation reasonably expected to grow out of individual party's charge even if there is no objection to Commission requests for evidence; a disclosure by cooperating employer should not act as an estoppel against employer so as to exempt Commission from observing procedures that Congress has designed to obtain voluntary compliance with law. Civil Rights Act of 1964, §§ 701 et seq., 703(a) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a).

[28 Cases that cite this headline](#)

[6] Civil Rights

🔑 Charges and Investigations

For purposes of jurisdiction of suit by Equal Employment Opportunity Commission against employer, an investigation by Commission of one form of employment discrimination cannot

always be said to have reasonably been expected to grow out of an employee's charge of another form of employment discrimination. Civil Rights Act of 1964, §§ 701 et seq., 703(a) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a).

[3 Cases that cite this headline](#)

[7] Civil Rights

🔑 Persons Protected and Entitled to Sue

Definition of "a person claimed to be aggrieved" under Title VII of Civil Rights Act of 1964 includes a white person who may have suffered from loss of benefits from the lack of association with racial minorities at work. Civil Rights Act of 1964, § 706(a) as amended 42 U.S.C.A. § 2000e-5(b).

[22 Cases that cite this headline](#)

[8] Civil Rights

🔑 Charges and Investigations

Even if employee only has standing to complain of racial discrimination in employee's department, the Equal Employment Opportunity Commission may properly investigate the entire company for patterns of the discrimination of which the employee has complained and bring suit on the basis of evidence relating to the entire company uncovered during the investigation. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 706(a) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a), 2000e-5(b).

[2 Cases that cite this headline](#)

[9] Civil Rights

🔑 Charges and Investigations

Civil Rights

🔑 Pleading

White female employee had standing to file charge with Equal Employment Opportunity Commission protesting alleged race discrimination against blacks by her employer, and thus Commission investigation of employer for race discrimination was proper and allegations of racial discrimination in Commission's complaint were properly before

district court in action by Commission against employer. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 706(a) as amended [42 U.S.C.A. §§ 2000e et seq., 2000e-2\(a\), 2000e-5\(b\)](#).

[6 Cases that cite this headnote](#)

[10] Civil Rights

 [Parties Entitled or Liable; Immunity](#)

An award of attorney fees against Equal Employment Opportunity Commission for simply bringing allegations of racial discrimination in its complaint against employer was not proper. [42 U.S.C.A. § 1988](#); Civil Rights Act of 1964, §§ 706(k) as amended [42 U.S.C.A. § 2000e-5\(k\)](#).

[Cases that cite this headnote](#)

[11] Civil Rights

 [Results of Litigation; Prevailing Parties](#)

District court may, in its discretion, award an attorney's fee to employer if employer prevails against Equal Employment Opportunity Commission in suit by Commission against employer. Civil Rights Act of 1964, § 706(k) as amended [42 U.S.C.A. § 2000e-5\(k\)](#).

[1 Cases that cite this headnote](#)

[12] Civil Rights

 [Public Benefit; Private Attorneys General](#)

In an employment discrimination case under Civil Rights Act of 1964, attorney fees to prevailing private plaintiffs are allowed, absent exceptional circumstances, since such plaintiffs act as private attorneys general in furthering national policy of eradicating unlawful employment discrimination. Civil Rights Act of 1964, § 706(k) as amended [42 U.S.C.A. § 2000e-5\(k\)](#).

[1 Cases that cite this headnote](#)

[13] Civil Rights

 [Awards to Defendants; Frivolous, Vexatious, or Meritless Claims](#)

A finding of bad faith on part of losing plaintiff in a discrimination in employment case under Civil Rights Act of 1964 is not a necessary prerequisite to awarding attorney fees to a prevailing defendant employer; when the defendant employer prevails, the district court should exercise its discretion in light of all the circumstances of the case and plaintiff's conduct during litigation is but one factor for district court to consider. [42 U.S.C.A. § 1988](#); Civil Rights Act of 1964, § 706(k) as amended [42 U.S.C.A. § 2000e-5\(k\)](#).

[4 Cases that cite this headnote](#)

Attorneys and Law Firms

***441** Abner W. Sibal, Vincent Blackwood, Gen. Counsel, Mollie W. Neal, E.E.O.C., Washington, D. C., Milton C. Branch, Regional Atty., Atlanta Regional Litigation Center, E.E.O.C., Atlanta, Ga., for plaintiff-appellant.

William N. Ozier, Bass, Berry & Sims, Nashville, Tenn., for defendant-appellee.

Before WEICK, PECK and ENGEL, Circuit Judges.

Opinion

JOHN W. PECK, Circuit Judge.

Plaintiff-Appellant Equal Employment Opportunity Commission (EEOC) brought suit under Title VII of the Civil Rights Act of 1964, as amended in 1972, [42 U.S.C. ss 2000e, et seq.](#), alleging that defendant-appellee, The Bailey Company, Inc., had engaged in certain unlawful employment practices, in violation of s 703(a) of Title VII, [42 U.S.C. s 2000e-2\(a\)](#), with respect to blacks and Seventh Day Adventists. In the district court the EEOC sought to have appellee enjoined from engaging in such unlawful employment practices and to have appellee ordered to institute affirmative action programs to provide equal employment opportunities for blacks and Seventh Day Adventists. Appellee denied that it had engaged in any illegal discriminatory employment practices and asserted further that the allegations of racial and religious discrimination were not properly before the district court because the private party's charge of discrimination, which had triggered the EEOC investigation of appellee's employment practices, had been

filed by a white female alleging sex discrimination against women and race discrimination against black women.

The district court agreed with appellee that the EEOC could not bring a lawsuit alleging racial and religious discrimination based on a charge filed by a white woman because the woman did not have standing to charge racial and religious discrimination. The district court dismissed the suit for lack of jurisdiction and awarded attorneys' fees to appellee.

We affirm the portion of the district court order that dismissed for lack of jurisdiction the allegations of religious discrimination. We reverse the portion of the district court order dismissing the allegations of racial discrimination and remand to the district court that part of the case for consideration on the merits. We also reverse the district court award of attorneys' fees to appellee and remand that part of the case for reconsideration in light of the legal principles set forth in this opinion.

I

Appellee company is a Tennessee corporation engaging in the sale, service, and rental *442 of forklift trucks and other allied material handling equipment. Appellee employed approximately 100 people at the time of the EEOC investigation, of whom fifty-two worked at appellee's principal office and place of business in Nashville, Tennessee, and the remainder in the company's several branch offices. The EEOC's complaint and proof at trial focused solely on the employment practices at the Nashville main office.

The initial charge of discrimination lodged with the EEOC against appellee was filed October 19, 1970, by Mrs. Cecile Wade, a white female working in appellee's Accounting Department. Mrs. Wade charged that she had worked at the appellee company for almost two years, that she had experience and education in bookkeeping, that a man with less education and less experience than she was recently hired and placed in a supervisory position over her at a greater rate of pay, and that she was discharged because of her plans to file a charge of sex discrimination with the EEOC. On January 31, 1972, Mrs. Wade amended her charge to add allegations that the company in general failed "to promote females to supervisory positions because of their sex," that the company failed "to pay equally qualified females the same wages as males," and that the company failed "to recruit and hire Negro females because of their race."

The EEOC investigated the racial and sexual composition of appellee's work force, and on November 13, 1972, the Area Director for the EEOC issued a determination that appellee was not guilty of sex discrimination against Mrs. Wade. The Area Director found that Mrs. Wade was not offered the promotion, which she had complained in her charge about not receiving, because she had an unsatisfactory working relationship with her co-workers and that no evidence supported her allegations as to discharge and discriminatory wages.

The Area Director further determined, however, that there was reasonable cause to believe that appellee had failed to recruit and hire blacks because of their race. The Area Director referred first, to the statistical disparity between the percentage of blacks comprising the Nashville population, about 20% according to the U.S. Bureau of Census figures, and the percentage of blacks comprising the work force at appellee company, about 4% according to the work force data submitted to the EEOC by appellee, and second, to the apparent fact that the blacks who were currently working with appellee held low paying janitorial, utility porter, and utility shop employee positions. In addition, the Area Director determined that appellee company admitted that it had failed to hire a qualified male applicant because of his religion.

Pursuant to Title VII procedures, the EEOC attempted conciliation, but on April 4, 1974, notified appellee that such conciliation efforts were unsuccessful. On November 27, 1974, the EEOC filed this lawsuit. The EEOC complained that appellee had engaged in unlawful employment practices at its Nashville office in violation of s 703(a) of Title VII (1) by failing or refusing to hire blacks on an equal basis with whites because of race; (2) by maintaining departments and job classifications that have been segregated on the basis of race; (3) by otherwise limiting, segregating, and classifying employees in ways that have deprived blacks of employment opportunities; (4) by failing or refusing to hire Seventh Day Adventists on the basis of their religion; and (5) by failing or refusing to take affirmative action to eliminate such alleged discriminatory policies and practices.

Trial was held June 24, 1975. At trial, to prove that appellee's employment practices resulted in racial discrimination, the EEOC took testimony from the principal appellee officers and submitted exhibits during that testimony.

James Bailey, appellee's President, described the company structure. Appellee was divided into separate departments for Sales, Parts, Service, and Accounting, with each

department responsible for its own hiring. According to Lurline Yarchever, *443 appellee's Vice President-Finance and head of the Accounting Department, applicants for positions with appellee were received through newspaper advertisements, through listings with the State of Tennessee, private employment agencies and vocational schools, and through word-of-mouth. Mrs. Yarchever testified that a high school education was a qualification for most jobs with appellee, but she added that experience outweighed the value of a high school diploma and that the company had deviated from stated qualifications in hiring particular individuals. As to one category of employment, though, Gordon Morrow, appellee Vice President-Marketing and head of the Sales Department, stated that salesmen should have an engineering degree or engineering experience in order to represent competently appellee's product line.

Further examination of Mrs. Yarchever and exhibits presented with the examination showed the following. At the time of trial, two blacks were working at appellee company, one as a truckdriver and the other as a parts clerk. Previously, blacks had been employed only as janitors. No black had ever worked at appellee as an executive, a manager, a salesman, or a mechanic. No black had ever worked in the white collar Sales and Accounting Departments. Blacks had only worked in the blue collar Parts and Service Departments.

EEOC examination of Mrs. Yarchever at trial showed that these facts, suggesting race discrimination, were developed by the EEOC in its investigation of appellee by requests directed to Mrs. Yarchever to go through appellee employment records, which listed past and present employees, and to indicate whether such employee was white or black. Because appellee's regular employment records did not indicate race, Mrs. Yarchever had to comply with the request by using her memory of appellee's employees, and she did so in an effort to co-operate with the EEOC.

Mrs. Yarchever and Mr. Morrow testified, however, as to facts negating the possibility of race discrimination by appellee. They stated that in the Accounting and Sales Departments no black had ever applied and that there was a small turnover in personnel. Mr. Bailey stated that appellee never had any black applicants for any jobs except as truckdrivers and janitors and that appellee had difficulty getting mechanics of any race. Mrs. Yarchever further insisted that, although appellee had no affirmative action program, appellee's policy was to hire blacks if there was an opening.

The EEOC sought to prove individual cases of race discrimination with the testimony of five black men who had been or were then employees of appellee. Of course, appellee denied that these particular cases showed race discrimination.

The first black witness, Wilbur James Crowder, had been a truckdriver for over two years of the five years he had worked at appellee. He had a tenth grade education and no specialized training. Crowder received the truckdriver position by promotion within the company, replacing two whites who had previously held the position jointly, and stated that he thought he had been treated fairly at appellee. There was a conflict in the testimony as to whether Crowder "had to outwork" or "did outwork" the two whites for the truckdriver job. Although the EEOC elicited testimony to show that Crowder had never been told of job vacancies at appellee, the EEOC did not show that anyone at appellee received notice of job vacancies.

Willie Gene Fischer had been briefly employed as a janitor at appellee in 1974, even though he had prior experience as a truckdriver, crane operator, caterpillar operator, and mechanic. Fischer had applied for the janitorial job in response to a newspaper advertisement, did not apply for any other job at appellee, and left after two weeks for a better job installing air conditioners.

Isaac Cathey was one of four black employees at appellee in the spring of 1974. Cathey had an eleventh grade education and experience as a truckdriver and mail carrier. While employed by appellee as a *444 janitor, Cathey asked about a vacancy in the Parts Department. He was informed that the job paid less and was given instead a pay raise and an upgrade in job classification. Cathey did not press the issue and left appellee after three months to return to work with the State of Tennessee.

Gerald Tyson was employed as a porter at appellee for one year from the spring of 1974 to the spring of 1975. Tyson had a high school education and two years of auto mechanics trade school. Tyson had applied for the porter's position, and he admitted that he had quit his previous job as a mechanic because, as an ex-mental patient, he had problems with concentration and thus with the mechanics work. After a time with appellee, however, Tyson thought that he could again handle a mechanic's job even though he was on medication, and inquired about an opening as a mechanic's trainee. Tyson was passed over in favor of a white man who had experience as a mechanic and had been with appellee nine months.

David Lawson was employed as a janitor at appellee during the summer months of 1974. Lawson had twelve years of education, and his job with appellee was his first after leaving the Navy. Lawson left in the autumn to go to trade school.

The EEOC sought to prove religious discrimination by one statement in an affidavit taken from Mrs. Yarchever in August, 1972, when no counsel for appellee was present. The affidavit stated that appellee did not hire a male applicant for a supervisory position in the Accounting Department “because his religion prevented him from working past sundown on Friday and on Saturday.” However, Mrs. Yarchever denied that appellee had a policy of not hiring persons who could not work on certain days because of their religion and testified that she was Jewish and that the company had hired people, including Seventh Day Adventists, who observed the Sabbath on Saturday. The EEOC presented no Seventh Day Adventist witnesses.

Towards the end of trial, appellee counsel renewed his argument that the EEOC could not bring the lawsuit alleging racial and religious discrimination based on a charge filed by a white woman who only had standing to allege sex discrimination. On October 10, 1975, the district court issued its opinion, agreeing with appellee that the EEOC could not bring the lawsuit and consequently held that the district court was without jurisdiction.

The district court noted that under Title VII, the EEOC's role as investigator is triggered by the filing of a charge either by the EEOC or by a person aggrieved. The district court determined that an individual could not be aggrieved and thus have standing to file a charge against an employer for an unlawful employment practice unless the individual had suffered a deprivation at the hands of the employer because Title VII prohibits practices which discriminate against an individual in regard to his opportunity for and conditions of employment. As to the situation presented by this case, when the EEOC uncovers alleged racial and religious discrimination while investigating a charge of sex discrimination, the district court stated that the mechanism established by Congress required that the EEOC file a charge and observe the procedural prerequisites of notice and investigation as to the additional charges. The district court reasoned that if conciliation is to work according to the intention of Congress, then the EEOC must observe the procedural prerequisites so that the parties could have a reasonable opportunity to prepare for conciliation. Because the district court believed that this requirement had been made

clear to the EEOC in the case law interpreting Title VII, the suit was deemed in bad faith and attorneys' fees were awarded to appellee. The EEOC has appealed.

II

“In the Equal Employment Opportunity Act of 1972 Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court.” *445 [Occidental Life Insurance Co. v. EEOC](#), 432 U.S. 355, 97 S.Ct. 2447, 2451, 53 L.Ed.2d 402 (1977). The procedure is triggered when “a person claiming to be aggrieved” or a member of the EEOC files with the EEOC a charge alleging that an employer has engaged in an unlawful employment practice.¹ Such a charge is to be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is to serve notice of the charge on the employer within ten days of filing and to investigate the charge. s 706(b) of Title VII, 42 U.S.C. s 2000e-5(b). Under s 709(a) of Title VII, 42 U.S.C. s 2000e-8(a), the EEOC may gain access to evidence that is relevant to the charge under investigation, see [Blue Bell Boots, Inc. v. EEOC](#), 418 F.2d 355, 358 (6th Cir. 1969), and under s 710, 42 U.S.C. s 2000e-9,² the EEOC may gain access to evidence that relates to any matter under investigation. The EEOC is then required to determine, “as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge,”³ whether there is reasonable cause to believe the charge is true. s 706(b), 42 U.S.C. s 2000e-5(b). If there is no reasonable cause, the charge must be dismissed and the person claiming to be aggrieved shall be notified. If there is reasonable cause, the EEOC “shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion.” s 706(b), 42 U.S.C. s 2000e-5(b). When the EEOC is unable to secure a conciliation agreement acceptable to the EEOC, the EEOC may bring a civil action.⁴ s 706(f)(1), 42 U.S.C. s 2000e-5(f)(1). See [Occidental Life Insurance Co. v. EEOC](#), *supra*, 432 U.S. at --, 97 S.Ct. at 2450-2452; Conference Committee Report, Section-by-Section Analysis of H.R. 1746, The Equal Employment Act of 1972, 118 Cong.Rec. 7168-69 (Mar. 6, 1972).

The present case raises questions as to how this procedure is to work when any private party brings charges of discrimination that either are of a different kind than brought by the EEOC in its subsequent lawsuit or are of a kind against which the private party arguably would not have standing to

protest. Mrs. Wade, a white female, originally complained of sex discrimination and then amended her charge to include an allegation of race discrimination against black females. The EEOC brought a lawsuit alleging racial and religious discrimination. The district court held that Mrs. Wade's charge could not support the EEOC's lawsuit.

On appeal, the EEOC disputes the district court's conclusion. The EEOC argues first, that a white female does have standing to complain of the absence of black women from the work force and thus the EEOC could investigate racial discrimination and proceed to issue a reasonable cause determination, seek a conciliation agreement, and bring a lawsuit concerning allegations of racial discrimination. The second EEOC *446 argument is that the EEOC can investigate evidence of any other discrimination called to its attention during the course of an investigation and thus could issue a reasonable cause determination, seek a conciliation agreement, and bring a lawsuit concerning allegations of racial and religious discrimination regardless of Mrs. Wade's standing to complain of unlawful employment practices.

Appellee's argument in response is based on a categorization of the discrimination that can occur under Title VII. Appellee separates such discrimination into four kinds: (1) race or color, (2) religious creed, (3) national origin, and (4) sex. See [EEOC v. New York Broadcasting Service, Inc.](#), 364 F.Supp. 651 (W.D.Tenn.1973), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 356 (6th Cir. 1976). Appellee contends that an EEOC suit should be confined to those issues which the charging party would have standing to raise. Appellee argues that in the present case, Mrs. Wade, a white female, did not have standing and was not a person aggrieved within the meaning of s 706(b), 42 U.S.C. s 2000e-5(b), with respect to the allegations of racial and religious discrimination brought by the EEOC in its lawsuit because any such discrimination was not directed at her.

We agree with appellee that the district court correctly decided that it did not have jurisdiction over the allegations of religious discrimination in the EEOC's lawsuit, but our agreement as to the district court's conclusion is based on a different rationale. The portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of appellee reasonably expected to grow out of Mrs. Wade's charge of sex and race discrimination.

[1] The clearly stated rule in this Circuit is that the EEOC's complaint is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge

of discrimination." [Tipler v. E. I. duPont deNemours & Co.](#), 443 F.2d 125, 131 (6th Cir. 1971); [EEOC v. Kimberly-Clark Corp.](#), 511 F.2d 1352, 1363 (6th Cir. 1975), *cert. denied*, 423 U.S. 994, 96 S.Ct. 420 (1976); [McBride v. Delta Air Lines, Inc.](#), 551 F.2d 113, 115 (6th Cir. 1977). Although perhaps applied differently, the rule is the same in other circuits. [EEOC v. Occidental Life Insurance Co.](#), 535 F.2d 533, 541 (9th Cir. 1976), *aff'd on other grounds*, -- U.S. --, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); [Oubichon v. North American Rockwell Corp.](#), 482 F.2d 569, 571 (9th Cir. 1973); [Jenkins v. Blue Cross Mutual Hosp.](#), 538 F.2d 164, 167 (7th Cir. 1976), *cert. denied*, 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976); [EEOC v. Huttig Sash & Door Co.](#), 511 F.2d 453, 455 (5th Cir. 1975); [Danner v. Phillips Petroleum Co.](#), 447 F.2d 159, 162 (5th Cir. 1971); [Sanchez v. Standard Brands, Inc.](#), 431 F.2d 455, 466 (5th Cir. 1970); [King v. Georgia Power Co.](#), 295 F.Supp. 943, 947 (N.D.Ga.1968); [EEOC v. General Electric Co.](#), 532 F.2d 359, 366 (4th Cir. 1976).

There are two reasons for the rule that the EEOC complaint is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination. The first reason is that the rule permits an effective functioning of Title VII when the persons filing complaints are not trained legal technicians. "(T)his Court has recognized that Title VII of the Civil Rights Act of 1964 should not be construed narrowly," [Blue Bell Boots, Inc. v. EEOC](#), *supra*, 418 F.2d at 358, and thus adopted the rule because "charges of discrimination filed before the EEOC will generally be filed by lay complainants who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel." [Tipler v. E. I. duPont deNemours & Co.](#), *supra*, 443 F.2d at 131. Similarly, we stated in [McBride v. Delta Air Lines, Inc.](#), *supra*, 551 F.2d at 115:

Because administrative complaints are filed by completing a form designed to elicit specificity in charges, and because the forms are not legal pleadings and are rarely filed with the advice of legal counsel, any other standard would unreasonably limit subsequent judicial proceedings *447 which Congress has determined are necessary for effective enforcement of the legal standards established by Title VII. See [House Report No. 92-238](#), U.S.Code Cong. and Admin.News, pp. 2141, 2147-48 (1972).

The second reason for limiting the scope of the EEOC complaint to the scope of the EEOC investigation that can be reasonably expected to grow out of the private party's charge is explained in [Sanchez v. Standard Brands, Inc., supra, 431 F.2d at 466](#).

The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation.

[2] It is in light of these two reasons for the rule that we conclude in the present case that allegations of religious discrimination could not reasonably be expected to grow out of Mrs. Wade's charge. First, the present case does not involve the situation in which a lay person has inadequately set forth in the complaint filed with the EEOC the discrimination affecting that person. The evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting Mrs. Wade. Rather, the evidence presented by the EEOC was an isolated, single purported statement by Mrs. Yarchever, appellee's Vice President-Finance and head of the Accounting Department, inferring that she did not hire a male applicant because of his religious commitments which might be inconsistent with his hours of employment.

Thus, [Sanchez v. Standard Brands, Inc., supra, 431 F.2d 455](#), is distinguishable on the facts from the present case. In *Sanchez*, the woman who filed the complaint with the EEOC initially charged that the discrimination against her at work was based on sex. Investigation by the EEOC into the charge revealed that the employer discriminated

against the complaining party because of her national origin and against similarly situated employees because of their race. The lawsuit charging race and national origin discrimination was held to have reasonably grown out of the charge of sex discrimination, even putting aside an amended charge that included allegations of race and national origin discrimination, because the EEOC investigation into the charge revealed the true basis of the discrimination against the employee Sanchez and similarly situated employees. Not to allow the lawsuit would have penalized a lay person for not attaching the correct legal conclusion to her claim and thus would have constituted an improperly narrow construction of Title VII. See [Sanchez v. Standard Brands, Inc., supra, 431 F.2d at 462-67](#).

By contrast, in the present case the EEOC investigation into Mrs. Wade's charge revealed that not only was there no sex discrimination against Mrs. Wade, there was no unlawful discrimination of any kind against Mrs. Wade. Unlike *Sanchez*, the present case is not a matter of the complainant not attaching the correct legal conclusion to her charge with the EEOC. The EEOC's reasonable cause determination, conciliation efforts, and lawsuit made allegations of religious discrimination based on evidence wholly apart from Mrs. Wade's experience.

Second, the present case does not involve a situation in which it would be proper, in view of the statutory scheme of Title VII, to permit the lawsuit to include the allegations of religious discrimination. Rather, to allow the EEOC, as it did in the present *448 case, to issue a reasonable cause determination, to conciliate, and to sue on allegations of religious discrimination unrelated to the private party's charge of sex discrimination would result in undue violence to the legal process that Congress established to achieve equal employment opportunities in this country. See [EEOC v. General Electric Co., 532 F.2d 359, 375 \(4th Cir. 1976\)](#) (Widener, J., dissenting).

[3] The procedure to be followed when instances of discrimination, of a kind other than that raised by a charge filed by an individual party and unrelated to the individual party, come to the EEOC's attention during the course of an investigation of the private party's charge is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that charge. Then the employer is afforded notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation. Section 706(b) of Title VII, [42 U.S.C. s 2000e-5\(b\)](#), provides

for the filing of a charge by a member of the EEOC, and under such a filing, an employer will not be stripped of formal notice of the charge and of the opportunity to respond to the EEOC's inquiry into employment practices with respect to allegations of discrimination unrelated to the individual party's charge. In addition, the filing of a charge will permit settlement discussions to take place pursuant to 29 C.F.R. s 1601.19a⁵ after a preliminary investigation but before any finding of reasonable cause.

Several reasons support this position. The filing of a charge by a member of the EEOC as urged by this Court should lead to a more focused investigation on the facts of possible discrimination by an employer when that possible discrimination is not related to the individual party's charge. The danger of permitting the EEOC to sue with respect to discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party is illustrated by the present case. The sole piece of evidence relied upon by the EEOC to prove religious discrimination by appellee was, as we have said, a purported statement by Mrs. Yarchever, appellee's Vice President-Finance and head of the Accounting Department, in an affidavit capable of being construed as an admission that she had not hired a male applicant because he was a Sabbatarian. There was no other evidence presented by the EEOC as to any other possible cases of religious discrimination by appellee, and in the one situation that the EEOC did present, it is not clear, especially in view of the Supreme Court's recent decision in *TransWorld Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), that the facts were developed sufficiently to answer the question whether there would have been an undue hardship on appellee to accommodate reasonably to the applicant's religious practices. Section 701(j) of Title VII, 42 U.S.C. s 2000e(j), in conjunction with s 703 of Title VII, 42 U.S.C. s 2000e-2, provide in essence that discrimination against an individual because of religion will not be unlawful when there is an undue hardship on an employer to accommodate reasonably to the applicant's religious practices.

We thus are unable to accept the EEOC's argument that the allegations of religious discrimination were within the scope of an EEOC investigation reasonably related to Mrs. Wade's charge of sex discrimination because the "facts" of religious discrimination emerged during a legitimate investigation of sex discrimination. An investigation *449 into sex discrimination by appellee may have uncovered evidence suggesting religious discrimination not affecting Mrs. Wade.

The issue, however, is whether such religious discrimination was within the scope of an investigation reasonably related to Mrs. Wade's charge. We think not because otherwise, a proper resolution of the question of unlawful religious discrimination by appellee would be jeopardized.

Another reason for our position is the importance of conciliation to Title VII. When Title VII was originally enacted in 1964, the EEOC was not given the power to sue. Instead, cooperation and voluntary compliance were seen as the means for achieving equality of opportunity in employment. *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 947 (8th Cir. 1974). The experience with voluntary compliance as the sole means of EEOC enforcement was not entirely successful, however, and Congress was forced to recognize the shortcomings of the voluntary compliance approach without any other enforcement power. S.Rep.No. 92-415, 92d Cong., 1st Sess. 5 (1971); H.Rep.No. 92-238, 92d Cong., 1st Sess. 8-9 (1971), U.S.Code Cong. & Admin.News 1972, p. 2137. Congress thus enacted the 1972 amendments to Title VII to strengthen the EEOC's role of conciliator and to empower the EEOC to sue in federal court. See *EEOC v. Kimberly-Clark Corp.*, supra, 511 F.2d at 1357; *EEOC v. Hickey-Mitchell Co.*, supra, 507 F.2d 947.

Despite the added enforcement power, Congress still intended that conciliation be the preferred method for eradicating employment discrimination. *EEOC v. Kimberly-Clark Corp.*, supra, 511 F.2d at 1357; *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1092 (6th Cir. 1974). With the passage of the 1972 amendments to Title VII, the hope expressed by Congress was that recourse to the lawsuit will be the exception and not the rule, see Conference Committee Report, supra, 118 Cong.Rec. 7168, and "(o)nly if conciliation proves to be impossible. . . ." Remarks of Congressman Perkins, Conference Committee Report, Section-by-Section Analysis of H.R. 1746, The Equal Employment Act of 1972, 118 Cong.Rec. 7563 (Mar. 8, 1972). The EEOC's duty to attempt conciliation is thus "among its most essential functions," *EEOC v. Raymond Metal Products Co.*, 530 F.2d 590, 596 (4th Cir. 1976), and the "primary goal" of Title VII is "the securing of voluntary compliance with the law." *EEOC v. MacMillan Bloedel Containers, Inc.*, supra, 503 F.2d at 1092. Several courts have stated that the EEOC must seek to conciliate before it institutes suit. *Patterson v. American Tobacco Company*, 535 F.2d 257, 272 (4th Cir. 1976), cert. denied, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976); *EEOC v. Hickey-Mitchell Co.*, supra, 507 F.2d at 948.

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

We thus are unable to accept the EEOC's argument that, as in [Love v. Pullman](#), 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972), it would be a matter of placing form over substance, resulting in the waste of administrative resources and the delay in the enforcement of rights, by requiring a member of the EEOC to file a charge with respect to allegations of discrimination uncovered in an EEOC investigation which were of a kind not raised by the individual party and which did not affect the individual party. Moreover, the EEOC in the present case can hardly protest of delay. Mrs. Wade originally *450 filed her charge October 19, 1970. The EEOC's reasonable cause determination was issued over two years later on November 13, 1972. Almost one and one-half years later, on April 4, 1974, the EEOC notified appellee that conciliation efforts had failed. Nearly eight months after notification of the failure of conciliation and over four years after the filing of the original charge, on November 27, 1974, the EEOC filed suit.

[4] Finally, we believe that our position in the present case is supported by the concern expressed in Congress that due process safeguards be built into the statutory scheme of Title VII. Remarks of Congressman Quie, House Debate on H.R. 1746, 92d Cong., 1st Sess., 117 Cong.Rec. 31962 (Sept. 15, 1971); [S.Rep.No. 92-415](#), 92d Cong., 1st Sess. 25 (1971). Although neither the statutory language nor the legislative history directly address the question before us, it is clear that the requirement in s 703 of Title VII, [42 U.S.C. s 2000e-2](#), of timely notice to an employer of a charge filed with the EEOC alleging employment discrimination embodies due process guaranties. [New Orleans Public Service, Inc. v. Brown](#), 369 F.Supp. 702, 710 (E.D.La.1974). If an EEOC investigation of an employer uncovers possible unlawful discrimination of a kind not raised by the charging party and not affecting that party, then the employer should be given notice if the EEOC

intends to hold the employer accountable before the EEOC and in court.

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

III

[5] We would apply this holding on the issue of religious discrimination to that of race discrimination were it not for the fact that Mrs. Wade amended her charge to allege that appellee discriminated against black females. Absent the amendment to Mrs. Wade's charge, the EEOC allegations of race discrimination, based on evidence uncovered during the EEOC investigation, were even more unrelated to Mrs. Wade's charge of sex discrimination. The proof at trial concerning racial discrimination did not at all involve Mrs. Wade and her association with black females, but involved exhibits showing the racial composition of appellee's past and present work force and the experience of five black men in the blue collar Parts and Service Departments. Nonetheless, the EEOC has argued on appeal that an analysis of appellee's hiring and promotion practices with respect to blacks was reasonably related to Mrs. Wade's charge of sex discrimination because "(t)he fact of race . . . discrimination emerged during its legitimate investigation of the sex discrimination charge."⁶ The EEOC did not, however, receive evidence suggesting the possibility of race discrimination by appellee during an investigation of the sex discrimination charge. The EEOC subsequently received that information because it asked for it in what was obviously an investigation of possible race discrimination, and appellee's Mrs. Yarchever co-operated with the EEOC.⁷

*451 Hence, absent the amendment to Mrs. Wade's charge with the EEOC to include an allegation that appellee did not hire black females, what the EEOC is arguing in the present

case with respect to the scope of the EEOC complaint goes beyond the limitations set forth in *EEOC v. General Electric Co.*, supra, 532 F.2d 539. In that case, the Fourth Circuit held: When the same material, i.e., the tests used by the defendant, give rise to a reasonable cause to believe the defendant thereby is practicing discrimination both racial and sexual, the EEOC need not confine its actions to the racially discriminatory aspects of the testing program but may “include in its deliberations all facts developed in the course of a reasonable investigation of that charge” and may predicate a reasonable cause determination thereon. And any claim included properly in the reasonable cause determination and offer to conciliate may be the basis of a civil suit, if conciliation on that claim fails.

532 F.2d at 370. The Fourth Circuit allowed an EEOC complaint to charge both race and sex discrimination when the charges initiating Title VII procedures were filed by two black men who alleged only race discrimination because there was a root source of discrimination against blacks and women in the testing done by the employer.⁸

[6] In the present case, there was no such common source of discrimination against blacks and women. To justify the EEOC's position would require us to accept the proposition that once a charge is filed with the EEOC, then the EEOC may investigate whether the employer is engaged in any discriminatory practices and proceed to issuance of a reasonable cause determination, to conciliation, and even to court as to unlawful employment practices under Title VII that it may have uncovered. Such an expansive theory, giving the EEOC a carte blanche once a charge is filed with the EEOC, must be premised on the belief that all forms of unlawful employment discrimination whether by race, religion, sex, or national origin and whether involving hiring, discharge, promotion, or compensation are like or related regardless of the separate individuals involved. Under the EEOC's theory, investigation of one form of employment discrimination can always be said to have reasonably expected to grow out of a charge of another form of employment discrimination. See *EEOC v. Huttig Sash & Door Co.*, supra, 511 F.2d at 455; *EEOC v. General Electric Co.*, supra, 532 F.2d at 364-69. We do not subscribe to that theory because for the purposes of Title VII, forms of employment discrimination involving race, religion, sex, and national origin are not so related. See *EEOC v. New York Broadcasting Service, Inc.*, supra, 542 F.2d at 360.

In the present case, the investigation of race discrimination cannot be said to have been reasonably expected to grow out of Mrs. Wade's sex discrimination charge. The allegations of race discrimination in the EEOC complaint, however, are in a different posture before us than those of religious discrimination because Mrs. Wade amended her charge to allege that appellee failed to hire black females. If Mrs. Wade could charge race discrimination, then the EEOC investigation of appellee for race discrimination *452 was pursuant to a valid charge. The question presented, then, is whether Mrs. Wade, a white female, had standing under Title VII to file a charge with the EEOC protesting alleged race discrimination against blacks by appellee.

Congress specifically limited the filing of discrimination charges to persons actually injured by the alleged acts of discrimination. Section 706(b) of Title VII, 42 U.S.C. s 2000e-5(b), provides that a suit alleging an unlawful employment practice under Title VII be initiated by the filing of a charge “by or on behalf of a person claiming to be aggrieved.”

Appellee argues that “a person claiming to be aggrieved” under Title VII must be a person who is a member of the class against which the discrimination is allegedly directed. Appellee reasons that unless a person is a member of the class against which the discrimination is allegedly directed, then that person cannot suffer injury cognizable under Title VII. Appellee seeks support in dicta in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), which stated that to establish a prima facie case for a private action under Title VII, the complainant must carry the initial burden of showing:

- (i) that he belongs to a racial minority;
 - (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
 - (iii) that, despite his qualifications, he was rejected;
 - and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
- (emphasis supplied)

Appellee also cites several district court opinions, which have held that whites cannot properly file Title VII charges alleging discrimination against blacks, *EEOC v. New York Times Broadcasting Service, Inc.*, supra, 364 F.Supp. 651, *Ripp v.*

Dobbs House, Inc., 366 F.Supp. 205 (N.D.Ala.1973), and that a charge filed by a male cannot be the basis for an EEOC suit alleging discrimination against females. *EEOC v. National Mine Service Company*, 8 FEP Cases 1233 (E.D.Ky.1974); *EEOC v. General Electric Co.*, 376 F.Supp. 757 (E.D.Va.1974), rev'd 532 F.2d 359 (4th Cir. 1976). See *EEOC v. Beaver Gasoline Co.*, 45 U.S.L.W. 2545 (WD.Pa. (opinion filed April 22, 1977) May 24, 1977).

We would be inclined to agree with appellee were it not for the Supreme Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). In *Trafficante*, two tenants of an apartment complex, one white and one black, filed complaints, pursuant to Title VIII procedures, with the Secretary of Housing and Urban Development, alleging that their landlord discriminated against nonwhites. The complainants claimed that they had been injured as a result of the discriminatory practices of the owner of the apartment complex. The Supreme Court held that the definition of "person aggrieved" contained in s 810(a) of Title VIII, 42 U.S.C. s 3610(a), "showed a congressional intent to define standing as broadly as is permitted by Article III of the Constitution" and that the tenants in the case had suffered real injury in "the loss of important benefits from interracial associations" resulting from the "exclusion of minority persons from the apartment complex." 409 U.S. at 209-10, 93 S.Ct. at 367.

[7] For several reasons, *Trafficante* requires us to hold that the definition of "a person claiming to be aggrieved" under Title VII includes a white person, such as Mrs. Wade in the present case, who may have suffered from the loss of benefits from the lack of association with racial minorities at work. See *Waters v. Heublein*, 547 F.2d 466, 469-70 (9th Cir. 1976); *Gray v. Greyhound Lines, Inc.*, 545 F.2d 169, 176 (D.C. Cir. 1976); Note, Work Environment Injury Under Title VII, 82 Yale L.J. 1695 (1973); *Winston v. Lear-Siegler*, 558 F.2d 1266 (6th Cir. 1977).

First, the pertinent statutory language in Titles VII and VIII is strikingly similar. Section 706(b) of Title VII, 42 U.S.C. s 2000e-5(b), provides for the filing of *453 charges with the EEOC by a "person claiming to be aggrieved." Section 810(a) of Title VIII, 42 U.S.C. s 3610(a), provides for the filing of charges with the Secretary of Housing and Urban Development by a "person aggrieved." Since both Titles VII and VIII are civil rights acts, it is difficult to believe that Congress intended such similar language to have different meanings.

Second, the statutory design of the fair housing provisions in Title VIII is functionally nearly identical to the employment provisions of Title VII. Both Titles VII and VIII include a list of practices deemed to be discriminatory. Compare ss 804-06 of Title VIII, 42 U.S.C. ss 3604-06, with ss 703-04 of Title VII, 42 U.S.C. ss 2000e-2-3. Both Titles VII and VIII establish enforcement procedures initially set in motion by the filing of a charge by an aggrieved person. The charge is filed with the EEOC in the case of Title VII and the Secretary of Housing and Urban Development in the case of Title VIII. Both Titles VII and VIII provide for notification of the charges to the alleged offenders of the law, investigation into the alleged unlawful discrimination, and conciliation procedures. Both Titles VII and VIII empower persons aggrieved to bring private actions to end the alleged discrimination. Compare s 706 of Title VII, 42 U.S.C. s 2000e-5, with s 810 of Title VIII, 42 U.S.C. s 3610.

The only difference between Titles VII and VIII in this respect, destroying an otherwise existing symmetry, is that the EEOC has the power to bring public suits to enforce Title VII, whereas the Secretary of Housing and Urban Development has no such power under Title VIII. *Trafficante* did attach importance to Title VIII's lack of public enforcement in interpreting the "person aggrieved" language of Title VIII, but the existence of public enforcement under Title VII cannot be a basis for interpreting more narrowly the "person claiming to be aggrieved" language of Title VII. *Waters v. Heublein*, supra, 547 F.2d 466. The public enforcement power in Title VII was added by the 1972 amendments to that Act, before which time the enforcement procedures of Titles VII and VIII were virtually identical. The intention of the 1972 amendments to Title VII was to expand the coverage of and increase the compliance with the law, see Conference Report on H.R. 1746, 1972 U.S.Code Cong. & Admin.News p. 2179, not to narrow the class of complainants who might bring charges of discrimination to the attention of authorities. *Waters v. Heublein*, supra, 547 F.2d at 470.

Third, the Supreme Court in *Trafficante v. Metropolitan Life Insurance Co.*, supra, 409 U.S. at 209, 93 S.Ct. 364, cited a court of appeals precedent under Title VII, *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971), with approval in holding that the "person aggrieved" language of s 810 of Title VIII, 42 U.S.C. s 3610, showed a congressional intent to define standing under Title VIII as broadly as is permitted by Article III of the Constitution. *Hackett* had held that the "person claiming to be aggrieved" language of s 706 of Title VII, 42 U.S.C. s 2000e-5(b), showed a congressional

intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution. 445 F.2d at 446. The fact that Trafficante thus approved the reasoning of this Title VII case further demonstrates that on this issue of standing the Supreme Court does not conceive Titles VII and VIII to be different and that under both Titles VII and VIII a person can be aggrieved from the loss of benefits from the lack of interracial associations.

Fourth, the purposes and effects of Title VII in the employment field are identical to the purposes and effects of Title VIII in the housing field. *Waters v. Heublein*, supra, 547 F.2d 466. Both Titles VII and VIII are aimed at outlawing discrimination based on race, religion, national origin, and sex by providing equal employment and fair housing opportunities. The provision for such opportunities and the ending of discrimination declared unlawful by Titles VII and VIII will affect housing patterns and employment practices and thus increase interracial contact in both home and work environments. *454 The loss of benefits from the lack of interracial associations is as real at work as it is at home because “interpersonal contacts” occur in both places. *Waters v. Heublein*, supra, 547 F.2d 466.

Fifth, the EEOC has interpreted Title VII to confer upon every employee the right to a working environment free from unlawful employment discrimination.⁹ Under the EEOC's interpretation of Title VII, whites are aggrieved by discrimination against blacks at their place of employment and have standing to file charges with the EEOC and sue in court. *EEOC Decision No. 72-0591 (1971)*, CCH EEOC Decisions (1973) P 6314, at 4564; *EEOC Decision No. 71-909 (1970)*, CCH EEOC Decisions (1973) P 6193, at 4329. While it is true that an EEOC interpretation of Title VII is not controlling, see *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-46, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), an EEOC interpretation, if not entitled to “great deference,” *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), is to be viewed as a guide, and recognized as having come from a body of experience and informed judgment, especially if the EEOC has interpreted Title VII in a certain manner consistently and persuasively. *General Electric Co. v. Gilbert*, supra, 429 U.S. at 413-15, 97 S.Ct. 401. The EEOC has consistently held that whites could file charges with the EEOC because of discrimination against blacks at their place of employment, *EEOC Decision No. 70-09*, 2 CCH Empl.Prac.Guide P 6026 (1969), *EEOC Decision No. 71-909*, supra, *EEOC Decision No. 72-0591*, supra, and this aspect of the EEOC interpretation of Title VII is in agreement with our conclusion in the present case.

[8] Precisely how Trafficante applies in the employment context is a question we need not address. Trafficante held that a white tenant in an apartment complex had standing to complain of racial discrimination at his apartment complex. Whether a white employee has standing to complain to the EEOC of racial discrimination in the employee's entire company or only in the employee's department in the company is irrelevant in the present case to a determination of the proper scope of the EEOC complaint. Even if the employee only has standing to complain of racial discrimination in the employee's department, the EEOC may properly investigate the entire company for patterns of the discrimination of which the employee has complained and bring suit on the basis of evidence relating to the entire company uncovered during the investigation. *Blue Bell Boots, Inc. v. EEOC*, supra, 418 F.2d at 358; *Tipler v. E. I. duPont deNemours & Co.*, supra, 443 F.2d at 130-31; *McBride v. Delta Air Lines, Inc.*, supra, 551 F.2d at 115-16.

[9] In the present case, then, Mrs. Wade had standing to complain of discrimination against black females and the EEOC could investigate appellee for racial discrimination. The allegations of racial discrimination in the EEOC's complaint were thus properly before the district court, and on remand the district court must consider those allegations on the merits.

IV

[10] Because we conclude that the district court did have jurisdiction as to allegations of racial discrimination in the EEOC complaint, we must reverse the district court award of attorneys' fees to appellee and remand the question to the district court for reconsideration. An award of attorneys' fees against the EEOC for simply bringing the allegations of racial discrimination *455 in its complaint was not proper, although an award still may be justified if the district court decides the merits of the EEOC's allegations of racial discrimination in favor of appellee. An award of attorneys' fees against the EEOC for bringing the allegations of religious discrimination in its complaint may still be justified, but the district court must deal with that issue on remand. Any award of attorneys' fees by the district court in the present case, however, should be considered in light of the legal principles set forth in this opinion.

[11] Section 706(k) of Title VII, 42 U.S.C. s 2000e-5(k), provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorneys' fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The plain meaning of the section in the context of the present case is that the district court may, in its discretion, award an attorney's fee to appellee if appellee prevails against the EEOC. See *United States Steel Corp. v. United States*, 519 F.2d 359, 362 (3d Cir. 1975); *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131, 1133 (9th Cir. 1974). Appellee contends that such a literal construction of the statute is only proper.

The question that the EEOC raises, however, is whether the discretion of a district court in a Title VII case is limited as to the circumstances under which an award of attorneys' fees to a defendant employer is proper. The EEOC's argument with respect to attorneys' fees was stated in more sophisticated form by the Third Circuit in *United States Steel Corp. v. United States*, supra, 519 F.2d 359, which was followed by the Fourth Circuit in *EEOC v. Christiansburg Garment Company, Inc.*, 550 F.2d 949 (4th Cir. 1977), cert. granted, -- U.S. --, 97 S.Ct. 2948, 53 L.Ed.2d 1077 (1977).

[12] The argument is that when a statute commits the awarding of attorneys' fees to the discretion of the trial court, traditional equitable considerations apply. However, an analysis of those equitable factors in the context of Title VII cases leads to the application of two rules, one for private plaintiffs and one for defendant employers. On the one hand, attorneys' fees to prevailing private plaintiffs are allowed, absent exceptional circumstances, because such plaintiffs act as private attorneys general in furthering the national policy of eradicating unlawful employment discrimination. This theory was stated by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), a Title II case, but has been applied or recognized in Title VII by several courts of appeal because the statutory language permitting discretionary attorneys' fees under Titles II and VII is substantially identical. *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 464 F.2d

1002 (9th Cir. 1972); *United States Steel Corp. v. United States*, supra, 519 F.2d 359, 363; compare s 204(b) of Title II, 42 U.S.C. s 2000a-3(b), with s 706(k) of Title VII, 42 U.S.C. s 2000e-5(k). On the other hand, attorneys' fees to prevailing defendant employers are not allowed unless the private plaintiff or the EEOC shows bad faith, vexatiousness, abusive conduct, or an attempt to harass or embarrass because "(a) prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest." *United States Steel Corporation v. United States*, supra, 519 F.2d at 364; *EEOC v. Christiansburg Garment Company, Inc.*, supra, 550 F.2d at 951. Prevailing defendant employers would thus be reduced to receiving awards under the same standard as exists for the "American rule" of attorneys' fees, which does not allow the recovery of attorneys' fees except in such *456 instances as bad faith on the part of the opposing party. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

[13] We decline to hold that a finding of bad faith on the part of the losing plaintiff in a Title VII case is a necessary prerequisite to awarding attorneys' fees to a prevailing defendant employer. Section 706(k) of Title VII, 42 U.S.C. s 2000e-5(k), does not, on its face, permit the adoption of such an explicitly stated double standard. The EEOC may argue that different policy considerations with respect to private plaintiffs and defendants in the exercise of a district court's discretion are the cause of the double standard, but the institution of such different policy considerations as to prevailing private plaintiffs and defendants is a matter for Congress and not the courts. *EEOC v. Christiansburg Garment Company, Inc.*, supra, 550 F.2d 949, 952 (Widener, J., dissenting).

In *Alyeska Pipeline Co. v. Wilderness Society*, supra, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141, the Supreme Court held that only Congress, and not the courts, could authorize a "private attorney general" exception to the American rule that attorneys' fees are not, with few exceptions, recoverable in federal cases in the absence of statutory authorization. In *Alyeska*, the Court stated:

Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for the Congress to determine. (emphasis supplied)

421 U.S. at 262, 95 S.Ct. at 1624. The Supreme Court in *Alyeska* thus contemplates that Congress will state when different standards are to be applied to parties under a statute authorizing attorneys' fees, instead of courts creating standards based on surmises about the public interest. The Third Circuit in *United States Steel* and the Fourth Circuit in *Christiansburg Garment* believe that a defendant in a Title VII case does not further the public interest with its defense. Still, it seems clear from the language of s 706(k) of Title VII, 42 U.S.C. s 2000e-5(k), that Congress did not conceive of the relative equities between prevailing private plaintiffs and prevailing defendant employers as being different; a prevailing private plaintiff may further the goal of eradicating unlawful employment discrimination but a prevailing defendant has suffered from an unnecessary burden imposed on its business. See *EEOC v. Western Electric Co.*, 10 FEP Cases 1275 (D.Md.1975).¹⁰

We are aware of legislative history to the Civil Rights Attorney's Fees Awards Act of 1976 that indicates Congress was aware and approved of the double standard in the award

of attorneys' fees under Title VII and intended that result with respect to the 1976 Attorney's Fees Act, although written like s 706(k) of Title VII, 42 U.S.C. s 2000e-5(k). See *S.Rep.No. 94-1011*, 94th Cong., 2d Sess. 4-5 (1976), U.S.Code Cong. & Admin.News 1976, p. 5908; *H.Rep. No. 94-1558*, 94th Cong., 2d Sess. 6-8 (1976). We decline, however, to depart from the generally accepted rule of statutory construction that the plain language of a statute dictates its interpretation by the courts. *Frankfurter*, Reading of Statutes, 47 Colum.L.Rev. 527 (1947); *Radin*, *Statutory Interpretation*, 43 *Harv.L.Rev.* 863 (1930).

In applying s 706(k) of Title VII, 42 U.S.C. s 2000e-5(k), when the defendant employer prevails, then, the district court should exercise its discretion in light of all the circumstances of the case. The plaintiff's conduct during litigation is but one factor for the district court to consider.

Affirmed in part and reversed in part.

All Citations

563 F.2d 439, 15 Fair Empl.Prac.Cas. (BNA) 972, 15 Empl. Prac. Dec. P 7840

Footnotes

- 1 Section 706(c) of Title VII, 42 U.S.C. s 2000e-5(c), provides that in the case of an alleged unlawful employment practice occurring in a state that has a law prohibiting that practice and a local authority established to grant relief from such practice, then no charge may be filed under s 706(b) of Title VII, 42 U.S.C. s 2000e-5(b), before the expiration of sixty days after proceedings have been commenced under state law, unless those proceedings have been terminated before the sixty day period closes.
- 2 Section 710 of Title VII, 42 U.S.C. s 2000e-9, was amended in 1972 to incorporate s 11 of the National Labor Relations Act, 29 U.S.C. s 161.
- 3 s 706(b) of Title VII, 42 U.S.C. s 2000e-5(b). If the case has been first referred under s 706(c) and (d) of Title VII, 42 U.S.C. s 2000e-5(c) and (d) to a state agency for possible disposition under state law outlawing discriminatory employment practices, then the EEOC is to make a reasonable cause determination, so far as practicable, not later than 120 days from the date upon which the EEOC is authorized to take action with respect to the charge.
- 4 If the employer charged with unlawful discriminatory employment practices is a government, government agency, or political subdivision, and if the EEOC is unsuccessful in conciliation with that category of employer, then the EEOC shall refer the case to the Attorney General, who may bring a civil action in federal court. s 706(f)(1) of Title VII, 42 U.S.C. s 2000e-5(f)(1).
- 5 29 C.F.R. s 1601.19a provides for predetermination settlement procedure. At any time subsequent to a preliminary investigation and prior to the issuance of a determination as to reasonable cause, the District Directors, or other designated officers, may engage in settlement discussions. The District Directors, or other designated officers, may make and approve settlements on behalf of the Commission, in those cases where such authority has been delegated to them by the Commission.
- 6 Appellant EEOC brief at 31.
- 7 We reject the apparent position of *EEOC v. Occidental Life Insurance Co.*, 535 F.2d 533, 541 (9th Cir. 1976), aff'd on other grounds, -- U.S. --, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), that the scope of the EEOC's complaint could not be ruled as not limited to the scope of the EEOC investigation reasonably expected to grow out of the individual party's charge because there was no objection to the EEOC requests for evidence. The facts revealed by the evidence produced

15 Fair Empl.Prac.Cas. (BNA) 972, 15 Empl. Prac. Dec. P 7840

by an employer may go beyond what is arguably relevant to the charge. In the present case, appellee co-operated with the EEOC. The disclosure, however, should not act as an estoppel against the employer so as to exempt the EEOC from observing the procedures that Congress has designed to obtain voluntary compliance with the law. To adopt the position stated in Occidental Life by the Ninth Circuit would reward recalcitrant employers but possibly strip cooperating employers of procedural protections.

- 8 The Fourth Circuit in [EEOC v. General Electric Co.](#), 532 F.2d 359 (4th Cir. 1976), cited this Court's decision in [EEOC v. Kimberly-Clark Corp.](#), 511 F.2d 1352 (6th Cir. 1975), for this rule, but in Kimberly-Clark, the private charge was filed by a black person alleging racial discrimination and the EEOC complaint incorporated other allegations of racial discrimination. Thus, Kimberly-Clark does not support the broader propositions in General Electric concerning the scope of the EEOC complaint.
- 9 While the EEOC interpretation of Title VII suggests a theory of standing broader than that adopted in [Trafficante v. Metropolitan Life Insurance Co.](#), 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), we are not approving that broader theory. More specifically, we pass no judgment on the questions whether a male could file charges alleging sex discrimination against females, whether native born Americans could file charges alleging national origin discrimination against Mexican-Americans, and whether a Methodist could file charges alleging religious discrimination against Seventh Day Adventists.
- 10 Another problem with the EEOC position on appeal is that it would render the statute authorizing an award of attorneys' fees superfluous in private Title VII cases when the defendant prevails. If the objective of Congress had been to authorize the assessments of attorneys' fees against a private plaintiff who acts in bad faith, then no new statutory provision would have been necessary because the American rule allows recovery in such cases even without a statute. [Alyeska Pipeline Service Co. v. Wilderness Society](#), supra, 421 U.S. at 258-59, 95 S.Ct. 1612. See [Newman v. Piggie Park Enterprises](#), supra, 390 U.S. at 402 n. 4, 88 S.Ct. 964.

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EXHIBIT 32



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Called into Doubt by [Bauer v. Holder](#), E.D.Va., June 10, 2014

444 F.3d 1104
 United States Court of Appeals,
 Ninth Circuit.

Darlene JESPERSEN, Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY,
 INC., Defendant-Appellee.

No. 03-15045.

Argued and Submitted June 22, 2005.

Filed April 14, 2006.

Synopsis

Background: Female bartender at casino terminated for refusing to wear makeup sued employer for sex discrimination under Title VII, alleging both disparate treatment and disparate impact, and asserted claims under state law. The United States District Court for the District of Nevada, [Edward C. Reed, Jr., J.](#), 280 F.Supp.2d 1189, granted summary judgment in favor of employer in part. Employee appealed. The Court of Appeals, 392 F.3d 1076, affirmed.

Holdings: On rehearing en banc, the Court of Appeals, [Schroeder](#), Chief Judge, held that:

[1] requirement that only female employees wear makeup was insufficient to establish prima facie Title VII sex discrimination based on disparate impact;

[2] Court of Appeals would not take judicial notice of asserted fact that it cost more money and took more time for a female employee than a male employee to comply with employer's grooming policy; and

[3] grooming policy did not constitute impermissible sex stereotyping, as would establish that gender played a motivating role in employer's policy.

Affirmed.

[Pregerson](#), Circuit Judge, filed dissenting opinion, with which [Konzinski](#), [Graber](#), and [Fletcher](#), Circuit Judges, joined.

[Kozinski](#), Circuit Judge, filed dissenting opinion, with which [Graber](#) and [Fletcher](#), Circuit Judges, joined.

West Headnotes (7)

[1] **Civil Rights**

🔑 Motive or Intent; Pretext

Civil Rights

🔑 Disparate Impact

In order to assert a valid Title VII claim for sex discrimination, an employee must make out a prima facie case establishing that the challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of gender. Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C.A. § 2000e-2(e)(1).

14 Cases that cite this headnote

[2] **Civil Rights**

🔑 Effect of Prima Facie Case; Shifting Burden

Once an employee establishes a prima facie Title VII discrimination case, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2 Cases that cite this headnote

[3] **Civil Rights**

🔑 Personal Appearance; Hair and Grooming

Employer's grooming policy which required female employees to wear makeup, and required male employees to keep their hair short, was not sufficient to establish female employee's prima facie disparate impact Title VII sex discrimination claim, absent showing that the policy imposed unreasonable or unequal burdens on female employees. Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C.A. § 2000e-2(e)(1).

8 Cases that cite this headnote

[4] **Civil Rights**

🔑 [Personal Appearance; Hair and Grooming](#)

Grooming standards imposed by employers that appropriately differentiate between the genders are not facially discriminatory, for purpose of employee's Title VII gender discrimination claim. Civil Rights Act of 1964, § 703(e)(1), [42 U.S.C.A. § 2000e-2\(e\)\(1\)](#).

16 Cases that cite this headnote

[5] **Evidence**

🔑 [Facts Relating to Human Life, Health, Habits, and Acts](#)

Court of Appeals would not take judicial notice of asserted fact that it cost more money and took more time for a female employee than for a male employee to comply with employer's grooming policy, requiring female employees to wear makeup and male employees to keep their hair short, in female employee's Title VII gender discrimination claim challenging grooming policy, as such matters were not appropriate for judicial notice. [Fed.Rules Evid.Rule 201, 28 U.S.C.A.](#)

16 Cases that cite this headnote

[6] **Civil Rights**

🔑 [Motive or Intent; Pretext](#)

In establishing that gender played a motivating part in an employment decision, an employee in a Title VII gender discrimination case may introduce evidence that the employment decision was made in part because of a sex stereotype. Civil Rights Act of 1964, § 703(e)(1), [42 U.S.C.A. § 2000e-2\(e\)\(1\)](#).

9 Cases that cite this headnote

[7] **Civil Rights**

🔑 [Personal Appearance; Hair and Grooming](#)

Employer's grooming policy which required female bartenders at casino to wear makeup, and required male bartenders to keep their

hair short, did not constitute impermissible sex stereotyping, as would establish that gender played a motivating role in employer's policy, for purpose of Title VII sex discrimination claim brought by female bartender who was discharged for failing to comply with policy; there was no showing that the grooming requirement was intended to be sexually provocative, that it was intended to stereotype women as sex objects, that it subjected employees to sexual harassment, or that female bartender was treated any differently than any other bartender who did not comply with the policy. Civil Rights Act of 1964, § 703(e)(1), [42 U.S.C.A. § 2000e-2\(e\)\(1\)](#).

14 Cases that cite this headnote

Attorneys and Law Firms

***1105** [Jennifer C. Pizer](#), Lambda Legal Defense and Education Fund, Inc., Los Angeles, CA, for the plaintiff-appellant.

[Kenneth J. McKenna](#), Kenneth James McKenna, Inc., Reno, NV, for the plaintiff-appellant.

[Patrick H. Hicks](#) and [Veronica Arechederra Hall](#), Littler Mendelson, P.C., Las Vegas, NV, for the defendant-appellee.

Appeal from the United States District Court for the District of Nevada; [Edward C. Reed](#), District Judge, Presiding. D.C. No. CV-01-00401-ECR.

Before [SCHROEDER](#), Chief Judge, [PREGERSON](#), [KOZINSKI](#), [RYMER](#), [SILVERMAN](#), [GRABER](#), [W. FLETCHER](#), [TALLMAN](#), [CLIFTON](#), [CALLAHAN](#), and [BEA](#), Circuit Judges.

Opinion

[SCHROEDER](#), Chief Judge.

We took this sex discrimination case en banc in order to reaffirm our circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims.

The plaintiff, Darlene Jespersen, was terminated from her position as a bartender at the sports bar in Harrah's Reno casino not long after Harrah's began to enforce its

comprehensive uniform, appearance and grooming standards for all bartenders. The standards required all bartenders, men and women, to wear the same uniform of black pants and white shirts, a bow tie, and comfortable black *1106 shoes. The standards also included grooming requirements that differed to some extent for men and women, requiring women to wear some facial makeup and not permitting men to wear any. Jespersen refused to comply with the makeup requirement and was effectively terminated for that reason.

The district court granted summary judgment to Harrah's on the ground that the appearance and grooming policies imposed equal burdens on both men and women bartenders because, while women were required to use makeup and men were forbidden to wear makeup, women were allowed to have long hair and men were required to have their hair cut to a length above the collar. *Jespersen v. Harrah's Operating Co.*, 280 F.Supp.2d 1189, 1192-93 (D.Nev.2002). The district court also held that the policy could not run afoul of Title VII because it did not discriminate against Jespersen on the basis of the "immutable characteristics" of her sex. *Id.* at 1192. The district court further observed that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion), prohibiting discrimination on the basis of sex stereotyping, did not apply to this case because in the district court's view, the Ninth Circuit had excluded grooming standards from the reach of *Price Waterhouse*. *Jespersen*, 280 F.Supp.2d at 1193. In reaching that conclusion, the district court relied on *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 875 n. 7 (9th Cir.2001) ("We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."). *Jespersen*, 280 F.Supp.2d at 1193. The district court granted summary judgment to Harrah's on all claims.

The three-judge panel affirmed, but on somewhat different grounds. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir.2004). The panel majority held that Jespersen, on this record, failed to show that the appearance policy imposed a greater burden on women than on men. *Id.* at 1081-82. It pointed to the lack of any affidavit in this record to support a claim that the burdens of the policy fell unequally on men and women. Accordingly, the panel did not agree with the district court that grooming policies could never discriminate as a matter of law. On the basis of *Nichols* and *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th

Cir.2002) (en banc), the panel also held that *Price Waterhouse* could apply to grooming or appearance standards only if the policy amounted to sexual harassment, which would require a showing that the employee suffered harassment for failure to conform to commonly-accepted gender stereotypes. *Id.* at 1082-83. The dissent would have denied summary judgment on both theories. *Id.* at 1083-88.

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

I. BACKGROUND

Plaintiff Darlene Jespersen worked successfully as a bartender at Harrah's for *1107 twenty years and compiled what by all accounts was an exemplary record. During Jespersen's entire tenure with Harrah's, the company maintained a policy encouraging female beverage servers to wear makeup. The parties agree, however, that the policy was not enforced until 2000. In February 2000, Harrah's implemented a "Beverage Department Image Transformation" program at twenty Harrah's locations, including its casino in Reno. Part of the program consisted of new grooming and appearance standards, called the "Personal Best" program. The program contained certain appearance standards that applied equally to both sexes, including a standard uniform of black pants, white shirt, black vest, and black bow tie. Jespersen has never objected to any of these policies. The program also contained some sex-differentiated appearance requirements as to hair, nails, and makeup.

In April 2000, Harrah's amended that policy to require that women wear makeup. Jespersen's only objection here is to the makeup requirement. The amended policy provided in relevant part:

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job

descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

* * *

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

- Overall Guidelines (applied equally to male/ female):
 - Appearance: Must maintain Personal Best image portrayed at time of hire.
 - Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
 - No faddish hairstyles or unnatural colors are permitted.
- Males:
 - Hair must not extend below top of shirt collar. Ponytails are prohibited.
 - Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
 - Eye and facial makeup is not permitted.
 - Shoes will be solid black leather or leather type with rubber (non skid) soles.
- Females:
 - Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
 - Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
 - Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
 - Shoes will be solid black leather or leather type with rubber (non skid) soles.
 - *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times. (emphasis added).*

Jespersen did not wear makeup on or off the job, and in her deposition stated that ***1108** wearing it would conflict with her self-image. It is not disputed that she found the makeup requirement offensive, and felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender. Unwilling to wear the makeup, and not qualifying for any open positions at the casino with a similar compensation scale, Jespersen left her employment with Harrah's.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission and obtaining a right to sue notification, Jespersen filed this action in July 2001. In her complaint, Jespersen sought damages as well as declaratory and injunctive relief for discrimination and retaliation for opposition to discrimination, alleging that the "Personal Best" policy discriminated against women by "(1) subjecting them to terms and conditions of employment to which men are not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."

Harrah's moved for summary judgment, supporting its motion with documents giving the history and purpose of the appearance and grooming policies. Harrah's argued that the policy created similar standards for both men and women, and that where the standards differentiated on the basis of sex, as with the face and hair standards, any burdens imposed fell equally on both male and female bartenders.

In her deposition testimony, attached as a response to the motion for summary judgment, Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she "felt very degraded and very demeaned." In addition, Jespersen testified that "it prohibited [her] from doing [her] job" because "[i]t affected [her] self-dignity ... [and] took away [her] credibility as an individual and as a person." Jespersen made no cross-motion for summary judgment, taking the position that the case should go to the jury. Her response to Harrah's motion for summary judgment relied solely on her own deposition testimony regarding her subjective reaction to the makeup policy, and on favorable customer feedback and employer evaluation forms regarding her work.

The record therefore does not contain any affidavit or other evidence to establish that complying with the "Personal Best" standards caused burdens to fall unequally on men or women,

and there is no evidence to suggest Harrah's motivation was to stereotype the women bartenders. Jespersen relied solely on evidence that she had been a good bartender, and that she had personal objections to complying with the policy, in order to support her argument that Harrah's "'sells' and exploits its women employees." Jespersen contended that as a matter of law she had made a prima facie showing of gender discrimination, sufficient to survive summary judgment on both of her claims.

The district court granted Harrah's motion for summary judgment on all of Jespersen's claims. *Jespersen*, 280 F.Supp.2d at 1195-96. In this appeal, Jespersen maintains that the record before the district court was sufficient to create triable issues of material fact as to her unlawful discrimination claims of unequal burdens and sex stereotyping. We deal with each in turn.

II. UNEQUAL BURDENS

[1] [2] In order to assert a valid Title VII claim for sex discrimination, a plaintiff must make out a prima facie case establishing that the challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on *1109 the basis of gender. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 673 (9th Cir.1980). Once a plaintiff establishes such a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell*, 411 U.S. at 802, 93 S.Ct. 1817.

[3] In this case, Jespersen argues that the makeup requirement itself establishes a prima facie case of discriminatory intent and must be justified by Harrah's as a bona fide occupational qualification. See 42 U.S.C. § 2000e-2(e)(1).¹ Our settled law in this circuit, however, does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.

In *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602 (9th Cir.1982), we considered the Continental Airlines policy that imposed strict weight restrictions on female flight attendants, and held it constituted a violation of Title VII. We did so because the airline imposed no weight restriction whatsoever on a class of male employees who performed the same or

similar functions as the flight attendants. *Id.* at 610. Indeed, the policy was touted by the airline as intended to "create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.'" *Id.* at 604. In fact, Continental specifically argued that its policy was justified by its "desire to compete [with other airlines] by featuring attractive female cabin attendants[.]" a justification which this court recognized as "discriminatory on its face." *Id.* at 609. The weight restriction was part of an overall program to create a sexual image for the airline. *Id.* at 604.

In contrast, this case involves an appearance policy that applied to both male and female bartenders, and was aimed at creating a professional and very similar look for all of them. All bartenders wore the same uniform. The policy only differentiated as to grooming standards.

In *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir.2000), we dealt with a weight policy that applied different standards to men and women in a facially unequal way. The women were forced to meet the requirements of a medium body frame standard while men were required to meet only the more generous requirements of a large body frame standard. *Id.* at 854. In that case, we recognized that "[a]n appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." *Id.* The United weight policy, however, did not impose equal burdens. On its face, the policy embodied a requirement that categorically "'applie[d] less favorably to one gender[.]" and the burdens imposed upon that gender were obvious from the policy itself. *Id.* (quoting *Gerdom*, 692 F.2d at 608 (alteration omitted)).

[4] This case stands in marked contrast, for here we deal with requirements that, on their face, are not more onerous for one gender than the other. Rather, Harrah's "Personal Best" policy contains sex-differentiated requirements regarding each employee's hair, hands, and face. While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that *1110 appropriately differentiate between the genders are not facially discriminatory.

We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits. See, e.g., *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir.1977); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir.1977); *Earwood v. Cont'l Southeastern Lines, Inc.*, 539 F.2d 1349,

1350 (4th Cir.1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir.1976) (per curiam); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir.1975); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir.1975) (en banc); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir.1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C.Cir.1973). The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an “unequal burden” for the plaintiff’s gender. See *Frank*, 216 F.3d at 854-55; *Gerdorn*, 692 F.2d at 605-06; see also *Fountain*, 555 F.2d at 755-56.

Not every differentiation between the sexes in a grooming and appearance policy creates a “significantly greater burden of compliance[.]” *Gerdorn*, 692 F.2d at 606. For example, in *Fountain*, this court upheld Safeway’s enforcement of its sex-differentiated appearance standard, including its requirement that male employees wear ties, because the company’s actions in enforcing the regulations were not “overly burdensome to its employees [.]” 555 F.2d at 756; see also *Baker*, 507 F.2d at 898. Similarly, as the Eighth Circuit has recognized, “[w]here, as here, such [grooming and appearance] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities.” *Knott*, 527 F.2d at 1252. Under established equal burdens analysis, when an employer’s grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.

[5] Jespersen asks us to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short, but these are not matters appropriate for judicial notice. Judicial notice is reserved for matters “generally known within the territorial jurisdiction of the trial court” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Fed.R.Evid.* 201. The time and cost of makeup and haircuts is in neither category. The facts that Jespersen would have this court judicially notice are not subject to the requisite “high degree of indisputability” generally required for such judicial notice. *Fed.R.Evid.* 201 advisory committee’s note.

Our rules thus provide that a plaintiff may not cure her failure to present the trial court with facts sufficient to establish the validity of her claim by requesting that this court take judicial

notice of such facts. See *id.*; see also *Fed. R. Civ. Proc.* 56(e). Those rules apply here. Jespersen did not submit any documentation or any evidence of the relative cost and time required to comply with the grooming requirements by men and women. As a result, we would have to speculate about those issues in order to then guess whether the policy creates unequal burdens for women. This would not be appropriate. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (“[T]here is no issue for trial unless there is sufficient evidence favoring the *1111 nonmoving party for a jury to return a verdict for that party.”); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983) (“A party opposing a summary judgment motion must produce *specific* facts showing that there remains a genuine factual issue for trial and evidence significantly probative as to any material fact claimed to be disputed.”) (internal quotation marks and alteration omitted); cf. *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir.1991) (In a Title VII case, “a plaintiff cannot defeat summary judgment simply by making out a prima facie case.”).

Having failed to create a record establishing that the “Personal Best” policies are more burdensome for women than for men, Jespersen did not present any triable issue of fact. The district court correctly granted summary judgment on the record before it with respect to Jespersen’s claim that the makeup policy created an unequal burden for women.

III. SEX STEREOTYPING

In *Price Waterhouse*, the Supreme Court considered a mixed-motive discrimination case. 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). There, the plaintiff, Ann Hopkins, was denied partnership in the national accounting firm of Price Waterhouse because some of the partners found her to be too aggressive. *Id.* at 234-36, 109 S.Ct. 1775. While some partners praised Hopkins’s “ ‘strong character, independence and integrity[.]’ ” others commented that she needed to take “ ‘a course at charm school[.]’ ” *Id.* at 234-35, 109 S.Ct. 1775. The Supreme Court determined that once a plaintiff has established that gender played “a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.” *Id.* at 258, 109 S.Ct. 1775.

[6] Consequently, in establishing that “gender played a motivating part in an employment decision,” a plaintiff in a Title VII case may introduce evidence that the employment decision was made in part because of a sex stereotype. *Id.* at 250-51, 109 S.Ct. 1775. According to the Court, this is because “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’ ” *Id.* at 251, 109 S.Ct. 1775 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (alteration omitted)). It was therefore impermissible for Hopkins's employer to place her in an untenable Catch-22: she needed to be aggressive and masculine to excel at her job, but was denied partnership for doing so because of her employer's gender stereotype. Instead, Hopkins was advised to “ ‘walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry.’ ” *Id.* at 235, 109 S.Ct. 1775.

The stereotyping in *Price Waterhouse* interfered with Hopkins' ability to perform her work; the advice that she should take “a course at charm school” was intended to discourage her use of the forceful and aggressive techniques that made her successful in the first place. *Id.* at 251, 109 S.Ct. 1775. Impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men.

[7] Harrah's “Personal Best” policy is very different. The policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires *1112 all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the non-skid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.

Judge Pregerson's dissent improperly divides the grooming policy into separate categories of hair, hands, and face,

and then focuses exclusively on the makeup requirement to conclude that the policy constitutes sex stereotyping. *See* Judge Pregerson Dissent at 1116. This parsing, however, conflicts with established grooming standards analysis. *See, e.g., Knott v. Mo. Pac. R. Co.*, 527 F.2d at 1252 (“Defendant's hair length requirement for male employees is part of a comprehensive personal grooming code applicable to all employees.”) (emphasis added). The requirements must be viewed in the context of the overall policy. The dissent's conclusion that the unequal burdens analysis allows impermissible sex stereotyping to persist if imposed equally on both sexes, *see* Judge Pregerson Dissent at 1115-16, is wrong because it ignores the protections of *Price Waterhouse* our decision preserves. 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 *Price Waterhouse*.

We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.

This is not a case where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects. *See, e.g., EEOC v. Sage Realty Corp.*, 507 F.Supp. 599 (S.D.N.Y.1981). In *Sage Realty*, the plaintiff was a lobby attendant in a hotel that employed only female lobby attendants and required a mandatory uniform. The uniform was an octagon designed with an opening for the attendant's head, to be worn as a poncho, with snaps at the wrists and a tack on each side of the poncho, which was otherwise open. *Id.* at 604. The attendants wore blue dancer pants as part of the uniform but were prohibited from wearing a shirt, blouse, or skirt under the outfit. *Id.* There, the plaintiff was required to wear a uniform that was “short and revealing on both sides [such that her] thighs and portions of her buttocks were exposed.” *Id.* Jespersen, in contrast, was asked only to wear a unisex uniform that covered her entire body and was designed for men and women. The “Personal Best” policy does not, on its face, indicate any discriminatory or sexually stereotypical intent on the part of Harrah's.

Nor is this a case of sexual harassment. See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068-69 (9th Cir.2002) (en banc); *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874 (9th Cir.2001). Following *Price Waterhouse*, our court has held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation *1113 of Title VII. In *Nichols*, a male waiter was systematically abused for failing to act "as a man should act," for walking and carrying his tray "like a woman," and was derided for not having sexual intercourse with a female waitress who was his friend. *Nichols*, 256 F.3d at 874. Applying *Price Waterhouse*, our court concluded that this harassment was actionable discrimination because of the plaintiff's sex. *Id.* at 874-75. In *Rene*, the homosexual plaintiff stated a Title VII sex stereotyping claim because he endured assaults "of a sexual nature" when Rene's co-workers forced him to look at homosexual pornography, gave him sexually-oriented "joke" gifts and harassed him for behavior that did not conform to commonly-accepted male stereotypes. *Rene*, 305 F.3d at 1064-65. *Nichols* and *Rene* are not grooming standards cases, but provide the framework for this court's analysis of when sex stereotyping rises to the level of sex discrimination for Title VII purposes. Unlike the situation in both *Rene* and *Nichols*, Harrah's actions have not condoned or subjected Jespersen to any form of alleged harassment. It is not alleged that the "Personal Best" policy created a hostile work environment.

Nor is there evidence in this record that Harrah's treated Jespersen any differently than it treated any other bartender, male or female, who did not comply with the written grooming standards applicable to all bartenders. Jespersen's claim here materially differs from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender.

We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves. This record, however, is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer. This case is essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy that applies largely the

same requirements to both men and women. As we said in *Nichols*, in commenting on grooming standards, the touchstone is reasonableness. A makeup requirement must be seen in the context of the overall standards imposed on employees in a given workplace.

AFFIRMED.

PREGERSON, Circuit Judge, with whom Judges KOZINSKI, GRABER, and W. FLETCHER join, dissenting: I agree with the majority that appearance standards and grooming policies may be subject to Title VII claims. I also agree with the majority that a Title VII plaintiff challenging appearance standards or grooming policies may "make out a prima facie case [by] establishing that the challenged employment action was *either* intentionally discriminatory *or* that it had a discriminatory effect on the basis of gender." Maj. Op. at 1108 (emphasis added). In other words, I agree with the majority that a Title VII plaintiff may make out a prima facie case by showing that the challenged policy either was motivated in part "because of a sex stereotype," Maj. Op. at 1111, or "creates an 'unequal burden' for the plaintiff's gender," Maj. Op. at 1110. Finally, I agree with the majority that Jespersen failed to introduce sufficient evidence to establish that Harrah's "Personal Best" program created an undue burden on Harrah's female bartenders.¹ I part *1114 ways with the majority, however, inasmuch as I believe that the "Personal Best" program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was "because of" her sex. Accordingly, I dissent from Part III of the majority opinion and from the judgment of the court.

The majority contends that it is bound to reject Jespersen's sex stereotyping claim because she presented too little evidence—only her "own subjective reaction to the makeup requirement." Maj. Op. at 1112. I disagree. Jespersen's evidence showed that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders. Harrah's stringent "Personal Best" policy required female beverage servers to wear foundation, blush, mascara, and lip color, and to ensure that lip color was on at all times. Jespersen and her female colleagues were required to meet with professional image consultants who in turn created a facial template for each woman. Jespersen was required not simply to wear makeup; in addition, the consultants dictated where and how the makeup had to be applied.

Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination “because of” sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that “gender must be irrelevant to employment decisions.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) (emphasis added).²

Notwithstanding Jespersen's failure to present additional evidence, little is required to make out a sex-stereotyping-as distinct from an undue burden-claim in this situation. In *Price Waterhouse*, the Supreme Court held that an employer may not condition employment on an employee's conformance to a sex stereotype associated with their gender. *Id.* at 250-51, 109 S.Ct. 1775. As the majority recognizes, *Price Waterhouse* allows a Title VII plaintiff to “introduce evidence that the employment decision was made in part because of a sex stereotype.” Maj. Op. at 1111; see also *Price Waterhouse*, 490 U.S. at 277, 109 S.Ct. 1775 (O'Connor, J., concurring) (requiring that a plaintiff show “direct evidence that decisionmakers *1115 placed substantial negative reliance on an illegitimate criterion in reaching their decision”). It is not entirely clear exactly what this evidence must be, but nothing in *Price Waterhouse* suggests that a certain type or quantity of evidence is required to prove a prima facie case of discrimination. Cf. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-102, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (holding that a plaintiff may prove discrimination in a Title VII case using either direct or circumstantial evidence and that, to obtain a mixed-motive instruction, the plaintiff need only present evidence sufficient for a reasonable jury to conclude, by a preponderance of the evidence, that sex was a motivating factor for an employment practice).

Moreover, *Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves, not only as to how they should behave. See 490 U.S. at 235, 109 S.Ct. 1775 (noting that the plaintiff was told that her consideration for partnership would be enhanced if, among other things, she “dress[ed] more femininely, [wore] make-up, [had] her hair styled, and [wore] jewelry”); see also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir.2005) (recognizing that one can fail to conform to gender stereotypes either through behavior or through appearance); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir.2004) (“After *Price Waterhouse*, an employer who discriminates against women

because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex.”); *Doe v. City of Belleville*, 119 F.3d 563, 582 (7th Cir.1997) (rejecting the defendant's argument that *Price Waterhouse* does not apply to personal appearance standards), *vacated and remanded on other grounds*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

Hopkins, the *Price Waterhouse* plaintiff, offered individualized evidence, describing events in which she was subjected to discriminatory remarks. However, the Court did not state that such evidence was required. To the contrary, the Court noted that

By focusing on Hopkins' specific proof ... we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, ‘standing alone,’ would or would not establish a plaintiff's case, since such a decision is unnecessary in this case.

Price Waterhouse, 490 U.S. at 251-52, 109 S.Ct. 1775; see also *id.* at 271, 109 S.Ct. 1775 (O'Connor, J., concurring) (recognizing that “direct evidence of intentional discrimination is hard to come by”). The fact that Harrah's required female bartenders to conform to a sex stereotype by wearing full makeup while working is not in dispute, and the policy is described at length in the majority opinion. See Maj. Op. at 1107. This policy did not, as the majority suggests, impose a “grooming, apparel, or appearance requirement that an individual finds personally offensive,” Maj. Op. at 1112, but rather one that treated Jespersen differently from male bartenders “because of” her sex. I believe that the fact that Harrah's designed and promoted a policy that required women to conform to a sex stereotype by wearing full makeup is sufficient “direct evidence” of discrimination.

The majority contends that Harrah's “Personal Best” appearance policy is very different from the policy at issue in *Price Waterhouse* in that it applies to both men and women. See Maj. Op. at 1111 (“[The Personal Best policy] applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the *1116 same uniforms while interacting with the public in the context of the entertainment industry.”) I disagree. As the majority

concedes, “Harrah’s ‘Personal Best’ policy contains sex-differentiated requirements regarding each employee’s hair, hands, and face.” Maj. Op. at 1112. The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny. By refusing to consider the makeup requirement separately, and instead stressing that the policy contained some gender-neutral requirements, such as color of clothing, as well as a variety of gender-differentiated requirements for “hair, hands, and face,” the majority’s approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women. By this logic, it might well have been permissible in *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir.2000), to require women, but not men, to meet a medium body frame standard if that requirement were imposed as part of a “physical appearance” policy that also required men, but not women, to achieve a certain degree of upper body muscle definition. But the fact that employees of both genders are subjected to gender-specific requirements does not necessarily mean that particular requirements are not motivated by gender stereotyping.

Because I believe that we should be careful not to insulate appearance requirements by viewing them in broad categories, such as “hair, hands, and face,” I would consider the makeup requirement on its own terms. Viewed in isolation-or, at the very least, as part of a narrower category of requirements affecting employees’ faces-the makeup or facial uniform requirement becomes closely analogous to the uniform policy held to constitute impermissible sex stereotyping in *Carroll v. Talman Federal Savings & Loan Ass’n of Chicago*, 604 F.2d 1028, 1029 (7th Cir.1979). In *Carroll*, the defendant bank required women to wear employer-issued uniforms, but permitted men to wear business attire of their own choosing. The Seventh Circuit found this rule discriminatory because it suggested to the public that the uniformed women held a “lesser professional status” and that women could not be trusted to choose appropriate business attire. *Id.* at 1032-33.

Just as the bank in *Carroll* deemed female employees incapable of achieving a professional appearance without assigned uniforms, Harrah’s regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah’s. The inescapable message is that

women’s undoctored faces compare unfavorably to men’s, not because of a physical difference between men’s and women’s faces, but because of a cultural assumption-and gender-based stereotype-that women’s faces are incomplete, unattractive, or unprofessional without full makeup. We need not denounce all makeup as inherently offensive, just as there was no need to denounce all uniforms as inherently offensive in *Carroll*, to conclude that *requiring* female bartenders to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex. Therefore, I strongly disagree with the majority’s conclusion that there “is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.” Maj. Op. at 1112.

I believe that Jespersen articulated a classic case of *Price Waterhouse* discrimination *1117 and presented undisputed, material facts sufficient to avoid summary judgment. Accordingly, Jespersen should be allowed to present her case to a jury. Therefore, I respectfully dissent.

KOZINSKI, Circuit Judge, with whom Judges **GRABER** and **W. FLETCHER** join, dissenting:

I agree with Judge Pregerson and join his dissent-subject to one caveat: I believe that Jespersen also presented a triable issue of fact on the question of disparate burden.

The majority is right that “[t]he [makeup] requirements must be viewed in the context of the overall policy.” Maj. at 1112; *see also id.* at 1113. But I find it perfectly clear that Harrah’s overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. “teased, curled, or styled” hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. *See id.* at 1107. The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the “overall policy” more burdensome for the former than for the latter. The only question is how much.

It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time? Harrah’s policy requires women to apply face powder, blush, mascara and lipstick. You don’t need an expert witness to figure out that such items don’t grow on trees.

Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists. It's hard to imagine that a woman could "put on her face," as they say, in the time it would take a man to shave—certainly not if she were to do the careful and thorough job Harrah's expects. Makeup, moreover, must be applied and removed every day; the policy burdens men with no such daily ritual. While a man could jog to the casino, slip into his uniform, and get right to work, a woman must travel to work so as to avoid smearing her makeup, or arrive early to put on her makeup there.

It might have been tidier if Jespersen had introduced evidence as to the time and cost associated with complying with the makeup requirement, but I can understand her failure to do so, as these hardly seem like questions reasonably subject to dispute. We could—and should—take judicial notice of these incontrovertible facts.

Alternatively, Jespersen did introduce evidence that she finds it burdensome to *wear* makeup because doing so is inconsistent with her self-image and interferes with her job performance. *See maj.* at 1107-08. My colleagues dismiss this evidence, apparently on the ground that wearing makeup does not, as a matter of law, constitute a substantial burden. This presupposes that Jespersen is unreasonable or idiosyncratic in her discomfort. Why so? Whether to wear cosmetics—literally, the face one presents to the world—is an intensely personal choice. Makeup, moreover, touches delicate parts of the anatomy—the lips, the eyes, the cheeks—and can cause serious discomfort, sometimes even [allergic reactions](#), for someone unaccustomed to wearing it. If you are used to wearing makeup—as most American women are—this may seem like ***1118** no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Footnotes

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.

Nor do I think it appropriate for a court to dismiss a woman's testimony that she finds wearing makeup degrading and intrusive, as Jespersen clearly does. Not only do we have her sworn statement to that effect, but there can be no doubt about her sincerity or the intensity of her feelings: She quit her job—a job she performed well for two decades—rather than put on the makeup. That is a choice her male colleagues were not forced to make. To me, this states a case of disparate burden, and I would let a jury decide whether an employer can force a woman to make this choice.

Finally, I note with dismay the employer's decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter. Quality employees are difficult to find in any industry and I would think an employer would long hesitate before forcing a loyal, long-time employee to quit over an honest and heartfelt difference of opinion about a matter of personal significance to her. Having won the legal battle, I hope that Harrah's will now do the generous and decent thing by offering Jespersen her job back, and letting her give it her personal best—without the makeup.

All Citations

444 F.3d 1104, 97 Fair Empl.Prac.Cas. (BNA) 1473, 87 Empl. Prac. Dec. P 42,322, 06 Cal. Daily Op. Serv. 3093, 2006 Daily Journal D.A.R. 4549

- 1 “[I]t shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise[.]”
- 1 I have little doubt that Jespersen could have made some kind of a record in order to establish that the “Personal Best” policies are more burdensome for women than for men. The cost of makeup and time needed to apply it can both be quantified as can, for example, the cost of haircuts and time needed for nail trimming; had a record been offered in this case to establish the alleged undue burden on women, the district court could have evaluated it. Having failed to create such a record, Jespersen did not present any triable issue of fact on this issue.
- 2 Title VII identifies only one circumstance in which employers may take gender into account in making an employment decision—namely, “when gender is a ‘bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.’ ” *Price Waterhouse*, 490 U.S. at 242, 109 S.Ct. 1775 (alterations in original) (quoting 42 U.S.C. § 2000e-2(e)); see also *Dothard v. Rawlinson*, 433 U.S. 321, 334, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) (recognizing that the BFOQ was meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex). Harrah's has not attempted to defend the “Personal Best” makeup requirement as a BFOQ. In fact, there is little doubt that the “Personal Best” policy is not a business necessity, as Harrah's quietly disposed of this policy after Jespersen filed this suit. Regardless, although a BFOQ is a defense that an employer may raise, see *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515 (9th Cir.2000), it does not preclude the employee from demonstrating the elements of a prima facie case of discrimination and presenting her case to a jury.

EXHIBIT 33



KeyCite Red Flag - Severe Negative Treatment

Superseded by Statute as Stated in [Burrage v. U.S.](#), U.S., January 27, 2014

109 S.Ct. 1775
Supreme Court of the United States

PRICE WATERHOUSE, Petitioner

v.

Ann B. HOPKINS.

No. 87-1167.

|
Argued Oct. 31, 1988.

|
Decided May 1, 1989.

Female partnership candidate who was refused admission as partner in accounting firm brought sex discrimination action against firm. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., [618 F.Supp. 1109](#), ruled in candidate's favor on issue of liability, and cross appeals were taken. The District of Columbia Circuit Court of Appeals, [825 F.2d 458](#), affirmed in part, reversed in part and remanded. On certiorari, the Supreme Court, Justice Brennan, held that: (1) when plaintiff in Title VII case proves that her gender played part in employment decision, defendant may avoid finding of liability by proving by preponderance of the evidence that it would have made same decision even if it had not taken plaintiff's gender into account, and (2) evidence was sufficient to establish that sexual stereotyping played a part in evaluating plaintiff's candidacy.

Reversed and remanded.

Justices White and O'Connor filed opinions concurring in judgment.

Justice Kennedy filed dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

West Headnotes (25)

[1] **Civil Rights**

🔑 Nature and existence of employment relationship

Employment decisions pertaining to advancement to partnership are subject to challenge under Title VII. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

Cases that cite this headnote

[2] **Federal Courts**

🔑 Presentation of Questions Below or on Review; Record; Waiver

Issue of whether accounting firm violated Title VII when it allegedly subjected female partnership candidate to biased decision-making process that "tended to deprive" woman of partnership on basis of sex could not be raised for first time before Supreme Court. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 703(a)(1, 2), as amended, [42 U.S.C.A. § 2000e-2\(a\)\(1, 2\)](#).

179 Cases that cite this headnote

[3] **Civil Rights**

🔑 Practices prohibited or required in general; elements

Sex discrimination provision of Title VII means that gender must be irrelevant to employment decisions. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 703(a)(1, 2), as amended, [42 U.S.C.A. § 2000e-2\(a\)\(1, 2\)](#).

7 Cases that cite this headnote

[4] **Civil Rights**

🔑 Motive or intent; pretext

Critical inquiry in Title VII sex discrimination case is whether gender was factor in employment decision at moment it was made. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 703(a)(1), as amended, [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

[48 Cases that cite this headnote](#)

[5] Civil Rights

🔑 Motive or intent; pretext

Title VII meant to condemn even those decisions based on mixture of legitimate and illegitimate considerations. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 703(a)(1), as amended, [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

[43 Cases that cite this headnote](#)

[6] Civil Rights

🔑 Motive or intent; pretext

When employer considers both gender and legitimate factors at time of making employment decision, that decision was “because of” sex and the other, legitimate considerations for Title VII purposes, even if decision would have been same if gender had not been taken into account. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 703(a)(1), as amended, [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

[73 Cases that cite this headnote](#)

[7] Civil Rights

🔑 Sex discrimination

Sex discrimination plaintiff is obligated to prove in Title VII case that employer relied upon sex-based considerations in coming to its decision. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[80 Cases that cite this headnote](#)

[8] Civil Rights

🔑 Motive or intent; pretext

Employer may not be held liable under Title VII if it can prove that, even if it had not taken gender into account in making employment decision, it would have come to same decision

regarding particular person. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[44 Cases that cite this headnote](#)

[9] Civil Rights

🔑 Discrimination by reason of race, color, ethnicity, or national origin, in general

Civil Rights

🔑 Religious Discrimination

Principles announced by Supreme Court with regard to sex discrimination under Title VII applied with equal force to discrimination based on race, religion, or national origin. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[48 Cases that cite this headnote](#)

[10] Civil Rights

🔑 Practices prohibited or required in general; elements

While employer may not take gender into account in making employment decision under Title VII, except in circumstances in which gender is a bona fide occupational qualification, it is free to decide against a woman for other reasons. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 703(e), as amended, [42 U.S.C.A. § 2000e-2\(e\)](#).

[13 Cases that cite this headnote](#)

[11] Civil Rights

🔑 Motive or intent; pretext

Once plaintiff in Title VII case shows that gender played motivating part in employment decision, defendant may avoid finding of liability only by proving that it would have made same decision even if it had not allowed gender to play such a role. (Per opinion of Justice Brennan, with three

Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[590 Cases that cite this headnote](#)

[12] Civil Rights

🔑 Motive or intent; pretext

Title VII provision permitting court to award affirmative relief when it finds that employer has engaged in unlawful employment practice yet forbidding court to order reinstatement of or back pay to individual discharged for any reason other than discrimination does not mean court inevitably can find violation of statute without having considered whether employment decision would have been the same absent impermissible motive; provision merely limits courts' authority to award affirmative relief in those circumstances in which violation of statute is not dependent upon effect of employer's discriminatory practices on particular employee, as in pattern-or-practice suits and class actions. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 706(g), as amended, [42 U.S.C.A. § 2000e-5\(g\)](#).

[103 Cases that cite this headnote](#)

[13] Civil Rights

🔑 Sex discrimination

Plaintiff retains burden of persuasion on issue of whether gender played part in employment decision in Title VII sex discrimination case. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[68 Cases that cite this headnote](#)

[14] Civil Rights

🔑 Motive or intent; pretext

If plaintiff in Title VII sex discrimination case fails to satisfy fact finder that it is more likely than not that forbidden characteristic played part in employment decision, then plaintiff

may prevail only if she proves that employer's stated reason for its decision is pretextual. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[161 Cases that cite this headnote](#)

[15] Civil Rights

🔑 Motive or intent; pretext

In specific context of sex stereotyping, employer who acts on basis of belief that woman cannot be aggressive, or that she must not be, has acted on basis of gender for Title VII purposes. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[132 Cases that cite this headnote](#)

[16] Civil Rights

🔑 Particular cases

Civil Rights

🔑 Motive or intent; pretext

Comments of partners in accounting firm concerning female partnership candidate were sufficient to show that candidate's rejection was result of sex stereotyping, in candidate's Title VII action. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[51 Cases that cite this headnote](#)

[17] Civil Rights

🔑 Motive or intent; pretext

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played part in particular employment decision for Title VII purposes; plaintiff must show that employer actually relied on her gender in making its decision. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of

1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[415 Cases that cite this headnote](#)

[18] **Civil Rights**

🔑 [Admissibility of evidence; statistical evidence](#)

In showing that employer actually relied on gender in making employment decision in Title VII case, stereotype remarks can be evidence that gender played a part. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[175 Cases that cite this headnote](#)

[19] **Civil Rights**

🔑 [Motive or intent; pretext](#)

Employer may not prevail in mixed-motives Title VII sex discrimination case by offering legitimate and sufficient reason for its decision if that reason did not motivate it at time of employment decision. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[521 Cases that cite this headnote](#)

[20] **Civil Rights**

🔑 [Motive or intent; pretext](#)

Employer may not meet its burden in mixed-motives Title VII sex discrimination case by merely showing that at time of employment decision it was motivated only in part by legitimate reason; employer instead must show that its legitimate reason, standing alone, would have induced it to make same decision. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[1004 Cases that cite this headnote](#)

[21] **Civil Rights**

🔑 [Weight and Sufficiency of Evidence](#)

Employer who has allowed discriminatory impulse to play motivating part in employment decision must prove in Title VII case by preponderance of the evidence that it would have made same decision in absence of discrimination. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[326 Cases that cite this headnote](#)

[22] **Civil Rights**

🔑 [Civil actions in general](#)

Conventional rules of civil litigation generally apply in Title VII cases. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[4 Cases that cite this headnote](#)

[23] **Federal Courts**

🔑 [Particular cases](#)

Remand was required in Title VII sex discrimination case to determine whether accounting firm had proved by preponderance of the evidence that it would not have placed female partnership candidate “on hold” even if it had not permitted sex-linked evaluations to play part in decision-making process, where lower courts required firm to make its proof by clear and convincing evidence. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e et seq.](#)

[77 Cases that cite this headnote](#)

[24] **Civil Rights**

🔑 [Sex discrimination](#)

Evidence in Title VII action that partners in accounting firm placed female partnership candidate “on hold” based on evaluations suggesting that she be required to take “a course at charm school,” and dress more femininely and wear makeup, together with testimony of social psychologist indicating that decision was based on sexual stereotyping, was sufficient to establish that sexual stereotyping played part in decision to place candidacy on hold. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[272 Cases that cite this headnote](#)

[25] Civil Rights

🔑 Sex discrimination

When plaintiff in Title VII case proves that her gender played motivating part in employment decision, defendant may avoid finding of liability only by proving by preponderance of the evidence that it would have made same decision even if it had not taken plaintiff's gender into account. (Per opinion of Justice Brennan, with three Justices concurring and two Justices concurring in judgment.) Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[1045 Cases that cite this headnote](#)

**1778 Syllabus*

***228** Respondent was a senior manager in an office of petitioner professional accounting partnership when she was proposed for partnership in 1982. She was neither offered nor denied partnership but instead her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued petitioner in Federal District Court under Title VII of the Civil Rights Act of 1964, charging that it had discriminated against her on the basis of sex in its partnership decisions. The District Court ruled in respondent's favor on the question of liability, holding that petitioner had unlawfully discriminated against

her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping. The Court of Appeals affirmed. Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, and that petitioner had not carried this burden.

Held: The judgment is reversed, and the case is remanded.

[263 U.S.App.D.C. 321, 825 F.2d 458 \(1987\)](#), reversed and remanded.

Justice BRENNAN, joined by Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS, concluded that when a plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. The courts ****1779** below erred by requiring petitioner to make its proof by clear and convincing evidence. Pp. 1784–1795.

(a) The balance between employee rights and employer prerogatives established by Title VII by eliminating certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice is decisive in this case. The words “because of” in § 703(a)(1) of the Act, which forbids an employer to make an adverse decision against an employee “because of such individual's ... sex,” requires looking at *all* of the reasons, both legitimate and illegitimate, contributing to the decision *at the time it is made*. The preservation of employers' freedom of choice means that an employer will not be liable if it can prove that, if ***229** it had not taken gender into account, it would have come to the same decision. This Court's prior decisions demonstrate that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive. Here, petitioner may not meet its burden by merely showing that respondent's interpersonal problems—abrasiveness with staff members—constituted a legitimate reason for denying her partnership; instead, petitioner must show that its legitimate reason, standing alone, would have induced petitioner to deny respondent partnership. Pp. 1784–1792.

(b) Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that the parties need only prove their case by a preponderance of the evidence. Pp. 1791–1793.

(c) The District Court's finding that sex stereotyping was permitted to play a part in evaluating respondent as a candidate for partnership was not clearly erroneous. This finding is not undermined by the fact that many of the suspect comments made about respondent were made by partners who were supporters rather than detractors. Pp. 1791–1795.

Justice WHITE, although concluding that the Court of Appeals erred in requiring petitioner to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, which sets forth the proper approach to causation in this case, also concluded that the plurality here errs in seeming to require, at least in most cases, that the employer carry its burden by submitting objective evidence that the same result would have occurred absent the unlawful motivation. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof, and there is no special requirement of objective evidence. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action. Pp. 1780–1782.

Justice O'CONNOR, although agreeing that on the facts of this case, the burden of persuasion should shift to petitioner to demonstrate by a preponderance of the evidence that it would have reached the same decision absent consideration of respondent's gender, and that this burden shift is properly part of the liability phase of the litigation, concluded that the plurality misreads Title VII's substantive causation requirement to *command* burden shifting if the employer's decisional process is *230 “tainted” by awareness of sex or race in any way, and thereby effectively eliminates the requirement. Justice O'CONNOR also concluded that the burden shifting rule should be limited to cases such as the present in which the employer has created **1780 uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion. Pp. 1780–1790.

(a) Contrary to the plurality's conclusion, Title VII's plain language making it unlawful for an employer to undertake an adverse employment action “because of” prohibited factors and the statute's legislative history demonstrate that a substantive violation only occurs when consideration of an illegitimate criterion is the “but-for” cause of the adverse action. However, nothing in the language, history, or purpose of the statute prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role in the employment decision. Such a rule has been adopted in tort and other analogous types of cases, where leaving the burden of proof on the plaintiff to prove “but-for” causation would be unfair or contrary to the deterrent purposes embodied in the concept of duty of care. Pp. 1781–1785.

(b) Although the burden shifting rule adopted here departs from the careful framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207—which clearly contemplate that an individual disparate treatment plaintiff bears the burden of persuasion throughout the litigation—that departure is justified in cases such as the present where the plaintiff, having presented direct evidence that the employer placed substantial, though unquantifiable, reliance on a forbidden factor in making an employment decision, has taken her proof as far as it could go, such that it is appropriate to require the defendant, which has created the uncertainty as to causation by considering the illegitimate criterion, to show that its decision would have been justified by wholly legitimate concerns. Moreover, a rule shifting the burden in these circumstances will not conflict with other Title VII policies, particularly its prohibition on preferential treatment based on prohibited factors. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827, distinguished. Pp. 1785–1788.

(c) Thus, in order to justify shifting the burden on the causation issue to the defendant, a disparate treatment plaintiff must show by direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision. Such a showing entitles the factfinder to presume that the employer's discriminatory animus made a difference in the outcome, and, if the employer

fails to carry its burden of persuasion, to conclude that the employer's decision was made "because of" consideration of the illegitimate factor, thereby satisfying *231 the substantive standard for liability under Title VII. This burden shifting rule supplements the *McDonnell Douglas-Burdine* framework, which continues to apply where the plaintiff has failed to satisfy the threshold standard set forth herein. Pp. 1788–1790.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., *post*, p. —, and O'CONNOR, J., *post*, p. —, filed opinions concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C.J., and SCALIA, J., joined, *post*, p. —.

Attorneys and Law Firms

Kathryn A. Oberly argued the cause for petitioner. With her on the briefs were *Paul M. Bator*, *Douglas A. Poe*, *Eldon Olson*, and *Ulric R. Sullivan*.

James H. Heller argued the cause for respondent. With him on the brief was *Douglas B. Huron*.*

* *Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold*; for the American Psychological Association by *Donald N. Bersoff*; for the Committees on Civil Rights, Labor and Employment Law, and Sex and Law of the Association of the Bar of the City of New York by *Jonathan Lang*, *Eugene S. Friedman*, *Arthur Leonard*, and *Colleen McMahon*; and for the NOW Legal Defense and Education Fund et al. by *Sarah E. Burns*, *Lynn Hecht Schafran*, *Joan E. Bertin*, *John A. Powell*, and *Donna R. Lenhoff*.

Solicitor General Fried, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Merrill*, *Deputy Assistant Attorney General Clegg*, *Brian J. Martin*, and *David K. Flynn* filed a brief for the United States as *amicus curiae*.

Opinion

Justice BRENNAN announced the judgment of the Court and delivered an opinion, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was **1781 proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later refused *232 to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership. Judge Gesell in the Federal District Court for the District of Columbia ruled in her favor on the question of liability, 618 F.Supp. 1109 (1985), and the Court of Appeals for the District of Columbia Circuit affirmed. 263 U.S.App.D.C. 321, 825 F.2d 458 (1987). We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 268 (1988).

I

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate—either on a “long” or a “short” form, depending on the partner's degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who submitted them, the firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on “hold,” or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to “hold” her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments

from partners will not guarantee a candidate's admission to the partnership, nor will a specific *233 quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.

[1] Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D.C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—were “held” for reconsideration the following year.¹ Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

**1782 In a jointly prepared statement supporting her candidacy, the partners in Hopkins' office showcased her successful 2-year effort to secure a \$25 million contract with the Department of State, labeling it “an outstanding performance” and one that Hopkins carried out “virtually at the partner level.” Plaintiff's Exh. 15. Despite Price Waterhouse's attempt at trial to minimize her contribution to this project, Judge Gesell *234 specifically found that Hopkins had “played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State.” 618 F.Supp., at 1112. Indeed, he went on, “[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.” *Ibid.*

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in their joint statement as “an outstanding professional” who had a “deft touch,” a “strong character, independence and integrity.” Plaintiff's Exh. 15. Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as “extremely competent, intelligent,” “strong and forthright, very productive, energetic and creative.” Tr. 150. Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and “intellectual clarity”; she was, in his words, “a stimulating conversationalist.” *Id.*, at 156–157. Evaluations such as these led Judge Gesell

to conclude that Hopkins “had no difficulty dealing with clients and her clients appear to have been very pleased with her work” and that she “was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked.” 618 F.Supp., at 1112–1113.

On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins' brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins' perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners' negative remarks about Hopkins—even those of partners supporting her—had to do with her “interpersonal *235 skills.” Both “[s]upporters and opponents of her candidacy,” stressed Judge Gesell, “indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.” *Id.*, at 1113.

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as “macho” (Defendant's Exh. 30); another suggested that she “overcompensated for being a woman” (Defendant's Exh. 31); a third advised her to take “a course at charm school” (Defendant's Exh. 27). Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it's a lady using foul language.” Tr. 321. Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.” Defendant's Exh. 27. But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 618 F.Supp., at 1117.

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie–Mellon University, testified at trial that the partnership selection process at

****1783** Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was “universally disliked” by staff (Defendant's Exh. 27), and another described her as “consistently annoying and irritating” (*ibid.*); yet these were people who had had very little contact with Hopkins. According to ***236** Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping—although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decisionmaking process.

In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, “[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers”; in this environment, “[t]o be identified as a ‘women's lib[b]er’ was regarded as [a] negative comment.” 618 F.Supp., at 1117. In fact, the judge found that in previous years “[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations.” *Ibid.*

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.

The judge went on to decide, however, that some of the partners' remarks about Hopkins stemmed from an impermissibly ***237** cabined view of the proper behavior

of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Hopkins' candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.

The Court of Appeals affirmed the District Court's ultimate conclusion, but departed from its analysis in one particular: it held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination. 263 U.S.App.D.C., at 333–334, 825 F.2d, at 470–471. Under this approach, an employer is not deemed to have violated Title VII if it proves that it would have made the same decision in the absence of an impermissible motive, whereas under the District Court's approach, the employer's proof in that respect only avoids equitable relief. We decide today that the Court of Appeals had the better approach, but that both courts erred in requiring the ****1784** employer to make its proof by clear and convincing evidence.

II

The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had ***238** not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability.² We conclude that, as often happens, the truth lies somewhere in between.

*239 A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.³ Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of “for cause” legislation,⁴ Title VII eliminates ****1785** certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

[2] [3] Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids ***240** an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or 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, *because of* such individual's ... sex.” 42 U.S.C. §§ 2000e-2(a)(1), (2) (emphasis added).⁵ We take these words to mean that gender must be irrelevant to employment decisions. To construe the words “because of” as colloquial shorthand for “but-for causation,” as does Price Waterhouse, is to misunderstand them.⁶

[4] [5] [6] But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) (“to fail or refuse”), in contrast, turns our attention to the actual moment of the ***241** event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*. Moreover, since we know that the words “because of” do not mean “*solely* because of,”⁷ we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate

considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

To attribute this meaning to the words “because of” does not, as the dissent asserts, ****1786** *post*, at 1808, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a “cause” of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply “in the air” unless we can identify at least one of them as a but-for cause of the object's movement. *Ibid*. Events that are causally overdetermined, in other words, may not have any “cause” at all. This cannot be so.

[7] We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant ***242** to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Our interpretation of the words “because of” also is supported by the fact that Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a “bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.” 42 U.S.C. § 2000e-2(e). The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. An employer may not, we have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988);

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

[8] To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.

To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-impact *243 cases, see *Watson* and *Griggs*, and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives. In *McDonnell Douglas*, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no **1787 racial discrimination, subtle or otherwise." 411 U.S., at 801, 93 S.Ct., at 1823–1824.

[9] When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history. An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, comanagers of the bill in the Senate, is representative of this general theme.⁸ According to their memorandum, Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications,

rather than on the basis of race or color." ⁹ 110 Cong.Rec. 7247 (1964), quoted in *Griggs v. *244 Duke Power Co.*, *supra*, 401 U.S., at 434, 91 S.Ct., at 855. The memorandum went on: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title." 110 Cong.Rec. 7213 (1964).

[10] [11] [12] Many other legislators made statements to a similar effect; we see no need to set out each remark in full here. The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability¹⁰ only by proving that **1788 it would have made the same *245 decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.

[13] Our holding casts no shadow on *Burdine*, in which we decided that, even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. 450 U.S., at 256–258, 101 S.Ct., at 1095–1096. We stress, first, that neither *246 court below shifted the burden of persuasion to Price Waterhouse on this question, and in fact, the District Court found that Hopkins had not shown that the firm's stated reason for its decision was pretextual. 618 F.Supp., at 1114–1115. Moreover, since we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of "shifting burdens" that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400, 103 S.Ct. 2469, 2473, 76 L.Ed.2d 667 (1983).¹¹

[14] Price Waterhouse's claim that the employer does not bear any burden of proof (if it bears one at all) until

the plaintiff has shown “substantial evidence that Price Waterhouse’s explanation for failing to promote Hopkins was not the ‘true reason’ for its action” (Brief for Petitioner 20) merely restates its argument that the plaintiff in a mixed-motives case *247 must squeeze her proof into *Burdine’s* framework. Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was **1789 “the ‘true reason’ ” (Brief for Petitioner 20 (emphasis added)) for the decision—which is the question asked by *Burdine*. See *Transportation Management, supra*, at 400, n. 5, 103 S.Ct., at 2473, n. 5.¹² Oblivious to this last point, the dissent would insist that *Burdine’s* framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate or an illegitimate set of considerations led to the challenged decision. To say that *Burdine’s* evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed.

*248 B

In deciding as we do today, we do not traverse new ground. We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer’s burden to justify decisions resulting from that practice. When an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment. See *Dothard v. Rawlinson*, 433 U.S. 321, 332–337, 97 S.Ct. 2720, 2728–2730, 53 L.Ed.2d 786 (1977). In a related context, although the Equal Pay Act expressly permits employers to pay different wages to women where disparate pay is the result of a “factor other than sex,” see 29 U.S.C. § 206(d)(1), we have decided that it is the employer, not the employee, who must prove that the actual disparity is not sex linked. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974). Finally, some courts have held that, under Title VII as amended by the Pregnancy Discrimination Act, it is the employer who has the burden of showing that its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy. See, e.g.,

Hayes v. Shelby Memorial Hospital, 726 F.2d 1543, 1548 (CA11 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1187 (CA4 1982). As these examples demonstrate, our assumption always has been that if an employer allows gender to affect its decisionmaking process, then it must carry the burden of justifying its ultimate decision. We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.

We have reached a similar conclusion in other contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits. In **1790 *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the *249 plaintiff claimed that he had been discharged as a public school teacher for exercising his free-speech rights under the First Amendment. Because we did not wish to “place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing,” *id.*, at 285, 97 S.Ct., at 575, we concluded that such an employee “ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record.” *Id.*, at 286, 97 S.Ct. at 575. We therefore held that once the plaintiff had shown that his constitutionally protected speech was a “substantial” or “motivating factor” in the adverse treatment of him by his employer, the employer was obligated to prove “by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct.” *Id.*, at 287, 97 S.Ct., at 576. A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a “but-for” cause of the employment decision. See *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 417, 99 S.Ct. 693, 697, 58 L.Ed.2d 619 (1979). See also *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270–271, n. 21, 97 S.Ct. 555, 566, n. 21, 50 L.Ed.2d 450 (1977) (applying *Mt. Healthy* standard where plaintiff alleged that unconstitutional motive had contributed to enactment of legislation); *Hunter v. Underwood*, 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985) (same).

In *Transportation Management*, we upheld the NLRB’s interpretation of § 10(c) of the National Labor Relations Act, which forbids a court to order affirmative relief for discriminatory conduct against a union member “if such

individual was suspended or discharged for cause.” 29 U.S.C. § 160(c). The Board had decided that this provision meant that once an employee had shown that his suspension or discharge was based in part on hostility to unions, it was up to the employer to prove by a preponderance of the evidence that it would have made the same decision in the absence of this impermissible motive. In such a situation, we emphasized, *250 “[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.” 462 U.S., at 403, 103 S.Ct., at 2475.

We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path.

C

[15] 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.¹³ In the specific context of sex stereotyping, **1791 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.

[16] Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of “sex stereotyping” in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. *251 As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court’s conclusion that a number of the partners’ comments showed sex stereotyping at work. See *infra*, at 1793–1794. 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 stereotype associated with their group, for “ [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended

to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’ ” *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

[17] [18] Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, “discrimination in the air”; rather, it is, as Hopkins puts it, “discrimination brought to ground and visited upon” an employee. Brief for Respondent 30. By focusing on Hopkins’ specific proof, however, we do not suggest a limitation on the possible ways *252 of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, “standing alone,” would or would not establish a plaintiff’s case, since such a decision is unnecessary in this case. But see *post*, at 1805 (O’CONNOR, J., concurring in judgment).

[19] [20] As to the employer’s proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive.¹⁴ Moreover, proving “ ‘that the same decision would have been justified ... is not the same as proving that the same decision would have been made.’ ” *Givhan*, 439 U.S., at 416, 99 S.Ct., at 697, quoting *Ayers v. Western Line Consolidated School District*, 555 F.2d 1309, 1315 (CA5 1977). An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the

decision it was motivated only in part by a legitimate ****1792** reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

III

[21] The courts below held that an employer who has allowed a discriminatory impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence ***253** of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.

[22] Conventional rules of civil litigation generally apply in Title VII cases, see, e.g., *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (discrimination not to be “treat[ed] ... differently from other ultimate questions of fact”), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390, 103 S.Ct. 683, 691, 74 L.Ed.2d 548 (1983). Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual. See *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388, 1396, 71 L.Ed.2d 599 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418, 427, 99 S.Ct. 1804, 1810, 60 L.Ed.2d 323 (1979) (involuntary commitment); *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966) (deportation); *Schneiderman v. United States*, 320 U.S. 118, 122, 125, 63 S.Ct. 1333, 1335, 1336, 87 L.Ed.2d 1796 (1943) (denaturalization). Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief, see, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974) (defamation), and we find it significant that in such cases it was the defendant rather than the plaintiff who sought the elevated standard of proof—suggesting that this standard

ordinarily serves as a shield rather than, as Hopkins seeks to use it, as a sword.

It is true, as Hopkins emphasizes, that we have noted the “clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount.” *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931). Likewise, an Equal Employment Opportunity Commission (EEOC) regulation does require federal agencies proved to have violated ***254** Title VII to show by clear and convincing evidence that an individual employee is not entitled to relief. See 29 CFR § 1613.271(c)(2) (1988). And finally, it is true that we have emphasized the importance of make-whole relief for victims of discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Yet each of these sources deals with the proper determination of relief rather than with the initial finding of liability. This is seen most easily in the EEOC's regulation, which operates only after an agency or the EEOC has found that “an employee of the agency was discriminated against.” See 29 CFR § 1613.271(c) (1988). Because we have held that, by proving that it would have made the same decision in the absence of discrimination, the employer may avoid a finding of liability altogether and not simply avoid certain equitable relief, these authorities do not help Hopkins to show why ****1793** we should elevate the standard of proof for an employer in this position.

Significantly, the cases from this Court that most resemble this one, *Mt. Healthy* and *Transportation Management*, did not require clear and convincing proof. *Mt. Healthy*, 429 U.S., at 287, 97 S.Ct., at 576; *Transportation Management*, 462 U.S., at 400, 403, 103 S.Ct., at 2473, 2475. We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

[23] Although Price Waterhouse does not concretely tell us how its proof was preponderant even if it was not clear and convincing, this general claim is implicit in its request for the less stringent standard. Since the lower courts required Price Waterhouse to make its proof by clear and convincing evidence, they did not determine whether Price Waterhouse

had proved by a *preponderance of the evidence* that it would have placed Hopkins' candidacy on hold even if it had not permitted *255 sex-linked evaluations to play a part in the decision-making process. Thus, we shall remand this case so that that determination can be made.

IV

[24] The District Court found that sex stereotyping “was permitted to play a part” in the evaluation of Hopkins as a candidate for partnership. 618 F.Supp., at 1120. Price Waterhouse disputes both that stereotyping occurred and that it played any part in the decision to place Hopkins' candidacy on hold. In the firm's view, in other words, the District Court's factual conclusions are clearly erroneous. We do not agree.

In finding that some of the partners' comments reflected sex stereotyping, the District Court relied in part on Dr. Fiske's expert testimony. Without directly impugning Dr. Fiske's credentials or qualifications, Price Waterhouse insinuates that a social psychologist is unable to identify sex stereotyping in evaluations without investigating whether those evaluations have a basis in reality. This argument comes too late. At trial, counsel for Price Waterhouse twice assured the court that he did not question Dr. Fiske's expertise (App. 25) and failed to challenge the legitimacy of her discipline. Without contradiction from Price Waterhouse, Fiske testified that she discerned sex stereotyping in the partners' evaluations of Hopkins and she further explained that it was part of her business to identify stereotyping in written documents. *Id.*, at 64. We are not inclined to accept petitioner's belated and unsubstantiated characterization of Dr. Fiske's testimony as “gossamer evidence” (Brief for Petitioner 20) based only on “intuitive hunches” (*id.*, at 44) and of her detection of sex stereotyping as “intuitively divined” (*id.*, at 43). Nor are we disposed to adopt the dissent's dismissive attitude toward Dr. Fiske's field of study and toward her own professional integrity, see *post*, at 1813, n. 5.

*256 Indeed, we are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school.” Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick,

perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.¹⁵

**1794 Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper department.¹⁶

*257 Price Waterhouse concedes that the proof in *Transportation Management*, adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff. Brief for Petitioner 45. But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of his union activity; there was, contrary to Price Waterhouse's suggestion, no direct evidence that that grudge had played a role in the decision, and, in fact, the employer had given other reasons in explaining the plaintiff's discharge. See 462 U.S., at 396, 103 S.Ct., at 2471. If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

Nor is the finding that sex stereotyping played a part in the Policy Board's decision undermined by the fact that many of the suspect comments were made by supporters rather than detractors of Hopkins. A negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decisionmaker to think less highly of the candidate; the Policy Board, in fact, did not simply tally the “yeses” and “noes” regarding a candidate, but carefully reviewed the content of the submitted comments. The additional suggestion that the comments were made by “persons outside the decisionmaking chain” (Brief for Petitioner 48)—and therefore could not have harmed Hopkins—simply ignores the critical role that partners' comments played in the Policy Board's partnership decisions.

Price Waterhouse appears to think that we cannot affirm the factual findings of the trial court without deciding that, instead of being overbearing and aggressive and curt, Hopkins is, in fact, kind and considerate and patient. If this is indeed its impression, petitioner misunderstands the theory *258 on which Hopkins prevailed. The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a *woman* manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as **1795 sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

V

[25] We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals' judgment against Price Waterhouse on liability and remand the case to that court for further proceedings.

It is so ordered.

Justice WHITE, concurring in the judgment.

In my view, to determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In *Mt. Healthy*, a public employee was not rehired, in part *259 because of his exercise of First Amendment rights and in part because of permissible considerations. The Court rejected a rule of causation that

focused "solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire," on the grounds that such a rule could make the employee better off by exercising his constitutional rights than by doing nothing at all. *Id.*, at 285, 97 S.Ct., at 575. Instead, the Court outlined the following approach:

"Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, at 287, 97 S.Ct., at 576 (footnote omitted).

It is not necessary to get into semantic discussions on whether the *Mt. Healthy* approach is "but-for" causation in another guise or creates an affirmative defense on the part of the employer to see its clear application to the issues before us in this case. As in *Mt. Healthy*, the District Court found that the employer was motivated by both legitimate and illegitimate factors. And here, as in *Mt. Healthy*, and as the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as Justice O'CONNOR states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action. The District Court, as its opinion was construed by the Court of Appeals, so found, 263 U.S.App.D.C. 321, 333, 334, 825 F.2d 458, 470, 471 (1987), and I agree that the finding was supported by the record. The burden of persuasion then *260 should have shifted to Price Waterhouse to prove "by a preponderance of the evidence that it would have reached the same decision ... in the absence of" the unlawful motive. *Mt. Healthy, supra*, 429 U.S., at 287, 97 S.Ct., at 576.

I agree with Justice BRENNAN that applying this approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in **1796 *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Court has made clear that "mixed-motives" cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, "the issue is whether either illegal or legal

motives, but not both, were the ‘true’ motives behind the decision.” *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400, n. 5, 103 S.Ct. 2469, 2473, n. 5, 76 L.Ed.2d 667 (1983). In mixed-motives cases, however, there is no one “true” motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate. It can hardly be said that our decision in this case is a departure from cases that are “inapposite.” *Ibid.* I also disagree with the dissent’s assertion that this approach to causation is inconsistent with our statement in *Burdine* that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” 450 U.S., at 253, 101 S.Ct., at 1093. As we indicated in *Transportation Management Corp.*, the showing required by *Mt. Healthy* does not improperly shift from the plaintiff the ultimate burden of persuasion on whether the defendant intentionally discriminated against him or her. See 462 U.S., at 400, n. 5, 103 S.Ct., at 2473, n. 5.

Because the Court of Appeals required Price Waterhouse to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy*, I concur in the judgment reversing this case in part and remanding. *261 With respect to the employer’s burden, however, the plurality seems to require, at least in most cases, that the employer submit objective evidence that the same result would have occurred absent the unlawful motivation. *Ante*, at 1791. In my view, however, there is no special requirement that the employer carry its burden by objective evidence. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action. *

Justice O’CONNOR, concurring in the judgment.

I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins’ candidacy absent consideration of her gender. I further agree that this burden shift is properly part of the liability phase of the litigation. I thus concur in the judgment of the Court.

My disagreement stems from the plurality’s conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof applied in this case. The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established by our unanimous decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), for use in cases such as this one where the employer has created uncertainty as to causation by knowingly giving *262 substantial weight to an impermissible **1797 criterion. I write separately to explain why I believe such a departure from the *McDonnell Douglas* standard is justified in the circumstances presented by this and like cases, and to express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered.

I

Title VII provides in pertinent part: “It shall be an unlawful employment practice 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) (emphasis added). The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the “but-for” cause of an adverse employment action. The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts. Critics of the bill that became Title VII labeled it a “thought control bill,” and argued that it created a “punishable crime that does not require an illegal external act as a basis for judgment.” 100 Cong.Rec. 7254 (1964) (remarks of Sen. Ervin). Senator Case, whose views the plurality finds so persuasive elsewhere, responded:

“The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences.” *Ibid.*

Thus, I disagree with the plurality's dictum that the words "because of" do not mean "but-for" causation; manifestly they *263 do. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 499, 106 S.Ct. 3019, 3062, 92 L.Ed.2d 344 (1986) (WHITE, J., dissenting) ("[T]he general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination"). We should not, and need not, deviate from that policy today. The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.

The evidence of congressional intent as to which party should bear the burden of proof on the issue of causation is considerably less clear. No doubt, as a general matter, Congress assumed that the plaintiff in a Title VII action would bear the burden of proof on the elements critical to his or her case. As the dissent points out, *post*, at 1809, n. 3, the interpretative memorandum submitted by sponsors of Title VII indicates that "the plaintiff, *as in any civil case*, would have the burden of proving that discrimination had occurred." 110 Cong.Rec. 7214 (1964) (emphasis added). But in the area of tort liability, from whence the dissent's "but-for" standard of causation is derived, see *post*, at 1807, the law has long recognized that in certain "civil cases" leaving the burden of persuasion on the plaintiff to prove "but-for" causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the "but-for" cause of the plaintiff's injury. See *e.g.*, *Summers v. Tice*, 33 Cal.2d 80, 84-87, 199 P.2d 1, 3-4 (1948). The same rule has been applied where the effect of a defendant's tortious conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff. See *Kingston v. Chicago & N.W.R. Co.*, 191 Wis. 610, 616, 211 N.W. 913, 915 (1927) ("Granting that the union of that fire [caused by defendant's **1798 *264 negligence] with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that ... the fire set by him was not the proximate cause of the damage"). See also 2 J. Wigmore, *Select Cases on the Law of Torts* § 153, p. 865 (1912) ("When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts, is culpable, then the defendant has the

burden of proving that the other person, or his other act, was the sole cause of the harm").

While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant's "breach of duty" was the "but-for" cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action,

"at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy." Malone, *Ruminations on Cause-In-Fact*, 9 *Stan.L.Rev.* 60, 67 (1956).

Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. As we have noted in the past, the award of backpay to a Title VII plaintiff provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as *265 possible, the last vestiges" of discrimination in employment. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418, 95 S.Ct. 2362, 2371-2372, 45 L.Ed.2d 280 (1975) (citation omitted). The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418, 95 S.Ct., at 2372.

Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, "[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote." 110 Cong.Rec. 7218 (1964). See also *id.*, at 13088 (remarks of Sen. Humphrey) ("What the bill does ... is simply to make it an illegal practice to use race as a factor in denying employment"). Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the

Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor caused a tangible employment injury of some kind.

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's ****1799** discriminatory motivation "caused" the employment decision. The employer has ***266** not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation in the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.

We have given recognition to these principles in our cases which have discussed the "remedial phase" of class action disparate treatment cases. Once the class has established that discrimination against a protected group was essentially the employer's "standard practice," there has been harm to the group and injunctive relief is appropriate. But as to the individual members of the class, the liability phase of the litigation is not complete. See *Dillon v. Coles*, 746 F.2d 998, 1004 (CA3 1984) ("It is misleading to speak of the additional proof required by an individual class member for relief as being a part of the damage phase, that evidence is actually an element of the liability portion of the case") (footnote omitted). Because the class has already demonstrated that, as a rule, illegitimate factors were considered in the employer's decisions, the burden shifts to the employer "to demonstrate that the individual applicant was denied an employment opportunity for legitimate reasons." *Teamsters v. United States*, 431 U.S. 324, 362, 97 S.Ct. 1843, 1868, 52 L.Ed.2d 396 (1977). See also *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772, 96 S.Ct. 1251, 1268, 47 L.Ed.2d 444 (1976).

The individual members of a class action disparate treatment case stand in much the same position as Ann Hopkins here. There has been a strong showing that the employer has done exactly what Title VII forbids, but the connection between the employer's illegitimate motivation and any injury to the individual plaintiff is unclear. At this point calling upon the employer to show that despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event hardly seems "unfair" or ***267** contrary to the substantive command of the statute. In fact, an individual plaintiff who has shown that an illegitimate factor played a substantial role in the decision in his or her case has proved *more* than the class member in a *Teamsters* type action. The latter receives the benefit of a burden shift to the defendant based on the *likelihood* that an illegitimate criterion was a factor in the individual employment decision.

There is a tension between the *Franks* and *Teamsters* line of decisions and the individual disparate treatment cases cited by the dissent. See *post*, at 1809–1811. Logically, under the dissent's view, each member of a disparate treatment class action would have to show "but-for" causation as to his or her individual employment decision, since it is not an element of the pattern or practice proof of the entire class and it is statutorily mandated that the plaintiff bear the burden of proof on this issue throughout the litigation. While the Court has properly drawn a distinction between the elements of a class action claim and an individual disparate treatment claim, see *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 873–878, 104 S.Ct. 2794, 2798–2801, 81 L.Ed.2d 718 (1984), and I do not suggest the wholesale transposition of rules from one setting to the other, our decisions in *Teamsters* and *Franks* do indicate a recognition that presumptions shifting the burden of persuasion based on evidentiary probabilities and the policies behind the statute are not alien to our Title VII jurisprudence.

Moreover, placing the burden on the defendant in this case to prove that the same decision would have been justified by legitimate reasons is consistent with our interpretation of the constitutional guarantee of equal protection. Like a disparate treatment plaintiff, one who asserts that governmental ****1800** action violates the Equal Protection Clause must show that he or she is "the victim of intentional discrimination." *Burdine*, 450 U.S., at 256, 101 S.Ct., at 1095. Compare *post*, at 1809, 1811. (KENNEDY, J., dissenting), with *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). In *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972), we dealt with

a criminal defendant's allegation that *268 members of his race had been invidiously excluded from the grand jury which indicted him in violation of the Equal Protection Clause. In addition to the statistical evidence presented by petitioner in that case, we noted that the State's "selection procedures themselves were not racially neutral." *Id.*, at 630, 92 S.Ct., at 1225. Once the consideration of race in the decisional process had been established, we held that "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Id.*, at 632, 92 S.Ct., at 1226.

We adhered to similar principles in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), a case which, like this one, presented the problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions. In *Arlington Heights* a group of minority plaintiffs claimed that a municipal governing body's refusal to rezone a plot of land to allow for the construction of low-income integrated housing was racially motivated. On the issue of causation, we indicated that the plaintiff was not required

"to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, *269 this judicial deference is no longer justified." *Id.*, at 265–266, 97 S.Ct., at 563 (citation omitted).

If the strong presumption of regularity and rationality of legislative decisionmaking must give way in the face of evidence that race has played a significant part in a legislative decision, I simply cannot believe that Congress intended Title VII to accord *more* deference to a private employer in the face of evidence that its decisional process has been substantially infected by discrimination. Indeed, where a public employee brings a "disparate treatment" claim under 42 U.S.C. § 1983 and the Equal Protection Clause the employee is entitled to

the favorable evidentiary framework of *Arlington Heights*. See, e.g., *Hervey v. Little Rock*, 787 F.2d 1223, 1233–1234 (CA8 1986) (applying *Arlington Heights* to public employee's claim of sex discrimination in promotion decision); *Lee v. Russell County Bd. of Education*, 684 F.2d 769, 773–774 (CA11 1982) (applying *Arlington Heights* to public employees' claims of race discrimination in discharge case). Under the dissent's reading of Title VII, Congress' extension of the coverage of the statute to public employers in 1972 has placed these employees under a less favorable evidentiary regime. In my view, nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role **1801 in the employment decision. Even the dissenting judge below "[had] no quarrel with [the] principle" that "a party with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent." 263 U.S.App.D.C. 321, 341, 825 F.2d 458, 478 (1987) (Williams, J. dissenting).

*270 II

The dissent's summary of our individual disparate treatment cases to date is fair and accurate, and amply demonstrates that the rule we adopt today is at least a change in direction from some of our prior precedents. See *post*, at 1809–1811. We have indeed emphasized in the past that in an individual disparate treatment action the plaintiff bears the burden of persuasion throughout the litigation. Nor have we confined the word "pretext" to the narrow definition which the plurality attempts to pin on it today. See *ante*, at 1788–1789. *McDonnell Douglas* and *Burdine* clearly contemplated that a disparate treatment plaintiff could show that the employer's proffered explanation for an event was not "the true reason" either because it *never* motivated the employer in its employment decisions or because it did not do so in a particular case. *McDonnell Douglas* and *Burdine* assumed that the plaintiff would bear the burden of persuasion as to both these attacks, and we clearly depart from that framework today. Such a departure requires justification, and its outlines should be carefully drawn.

First, *McDonnell Douglas* itself dealt with a situation where the plaintiff presented no direct evidence that the employer

had relied on a forbidden factor under Title VII in making an employment decision. The prima facie case established there was not difficult to prove, and was based only on the statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision. See *Teamsters*, 431 U.S., at 358, n. 44, 97 S.Ct., at 1866, n. 44. (“[T]he *McDonnell Douglas* formula does not require direct proof of discrimination”). In the face of this inferential proof, the employer's burden was deemed to be only one of production; the employer must articulate a legitimate reason for the adverse employment action. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). The plaintiff must then be given an “opportunity to demonstrate *271 by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.” *McDonnell Douglas*, 411 U.S., at 805, 93 S.Ct., at 1826. Our decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), also involved the “narrow question” whether, after a plaintiff had carried the “not onerous” burden of establishing the prima facie case under *McDonnell Douglas*, the burden of persuasion should be shifted to the employer to prove that a legitimate reason for the adverse employment action existed. 450 U.S., at 250, 101 S.Ct., at 1092. As the discussion of *Teamsters* and *Arlington Heights* indicates, I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.

The only individual disparate treatment case cited by the dissent which involved the kind of direct evidence of discriminatory animus with which we are confronted here is *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713–714, n. 2, 103 S.Ct. 1478, 1481, n. 2, 75 L.Ed.2d 403 (1983). The question presented to the Court in that case involved only a challenge to the elements of the prima facie case under *McDonnell Douglas* and *Burdine*, see Pet. for Cert. in *United States Postal Service Bd. of Governors v. Aikens*, O.T.1981, No. 81–1044, and the question we confront today was neither **1802 briefed nor argued to the Court. As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be

weighted in the same manner where there *is* direct evidence of intentional discrimination. Indeed, in one Age Discrimination in Employment Act case, the Court seemed to indicate that “the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.” *Trans World *272 Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621–622, 83 L.Ed.2d 523 (1985). See also *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403–404, n. 9, 97 S.Ct. 1891, 1897, n. 9, 52 L.Ed.2d 453 (1977).

Second, the facts of this case, and a growing number like it decided by the Courts of Appeals, convince me that the evidentiary standard I propose is necessary to make real the promise of *McDonnell Douglas* that “[i]n the implementation of [employment] decisions, it is abundantly clear that Title VII tolerates no ... discrimination, subtle or otherwise.” 411 U.S., at 801, 93 S.Ct., at 1823–1824. In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. 618 F.Supp. 1109, 1116–1117 (DC 1985). The District Court further found that these evaluations were given “great weight” by the decisionmakers at Price Waterhouse. *Id.*, at 1118. In addition, the District Court found that the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her “professional” problems would be solved if she would “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.*, at 1117 (footnote omitted). As the Court of Appeals characterized it, Ann Hopkins proved that Price Waterhouse “permitt [ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner.” 263 U.S.App.D.C., at 324, 825 F.2d, at 461.

At this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider *273 her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was

told by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid. If, as we noted in *Teamsters*, “[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof,” 431 U.S., at 359, n. 45, 97 S.Ct., at 1867, n. 45, one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate concerns.

Moreover, there is mounting evidence in the decisions of the lower courts that respondent here is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process. Many of these courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate ****1803** criterion makes sense as a rule of evidence and furthers the substantive command of Title VII. See, e.g., *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (CA11 1983) (Tjoflat, J.) (“It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action”). Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions. See, e.g., ***274** *Fields v. Clark University*, 817 F.2d 931, 935–937 CA1 1987) (where plaintiff produced “strong evidence” that sexist attitudes infected faculty tenure decision, burden properly shifted to defendant to show that it would have reached the same decision absent discrimination); *Thompkins v. Morris Brown College*, 752 F.2d 558, 563 (CA11 1985) (direct evidence of discriminatory animus in decision to discharge college professor shifted burden of persuasion to defendant).

Finally, I am convinced that a rule shifting the burden to the defendant where the plaintiff has shown that an illegitimate criterion was a “substantial factor” in the employment decision will not conflict with other congressional policies embodied in Title VII. Title VII expressly provides that an

employer need not give preferential treatment to employees or applicants of any race, color, religion, sex, or national origin in order to maintain a work force in balance with the general population. See 42 U.S.C. § 2000e–2(j). The interpretive memorandum, whose authoritative force is noted by the plurality, see *ante*, at 1787, n. 8, specifically provides: “There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.” 110 Cong.Rec. 7213 (1964).

Last Term, in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988), the Court unanimously concluded that the disparate impact analysis first enunciated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), should be extended to subjective or discretionary selection processes. At the same time a plurality of the Court indicated concern that the focus on bare statistics in the disparate impact setting could force employers to adopt “inappropriate prophylactic measures” in violation of § 2000e–2(j). The plurality went on to emphasize that in a disparate impact case, the plaintiff may not simply ***275** point to a statistical disparity in the employer's work force. Instead, the plaintiff must identify a particular employment practice and “must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.” 487 U.S., at 994, 108 S.Ct., at 2789. The plurality indicated that “the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.” *Id.*, at 997, 108 S.Ct., at 2790.

I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision. First, the explicit consideration of race, color, religion, sex, or national origin in making employment decisions “was the ****1804** most obvious evil Congress had in mind when it enacted Title VII.” *Teamsters*, 431 U.S., at 335, n. 15, 97 S.Ct., at 1854–1855, n. 15. While the prima facie case under *McDonnell Douglas* and the statistical

showing of imbalance involved in a disparate impact case may both be indicators of discrimination or its “functional equivalent,” they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting. Second, shifting the burden of persuasion to the employer in a situation like this one creates no incentive to preferential treatment in violation of § 2000e-2(j). To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.

While the danger of forcing employers to engage in unwarranted preferential treatment is thus less dramatic in this setting than in the situation the Court faced in *Watson*, it is far from wholly illusory. Based on its misreading of *276 the words “because of” in the statute, see *ante*, at 1785–1787, the plurality appears to conclude that if a decisional process is “tainted” by awareness of sex or race in any way, the employer has violated the statute, and Title VII thus commands that the burden shift to the employer to justify its decision. *Ante*, at 1791–1792. The plurality thus effectively reads the causation requirement out of the statute, and then replaces it with an “affirmative defense.” *Ante*, at 1788–1789.

In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision. As the Court of Appeals noted below: “While most circuits have not confronted the question squarely, the consensus among those that have is that once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination.” 263 U.S.App.D.C., at 333–334, 825 F.2d, at 470–471. Requiring that the plaintiff demonstrate that an illegitimate factor played a substantial role in the employment decision identifies those employment situations where the deterrent purpose of Title VII is most clearly implicated. As an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation, the factfinder is entitled to presume that the employer’s discriminatory animus made a difference to the outcome, absent proof to the contrary from the employer. Where a disparate treatment plaintiff has made such a showing, the burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration

of the illegitimate factor. The employer need not isolate the sole cause for the decision; rather it must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment *277 action. This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination. Cf. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977). If the employer fails to carry this burden, the factfinder is justified in concluding that the decision was made “because of” consideration of the illegitimate factor and the substantive standard for liability under the statute is satisfied.

Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63–69, 106 S.Ct. 2399, 2404–2407, 91 L.Ed.2d 49 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements **1805 by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff’s burden in this regard. In addition, in my view testimony such as Dr. Fiske’s in this case, standing alone, would not justify shifting the burden of persuasion to the employer. Race and gender always “play a role” in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to “a lady candidate” might show that gender “played a role” in the decision, but by no means could support a rational factfinder’s inference that the decision was made “because of” sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality’s suggestion to the contrary notwithstanding. See *ante*, at 1790, n. 13. The plurality proceeds from the premise that the words “because of” in the statute do not embody any *278 causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was

made “because of” the plaintiff’s protected status. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations. See also *ante*, at 1795 (WHITE, J., concurring in judgment).

In sum, because of the concerns outlined above, and because I believe that the deterrent purpose of Title VII is disserved by a rule which places the burden of proof on plaintiffs on the issue of causation in all circumstances, I would retain but supplement the framework we established in *McDonnell Douglas* and subsequent cases. The structure of the presentation of evidence in an individual disparate treatment case should conform to the general outlines we established in *McDonnell Douglas* and *Burdine*. First, the plaintiff must establish the *McDonnell Douglas* prima facie case by showing membership in a protected group, qualification for the job, rejection for the position, and that after rejection the employer continued to seek applicants of complainant’s general qualifications. *McDonnell Douglas*, 411 U.S., at 802, 93 S.Ct., at 1824. The plaintiff should also present any direct evidence of discriminatory animus in the decisional process. The defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision. As the dissent notes, under this framework, the employer “has every incentive to convince the trier of fact that the decision was lawful.” *Post*, at 1813, citing *Burdine*, 450 U.S., at 258, 101 S.Ct., at 1096. Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, *279 with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable, and it calibrates the evidentiary requirements demanded of the parties to the goals behind the statute itself.

I agree with the dissent, see *post*, at 1813, n. 4, that the evidentiary framework I propose should be available to all disparate treatment plaintiffs where an illegitimate consideration played a substantial role in an adverse employment decision. The Court’s allocation of the burden of proof in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 626–627, 107 S.Ct. 1442, 1449, 94 L.Ed.2d 615 (1987), rested squarely on “the analytical

framework set forth in *McDonnell Douglas*,” *id.*, at 626, 107 S.Ct., at 1449, which we alter today. It would be odd to say the least if the evidentiary rules applicable to Title VII actions were themselves dependent on the gender or the skin color of the litigants. But see *ante*, at 1809, n. 3.

In this case, I agree with the plurality that petitioner should be called upon to show that the outcome would have been the same if respondent’s professional merit had been its only concern. On remand, the District Court should determine whether Price Waterhouse has shown by a preponderance of the evidence that if gender had not been part of the process, its employment decision concerning Ann Hopkins would nonetheless have been the same.

Justice KENNEDY, with whom the Chief Justice and Justice SCALIA join, dissenting.

Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent.

*280 Before turning to my reasons for disagreement with the Court’s disposition of the case, it is important to review the actual holding of today’s decision. I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. *Ante*, at 1804–1805 (opinion of O’CONNOR, J.); *ante*, at 1795 (opinion of WHITE, J.). As the opinions make plain, the evidentiary scheme created today is not for every case in which a plaintiff produces evidence of stray remarks in the workplace. *Ante*, at 1791 (opinion of BRENNAN, J.); *ante*, at 1804 (opinion of O’CONNOR, J.).

Where the plaintiff makes the requisite showing, the burden that shifts to the employer is to show that legitimate employment considerations would have justified the decision

without reference to any impermissible motive. *Ante*, at 1796 (opinion of WHITE, J.); *ante*, at 1805 (opinion of O'CONNOR, J.). The employer's proof on the point is to be presented and reviewed just as with any other evidentiary question: the Court does not accept the plurality's suggestion that an employer's evidence need be "objective" or otherwise out of the ordinary. *Ante*, at 1797 (opinion of WHITE, J.).

In sum, the Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases. Although Justice O'CONNOR advances some thoughtful arguments for this change, I remain convinced that it is unnecessary and unwise. More troubling is the plurality's rationale for today's decision, which includes a number of unfortunate pronouncements on both causation and methods of proof in employment discrimination cases. To demonstrate the defects in the plurality's reasoning, it is necessary to *281 discuss, first, the standard of causation in Title VII cases, and, second, the burden of proof.

I

The plurality describes this as a case about the standard of causation under Title VII, *ante*, at 1784, but I respectfully suggest that the description is misleading. **1807 Much of the plurality's rhetoric is spent denouncing a "but-for" standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard. The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof. The plurality's causation analysis is misdirected, for it is clear that, whoever bears the burden of proof on the issue, Title VII liability requires a finding of but-for causation. See also *ante*, at 1797, and n. (opinion of WHITE, J.); *ante*, at 1796 (opinion of O'CONNOR, J.).

The words of Title VII are not obscure. The part of the statute relevant to this case provides:

"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." 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

By any normal understanding, the phrase "because of" conveys the idea that the motive in question made a difference to the outcome. We use the words this way in everyday speech. And assuming, as the plurality does, that we ought to consider the interpretive memorandum prepared by the statute's drafters, we find that this is what the words meant to them as well. "To discriminate is to make a distinction, to make a difference in treatment or favor." 110 Cong.Rec. 7213 (1964). Congress could not have chosen a clearer way *282 to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue.

Our decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives. The verbal formulae we have used in our precedents are synonymous with but-for causation. Thus we have said that providing different insurance coverage to male and female employees violates the statute by treating the employee "in a manner which but-for that person's sex would be different." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683, 103 S.Ct. 2622, 2631, 77 L.Ed.2d 89 (1983), quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 1377, 55 L.Ed.2d 657 (1978). We have described the relevant question as whether the employment decision was "based on" a discriminatory criterion, *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977), or whether the particular employment decision at issue was "made on the basis of" an impermissible factor, *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984).

What we term "but-for" cause is the least rigorous standard that is consistent with the approach to causation our precedents describe. If a motive is not a but-for cause of an event, then by definition it did not make a difference to the outcome. The event would have occurred just the same without it. Common-law approaches to causation often require proof of but-for cause as a starting point toward proof of legal cause. The law may require more than but-for cause, for instance proximate cause, before imposing liability. Any standard less than but-for, however, simply represents a decision to impose liability without causation. As Dean Prosser puts it, "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984).

*283 One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation, yet it adopts a but-for standard once it has placed the burden of proof **1808 as to causation upon the employer. This approach conflates the question whether causation must be shown with the question of how it is to be shown. Because the plurality's theory of Title VII causation is ultimately consistent with a but-for standard, it might be said that my disagreement with the plurality's comments on but-for cause is simply academic. See *ante*, at 1795 (opinion of WHITE, J.). But since those comments seem to influence the decision, I turn now to that part of the plurality's analysis.

The plurality begins by noting the quite unremarkable fact that Title VII is written in the present tense. *Ante*, at 1785. It is unlawful “to fail” or “to refuse” to provide employment benefits on the basis of sex, not “to have failed” or “to have refused” to have done so. The plurality claims that the present tense excludes a but-for inquiry as the relevant standard because but-for causation is necessarily concerned with a hypothetical inquiry into how a past event would have occurred absent the contested motivation. This observation, however, tells us nothing of particular relevance to Title VII or the cause of action it creates. I am unaware of any federal prohibitory statute that is written in the past tense. Every liability determination, including the novel one constructed by the plurality, necessarily is concerned with the examination of a past event.¹ The plurality's analysis of verb tense serves only to divert attention from the causation requirement that is made part of the statute by the “because *284 of” phrase. That phrase, I respectfully submit, embodies a rather simple concept that the plurality labors to ignore.²

We are told next that but-for cause is not required, since the words “because of” do not mean “solely because of.” *Ante*, at 1785. No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether consideration of sex must be a cause of the decision. Under the accepted approach to causation that I have discussed, sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282, n. 10, 96 S.Ct. 2574, 2580, n. 10, 49 L.Ed.2d 493

(1976). The plurality seems to say that since we know the words “because of” do not mean “solely because of,” they must not mean “because of” at all. This does not follow, as a matter of either semantics or logic.

The plurality's reliance on the “bona fide occupational qualification” (BFOQ) provisions of Title VII, 42 U.S.C. § 2000e-2(e), is particularly inapt. The BFOQ provisions allow an employer, in certain cases, to make an employment decision of which it is conceded that sex is the cause. That sex may be the legitimate cause of an employment decision where gender is a BFOQ is consistent with the opposite command *285 that a decision caused by sex in any other **1809 case justifies the imposition of Title VII liability. This principle does not support, however, the novel assertion that a violation has occurred where sex made no difference to the outcome.

The most confusing aspect of the plurality's analysis of causation and liability is its internal inconsistency. The plurality begins by saying: “When ... an employer considers both gender and legitimate factors at the time of making a decision, that decision was ‘because of’ sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.” *Ante*, at 1785. Yet it goes on to state that “an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision.” *Ante*, at 1786.

Given the language of the statute, these statements cannot both be true. Title VII unambiguously states that an employer who makes decisions “because of” sex has violated the statute. The plurality's first statement therefore appears to indicate that an employer who considers illegitimate reasons when making a decision is a violator. But the opinion then tells us that the employer who shows that the same decision would have been made absent consideration of sex is *not* a violator. If the second statement is to be reconciled with the language of Title VII, it must be that a decision that would have been the same absent consideration of sex was not made “because of” sex. In other words, there is no violation of the statute absent but-for causation. The plurality's description of the “same decision” test it adopts supports this view. The opinion states that “[a] court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a ‘but-for’ cause of the employment decision,” *ante*, at

1790, and that this “is not an imposition of liability ‘where sex made no difference to the outcome,’ ” *ante*, at 1788, n. 11.

*286 The plurality attempts to reconcile its internal inconsistency on the causation issue by describing the employer's showing as an “affirmative defense.” This is nothing more than a label, and one not found in the language or legislative history of Title VII. Section 703(a)(1) is the statutory basis of the cause of action, and the Court is obligated to explain how its disparate-treatment decisions are consistent with the terms of § 703(a)(1), not with general themes of legislative history or with other parts of the statute that are plainly inapposite. While the test ultimately adopted by the plurality may not be inconsistent with the terms of § 703(a)(1), see *infra*, at 1787, the same cannot be said of the plurality's reasoning with respect to causation. As Justice O'CONNOR describes it, the plurality “reads the causation requirement out of the statute, and then replaces it with an ‘affirmative defense.’ ” *Ante*, at 1804. Labels aside, the import of today's decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence.

II

We established the order of proof for individual Title VII disparate-treatment cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and reaffirmed this allocation in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Under *Burdine*, once the plaintiff presents a prima facie case, an inference of discrimination arises. The employer must rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The final burden of persuasion, however, belongs to the plaintiff. *Burdine* makes clear that the “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Id.*, at 253, 101 S.Ct., at 1093. See also *Board of Trustees of Keene State College v. Sweeney*, *287 439 U.S. 24, 29, 99 S.Ct. 295, 297, 58 L.Ed.2d 216 (1978) (STEVENS, J., dissenting).³ I would adhere to this established evidentiary framework, which provides the appropriate standard for this and other individual disparate-treatment cases. Today's creation of a new set of rules for “mixed-motives” cases is not mandated by the statute itself. The Court's attempt at refinement provides limited practical benefits at the cost of

confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision.

In view of the plurality's treatment of *Burdine* and our other disparate-treatment cases, it is important first to state why those cases are dispositive here. The plurality tries to reconcile its approach with *Burdine* by announcing that it applies only to a “pretext” case, which it defines as a case in which the plaintiff attempts to prove that the employer's proffered explanation is itself false. *Ante*, at 1788–1789, and n. 11. This ignores the language of *Burdine*, which states that a plaintiff may succeed in meeting her ultimate burden of persuasion “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.” 450 U.S., at 256, 101 S.Ct., at 1095 (emphasis added). Under the first of these two alternative methods, a plaintiff meets her burden if she can “persuade the court that the employment decision more likely than not was motivated by a discriminatory reason.” *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 717–718, 103 S.Ct. 1478, 1483, 75 L.Ed.2d 403 (1983) *288 BLACKMUN, J., concurring). The plurality makes no attempt to address this aspect of our cases.

Our opinions make plain that *Burdine* applies to all individual disparate-treatment cases, whether the plaintiff offers direct proof that discrimination motivated the employer's actions or chooses the indirect method of showing that the employer's proffered justification is false, that is to say, a pretext. See *Aikens*, *supra*, at 714, n. 3, 103 S.Ct., at 1481, n. 3 (“As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence”). The plurality is mistaken in suggesting that the plaintiff in a so-called “mixed-motives” case will be disadvantaged by having to “squeeze her proof into *Burdine's* framework.” *Ante*, at 1788. As we acknowledged in *McDonnell Douglas*, “[t]he facts necessarily will vary in Title VII cases,” and the specification of the prima facie case set forth there “is not necessarily applicable in every respect to differing factual situations.” 411 U.S., at 802, n. 13, 93 S.Ct., at 1824, n. 13. The framework was “never intended to be rigid, mechanized, or ritualistic.” *Aikens*, *supra*, 460 U.S., at 715, 103 S.Ct., at 1482. *Burdine* compels the employer to come forward with its explanation of the decision and permits the plaintiff to offer evidence under either of the logical methods for proof of discrimination. This is hardly a framework that confines

the plaintiff; still less is it a justification for saying that the ultimate burden of proof must be on the employer in a mixed-motives case. *Burdine* provides an orderly and adequate way to place both inferential and direct proof before the factfinder for a determination whether intentional discrimination has caused the employment decision. Regardless of the character of the evidence presented, we have consistently held that the ultimate burden “remains at all times with the plaintiff.” *Burdine*, *supra*, 450 U.S., at 253, 101 S.Ct., at 1093.

****1811** *Aikens* illustrates the point. There, the evidence showed that the plaintiff, a black man, was far more qualified than any of the white applicants promoted ahead of him. More important, the testimony showed that “the person responsible for the promotion decisions at issue had made numerous ***289** derogatory comments about blacks in general and *Aikens* in particular.” 460 U.S., at 713–714, n. 2, 103 S.Ct., at 1481, n. 2. Yet the Court in *Aikens* reiterated that the case was to be tried under the proof scheme of *Burdine*. Justice BRENNAN and Justice BLACKMUN concurred to stress that the plaintiff could prevail under the *Burdine* scheme in either of two ways, one of which was directly to persuade the court that the employment decision was motivated by discrimination. 460 U.S., at 718, 103 S.Ct., at 1483. *Aikens* leaves no doubt that the so-called “pretext” framework of *Burdine* has been considered to provide a flexible means of addressing all individual disparate-treatment claims.

Downplaying the novelty of its opinion, the plurality claims to have followed a “well-worn path” from our prior cases. The path may be well worn, but it is in the wrong forest. The plurality again relies on Title VII’s BFOQ provisions, under which an employer bears the burden of justifying the use of a sex-based employment qualification. See *Dothard v. Rawlinson*, 433 U.S. 321, 332–337, 97 S.Ct. 2720, 2728–2730, 53 L.Ed.2d 786 (1977). In the BFOQ context this is a sensible, indeed necessary, allocation of the burden, for there by definition sex is the but-for cause of the employment decision and the only question remaining is how the employer can justify it. The same is true of the plurality’s citations to Pregnancy Discrimination Act cases, *ante*, at 1789. In such cases there is no question that pregnancy was the cause of the disputed action. The Pregnancy Discrimination Act and BFOQ cases tell us nothing about the case where the employer claims not that a sex-based decision was justified, but that the decision was not sex-based at all.

Closer analogies to the plurality’s new approach are found in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct.

568, 50 L.Ed.2d 471 (1977), and *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983), but these cases were decided in different contexts. *Mt. Healthy* was a First Amendment case involving the firing of a teacher, and *Transportation Management* involved review of the NLRB’s interpretation of the National Labor Relations ***290** Act. The *Transportation Management* decision was based on the deference that the Court traditionally accords NLRB interpretations of the statutes it administers. See 462 U.S., at 402–403, 103 S.Ct., at 2474–2475. Neither case therefore tells us why the established *Burdine* framework should not continue to govern the order of proof under Title VII.

In contrast to the plurality, Justice O’CONNOR acknowledges that the approach adopted today is a “departure from the *McDonnell Douglas* standard.” *Ante*, at 1796. Although her reasons for supporting this departure are not without force, they are not dispositive. As Justice O’CONNOR states, the most that can be said with respect to the Title VII itself is that “nothing in the language, history, or purpose of Title VII *prohibits* adoption” of the new approach. *Ante*, at 1800 (emphasis added). Justice O’CONNOR also relies on analogies from the common law of torts, other types of Title VII litigation, and our equal protection cases. These analogies demonstrate that shifts in the burden of proof are not unprecedented in the law of torts or employment discrimination. Nonetheless, I believe continued adherence to the *Burdine* framework is more consistent with the statutory mandate. Congress’ manifest concern with preventing imposition of liability in cases where discriminatory animus did not actually cause an adverse action, see *ante*, at 1797 (opinion of O’CONNOR, J.), suggests to me that an ****1812** affirmative showing of causation should be required. And the most relevant portion of the legislative history supports just this view. See n. 3, *supra*. The limited benefits that are likely to be produced by today’s innovation come at the sacrifice of clarity and practical application.

The potential benefits of the new approach, in my view, are overstated. First, the Court makes clear that the *Price Waterhouse* scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue. The burden shift properly will be found to apply in ***291** only a limited number of employment discrimination cases. The application of the new scheme, furthermore, will make a difference only in a smaller subset

of cases. The practical importance of the burden of proof is the “risk of nonpersuasion,” and the new system will make a difference only where the evidence is so evenly balanced that the factfinder cannot say that either side’s explanation of the case is “more likely” true. This category will not include cases in which the allocation of the burden of proof will be dispositive because of a complete lack of evidence on the causation issue. Cf. *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948) (allocation of burden dispositive because no evidence of which of two negligently fired shots hit plaintiff). Rather, *Price Waterhouse* will apply only to cases in which there is substantial evidence of reliance on an impermissible motive, as well as evidence from the employer that legitimate reasons supported its action.

Although the *Price Waterhouse* system is not for every case, almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of “stray remarks” or other evidence of discriminatory animus. Trial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift. One of their new tasks will be the generation of a jurisprudence of the meaning of “substantial factor.” Courts will also be required to make the often subtle and difficult distinction between “direct” and “indirect” or “circumstantial” evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process. The presence of an existing burden-shifting mechanism distinguishes the individual disparate-treatment case from the tort, class-action discrimination, and equal protection cases on which *292 Justice O’CONNOR relies. The distinction makes Justice WHITE’S assertions that one “need look only to” *Mt. Healthy* and *Transportation Management* to resolve this case, and that our Title VII cases in this area are “inapposite,” *ante*, at 1795–1796, at best hard to understand.

Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U.S.C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials. See, e.g., Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 Va.L.Rev. 601 (1987) (noting high reversal rate caused by use of Title VII burden shifting in a jury setting). Perhaps such cases in the future

will require a bifurcated trial, with the jury retiring first to make the credibility findings necessary to determine whether the plaintiff has proved that an impermissible factor played a substantial part in the decision, and later hearing evidence on the “same decision” or “pretext” issues. Alternatively, perhaps the trial judge will have the unenviable task of formulating a single instruction for the jury on all of the various burdens potentially involved in the case.

I do not believe the minor refinement in Title VII procedures accomplished by today’s holding can justify the difficulties **1813 that will accompany it. Rather, I “remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.” *Burdine*, 450 U.S., at 258, 101 S.Ct., at 1096. Although the employer does not bear the burden of persuasion under *Burdine*, it must offer clear and reasonably specific reasons for the contested decision, and has every incentive to persuade the trier of fact that the decision was lawful. *Ibid.* Further, the suggestion that the employer should bear the burden of persuasion due to superior access to evidence has little force in the Title VII context, where the liberal discovery rules available to all litigants are supplemented by EEOC investigatory files. *Ibid.* *293 In sum, the *Burdine* framework provides a “sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,” *Aikens*, 460 U.S., at 715, 103 S.Ct., at 1482, and it should continue to govern the order of proof in Title VII disparate-treatment cases.⁴

III

The ultimate question in every individual disparate-treatment case is whether discrimination caused the particular decision at issue. Some of the plurality’s comments with respect to the District Court’s findings in this case, however, are potentially misleading. As the plurality notes, the District Court based its liability determination on expert evidence that some evaluations of respondent Hopkins were based on unconscious sex stereotypes,⁵ and on the fact that *294 *Price Waterhouse* failed to disclaim reliance on these comments when it conducted the partnership review. The District Court also based liability on *Price Waterhouse*’s failure to “make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes.” 618 F.Supp. 1109, 1119 (DC 1985).

Although the District Court's version of Title VII liability is improper under any of today's opinions, I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination ****1814** caused the plaintiff's harm. Our cases do not support the suggestion that failure to "disclaim reliance" on stereotypical comments itself violates Title VII. Neither do they support creation of a "duty to sensitize." As the dissenting judge in the Court of Appeals observed, acceptance of such theories would turn Title VII "from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts." 263 U.S.App.D.C. 321, 340, 825 F.2d 458, 477 (1987) (Williams, J., dissenting).

Employment discrimination claims require factfinders to make difficult and sensitive decisions. Sometimes this may mean that no finding of discrimination is justified even though a qualified employee is passed over by a less than admirable employer. In other cases, Title VII's protections properly extend to plaintiffs who are by no means model employees. As Justice BRENNAN notes, *ante*, at 1795, courts do not sit to determine whether litigants are nice. In this ***295** case, Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process. Had the District Court found on this record that sex discrimination caused the adverse decision, I doubt it would

have been reversible error. Cf. *Aikens, supra*, 460 U.S., at 714, n. 2, 103 S.Ct., at 1481, n. 2. That decision was for the finder of fact, however, and the District Court made plain that sex discrimination was not a but-for cause of the decision to place Hopkins' partnership candidacy on hold. Attempts to evade tough decisions by erecting novel theories of liability or multitiered systems of shifting burdens are misguided.

IV

The language of Title VII and our well-considered precedents require this plaintiff to establish that the decision to place her candidacy on hold was made "because of" sex. Here the District Court found that the "comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose," 618 F.Supp., at 1118, and that "[b]ecause plaintiff has considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually based evaluations," *id.*, at 1120. Hopkins thus failed to meet the requisite standard of proof after a full trial. I would remand the case for entry of judgment in favor of Price Waterhouse.

All Citations

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 Before the time for reconsideration came, two of the partners in Hopkins' office withdrew their support for her, and the office informed her that she would not be reconsidered for partnership. Hopkins then resigned. Price Waterhouse does not challenge the Court of Appeals' conclusion that the refusal to repropose her for partnership amounted to a constructive discharge. That court remanded the case to the District Court for further proceedings to determine appropriate relief, and those proceedings have been stayed pending our decision. Brief for Petitioner 15, n. 3. We are concerned today only with Price Waterhouse's decision to place Hopkins' candidacy on hold. Decisions pertaining to advancement to partnership are, of course, subject to challenge under Title VII. *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).
- 2 This question has, to say the least, left the Circuits in disarray. The Third, Fourth, Fifth, and Seventh Circuits require a plaintiff challenging an adverse employment decision to show that, but for her gender (or race or religion or national origin), the decision would have been in her favor. See, e.g., *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 179 (CA3 1985), cert. denied, 475 U.S. 1035, 106 S.Ct. 1244, 89 L.Ed.2d 353 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365–366 (CA4 1985); *Peters v. Shreveport*, 818 F.2d 1148, 1161 (CA5 1987); *McQuillen v. Wisconsin Education Assn. Council*, 830 F.2d 659, 664–665 (CA7 1987). The First, Second, Sixth, and Eleventh Circuits, on the other hand, hold that once the plaintiff has shown that a discriminatory motive was a "substantial" or "motivating" factor

in an employment decision, the employer may avoid a finding of liability only by proving that it would have made the same decision even in the absence of discrimination. These courts have either specified that the employer must prove its case by a preponderance of the evidence or have not mentioned the proper standard of proof. See, e.g., *Fields v. Clark University*, 817 F.2d 931, 936–937 (CA1 1987) (“motivating factor”); *Berl v. Westchester County*, 849 F.2d 712, 714–715 (CA2 1988) (“substantial part”); *Terbovitz v. Fiscal Court of Adair County, Ky.*, 825 F.2d 111, 115 (CA6 1987) (“motivating factor”); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1557 (CA11 1983). The Court of Appeals for the District of Columbia Circuit, as shown in this case, follows the same rule except that it requires that the employer’s proof be clear and convincing rather than merely preponderant. 263 U.S.App.D.C. 321, 333–334, 825 F.2d 458, 470–471 (1987); see also *Toney v. Block*, 227 U.S.App.D.C. 273, 275, 705 F.2d 1364, 1366 (1983) (Scalia, J.) (it would be “destructive of the purposes of [Title VII] to require the plaintiff to establish ... the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor”). The Court of Appeals for the Ninth Circuit also requires clear and convincing proof, but it goes further by holding that a Title VII violation is made out as soon as the plaintiff shows that an impermissible motivation played a part in an employment decision—at which point the employer may avoid reinstatement and an award of backpay by proving that it would have made the same decision in the absence of the unlawful motive. See, e.g. *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1165–1166 (1984) (Kennedy, J.) (“significant factor”). Last, the Court of Appeals for the Eighth Circuit draws the same distinction as the Ninth between the liability and remedial phases of Title VII litigation, but requires only a preponderance of the evidence from the employer. See, e.g., *Bibbs v. Block*, 778 F.2d 1318, 1320–1324 (1985) (en banc) (“discernible factor”).

3 We disregard, for purposes of this discussion, the special context of affirmative action.

4 Congress specifically declined to require that an employment decision have been “for cause” in order to escape an affirmative penalty (such as reinstatement or backpay) from a court. As introduced in the House, the bill that became Title VII forbade such affirmative relief if an “individual was ... refused employment or advancement, or was suspended or discharged for cause.” H.R.Rep. No. 7152, 88th Cong., 1st Sess., 77 (1963) (emphasis added). The phrase “for cause” eventually was deleted in favor of the phrase “for any reason other than” one of the enumerated characteristics. See 110 Cong.Rec. 2567–2571 (1964). Representative Celler explained that this substitution “specif[ied] cause”; in his view, a court “cannot find any violation of the act which is based on facts other ... than discrimination on the grounds of race, color, religion, or national origin.” *Id.*, at 2567.

5 In this Court, Hopkins for the first time argues that Price Waterhouse violated § 703(a)(2) when it subjected her to a biased decisionmaking process that “tended to deprive” a woman of partnership on the basis of her sex. Since Hopkins did not make this argument below, we do not address it.

6 We made passing reference to a similar question in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282, n. 10, 96 S.Ct. 2574, 2580, n. 10, 49 L.Ed.2d 493 (1976), where we stated that when a Title VII plaintiff seeks to show that an employer’s explanation for a challenged employment decision is pretextual, “no more is required to be shown than that race was a ‘but for’ cause.” This passage, however, does not suggest that the plaintiff *must* show but-for cause; it indicates only that if she does so, she prevails. More important, *McDonald* dealt with the question whether the employer’s stated reason for its decision was *the* reason for its action; unlike the case before us today, therefore, *McDonald* did not involve mixed motives. This difference is decisive in distinguishing this case from those involving “pretext.” See *infra*, at 1788, n. 12.

7 Congress specifically rejected an amendment that would have placed the word “solely” in front of the words “because of.” 110 Cong.Rec. 2728, 13837 (1964).

8 We have in the past acknowledged the authoritativeness of this interpretive memorandum, written by the two bipartisan “captains” of Title VII. See, e.g., *Firefighters v. Stotts*, 467 U.S. 561, 581, n. 14, 104 S.Ct. 2576, 2589, n. 14, 81 L.Ed.2d 483 (1984).

9 Many of the legislators’ statements, such as the memorandum quoted in text, focused specifically on race rather than on gender or religion or national origin. We do not, however, limit their statements to the context of race, but instead we take them as general statements on the meaning of Title VII. The somewhat bizarre path by which “sex” came to be included as a forbidden criterion for employment—it was included in an attempt to *defeat* the bill, see C. & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 115–117 (1985)—does not persuade us that the legislators’ statements pertaining to race are irrelevant to cases alleging gender discrimination. The amendment that added “sex” as one of the forbidden criteria for employment was passed, of course, and the statute on its face treats each of the enumerated categories exactly the same.

By the same token, our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.

10 Hopkins argues that once she made this showing, she was entitled to a finding that Price Waterhouse had discriminated against her on the basis of sex; as a consequence, she says, the partnership's proof could only limit the relief she received. She relies on Title VII's § 706(g), which permits a court to award affirmative relief when it finds that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice," and yet forbids a court to order reinstatement of, or backpay to, "an individual ... if such individual was refused ... employment or advancement or was suspended or discharged *for any reason other than* discrimination on account of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-5(g) (emphasis added). We do not take this provision to mean that a court inevitably can find a violation of the statute without having considered whether the employment decision would have been the same absent the impermissible motive. That would be to interpret § 706(g)—a provision defining *remedies*—to influence the substantive commands of the statute. We think that this provision merely limits courts' authority to award affirmative relief in those circumstances in which a violation of the statute is not dependent upon the effect of the employer's discriminatory practices on a particular employee, as in pattern-or-practice suits and class actions. "The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.'" *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876, 104 S.Ct. 2794, 2799-2800, 81 L.Ed.2d 718 (1984), quoting *Teamsters v. United States*, 431 U.S. 324, 360, n. 46, 97 S.Ct. 1843, 1867, n. 46, 52 L.Ed.2d 396 (1977).

Without explicitly mentioning this portion of § 706(g), we have in the past held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772, 96 S.Ct. 1251, 1268, 47 L.Ed.2d 444 (1976); *Teamsters v. United States*, *supra*, 431 U.S., at 324, 367-371, 97 S.Ct., at 1870-1873; *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 404, n. 9, 97 S.Ct. 1891, 1897, n. 9, 52 L.Ed.2d 453 (1977). These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination, not on charges of individual discrimination. Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) (upholding the National Labor Relations Board's identical interpretation of § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), which contains language almost identical to § 706(g)).

11 Given that both the plaintiff and defendant bear a burden of proof in cases such as this one, it is surprising that the dissent insists that our approach requires the employer to bear "the ultimate burden of proof." *Post*, at 1810. It is, moreover, perfectly consistent to say *both* that gender was a factor in a particular decision when it was made *and* that, when the situation is viewed hypothetically and after the fact, the same decision would have been made even in the absence of discrimination. Thus, we do not see the "internal inconsistency" in our opinion that the dissent perceives. See *post*, at 1807-1808. Finally, where liability is imposed because an employer is unable to prove that it would have made the same decision even if it had not discriminated, this is not an imposition of liability "where sex made no difference to the outcome." *Post*, at 1808. In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that gender *did* make a difference to the outcome.

12 Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. See, e.g., *post*, at 1812-1813. Juries long have decided cases in which defendants raised affirmative defenses. The dissent fails, moreover, to explain why the evidentiary scheme that we endorsed over 10 years ago in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), has not proved unworkable in that context but would be hopelessly complicated in a case brought under federal antidiscrimination statutes.

13 After comparing this description of the plaintiff's proof to that offered by Justice O'Connor's opinion, concurring in the judgment, *post*, at 1804, we do not understand why the concurrence suggests that they are meaningfully different from each other, see *post*, at 1803, 1804-1805. Nor do we see how the inquiry that we have described is "hypothetical," see

post, at 1808, n. 1. It seeks to determine the content of the entire set of reasons for a decision, rather than shaving off one reason in an attempt to determine what the decision would have been in the absence of that consideration. The inquiry that we describe thus strikes us as a distinctly nonhypothetical one.

14 Justice WHITE's suggestion, *post*, at 1796, that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision, is baffling.

15 We reject the claim, advanced by Price Waterhouse here and by the dissenting judge below, that the District Court clearly erred in finding that Beyer was "responsible for telling [Hopkins] what problems the Policy Board had identified with her candidacy." 618 F.Supp., at 1117. This conclusion was reasonable in light of the testimony at trial of a member of both the Policy Board and the Admissions Committee, who stated that he had "no doubt" that Beyer would discuss with Hopkins the reasons for placing her candidacy on hold and that Beyer "knew exactly where the problems were" regarding Hopkins. Tr. 316.

16 We do not understand the dissenters' dissatisfaction with the District Judge's statements regarding the failure of Price Waterhouse to "sensitize" partners to the dangers of sexism. *Post*, at 1813–1814. Made in the context of determining that Price Waterhouse had not disclaimed reliance on sex-based evaluations, and following the judge's description of the firm's history of condoning such evaluations, the judge's remarks seem to us justified.

* I agree with the plurality that if the employer carries this burden, there has been no violation of Title VII.

1 The plurality's description of its own standard is both hypothetical and retrospective. The inquiry seeks to determine whether "if we asked the employer at the moment of 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." *Ante*, at 1790.

2 The plurality's discussion of overdetermined causes only highlights the error of its insistence that but-for is not the substantive standard of causation under Title VII. The opinion discusses the situation where two physical forces move an object, and either force acting alone would have moved the object. *Ante*, at 1786. Translated to the context of Title VII, this situation would arise where an employer took an adverse action in reliance both on sex and on legitimate reasons, and *either* the illegitimate or the legitimate reason standing alone would have produced the action. If this state of affairs is proved to the factfinder, there will be no liability under the plurality's own test, for the same decision would have been made had the illegitimate reason never been considered.

3 The interpretive memorandum on which the plurality relies makes plain that "the plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred." 110 Cong.Rec. 7214 (1964). Coupled with its earlier definition of discrimination, the memorandum tells us that the plaintiff bears the burden of showing that an impermissible motive "made a difference" in the treatment of the plaintiff. This is none other than the traditional requirement that the plaintiff show but-for cause.

4 The plurality states that it disregards the special context of affirmative action. *Ante*, at 1784, n. 3. It is not clear that this is possible. Some courts have held that in a suit challenging an affirmative-action plan, the question of the plan's validity need not be reached unless the plaintiff shows that the plan was a but-for cause of the adverse decision. See *McQuillen v. Wisconsin Education Association Council*, 830 F.2d 659, 665 (CA7 1987), cert. denied, 485 U.S. 914, 108 S.Ct. 1068, 99 L.Ed.2d 248 (1988). Presumably it will be easier for a plaintiff to show that consideration of race or sex pursuant to an affirmative-action plan was a substantial factor in a decision, and the court will need to move on to the question of a plan's validity. Moreover, if the structure of the burdens of proof in Title VII suits is to be consistent, as might be expected given the identical statutory language involved, today's decision suggests that plaintiffs should no longer bear the burden of showing that affirmative-action plans are illegal. See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 626–627, 107 S.Ct. 1442, 1449, 94 L.Ed.2d 615 (1987).

5 The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral—e.g., "overbearing and abrasive"—without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." 263 U.S.App.D.C. 321, 340, 825 F.2d 458, 477 (1987) (Williams, J., dissenting). Today's opinions cannot be read as requiring factfinders to credit testimony based on this type of analysis. See also *ante*, at 1805 (opinion of O'CONNOR, J.).

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EXHIBIT 34



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Schroer v. Billington](#), D.D.C., March 31, 2006

378 F.3d 566

United States Court of Appeals,
Sixth Circuit.

Jimmie L. SMITH, Plaintiff–Appellant,

v.

CITY OF SALEM, OHIO, Thomas Eastek,
Walter Greenamyre, Brooke Zellers, Larry
D. DeJane, James A. Armeni, Joseph Julian,
and [Harry Dugan](#), Defendants–Appellees.

No. 03–3399.

Argued: March 19, 2004.

Decided and Filed: Aug. 5, 2004.

Rehearing En Banc Denied Oct. 18, 2004.

Synopsis

Background: City fire department employee, who was born male and subsequently was diagnosed with gender identity disorder, brought Title VII action against city and various city officials alleging sex discrimination. The United States District Court for the Northern District of Ohio, [Economus, J.](#), granted employer's motion to dismiss, and employee appealed.

Holdings: The Court of Appeals, [Cole](#), Circuit Judge, held that:

[1] employee offered direct evidence of causal connection between protected activity and adverse employment action;

[2] allegations that employee was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII;

[3] 24-hour suspension constituted an adverse employment action; and

[4] allegations sufficiently constituted claim of sex discrimination grounded in Equal Protection Clause pursuant to § 1983.

Reversed and remanded.

Opinion, [369 F.3d 912](#), superseded.

West Headnotes (7)

[1] **Federal Courts**

🔑 [Judgment or dismissal on the pleadings](#)

In reviewing motion for judgment on the pleadings, appellate court construes complaint in light most favorable to plaintiff and accepts complaint's factual inferences as true. [Fed.Rules Civ.Proc.Rule 12\(c\)](#), [28 U.S.C.A.](#)

[25 Cases that cite this headnote](#)

[2] **Civil Rights**

🔑 [Practices prohibited or required in general; elements](#)

To establish prima facie case of employment discrimination pursuant to Title VII, plaintiff must show that he: (1) is member of protected group; (2) suffered adverse employment action; (3) was qualified for position in question; and (4) was treated differently from similarly situated individuals outside of protected class. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

[69 Cases that cite this headnote](#)

[3] **Civil Rights**

🔑 [Practices prohibited or required in general; elements](#)

To establish prima facie case of retaliation pursuant to Title VII, plaintiff must show that: (1) he engaged in activity protected by Title VII; (2) defendant knew he engaged in this protected activity; (3) thereafter, defendant took employment action adverse to him; and (4) there was causal connection between protected activity and adverse employment action. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

69 Cases that cite this headnote

[4] **Civil Rights**

Retaliation claims

Evidence that city employee was suspended just four days after receiving right-to-sue letter from Equal Employment Opportunity Commission (EEOC) and six days after employee's attorney had contacted mayor constituted direct evidence of causal connection between protected activity and adverse employment action, for purposes of demonstrating prima facie case of retaliation under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

34 Cases that cite this headnote

[5] **Civil Rights**

Particular cases

Allegations by city fire department employee, who was born male and subsequently was diagnosed with gender identity disorder, that employee was discriminated against based upon employee's gender non-conforming behavior and appearance, which city felt were inappropriate for a male, were actionable under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

35 Cases that cite this headnote

[6] **Civil Rights**

Particular cases

Civil Rights

Discipline

Municipal Corporations

Grounds for removal

Public Employment

Exercise of Rights; Retaliation

Twenty-four-hour suspension of city fire department employee, who was born male and subsequently was diagnosed with gender identity disorder, constituted adverse employment action, as required to support employee's discrimination and retaliation claims under Title

VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

56 Cases that cite this headnote

[7] **Constitutional Law**

Public employees and officials in general

Constitutional Law

Labor, employment, and public officials

Municipal Corporations

Grounds for removal

Public Employment

Discharge, Suspension, and Other Adverse Action

Public Employment

Discrimination in general

Allegations by city fire department employee, who was born male and subsequently was diagnosed with gender identity disorder, that employee was discriminated against based upon employee's gender non-conforming behavior and appearance, sufficiently constituted claim of sex discrimination grounded in Equal Protection Clause pursuant to § 1983. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

44 Cases that cite this headnote

Attorneys and Law Firms

*567 Randi A. Barnabee (briefed), Deborah A. Smith & Company, Northfield, OH, for Plaintiff–Appellant.

Aretta K. Bernard (briefed), Roetzel & Andress, Akron, OH, for Defendant–Appellee.

Before COLE and GILMAN, Circuit Judges; SCHWARZER, Senior District Judge.*

AMENDED OPINION

COLE, Circuit Judge.

Plaintiff–Appellant Jimmie L. Smith appeals from a judgment of the United States District Court for the Northern District of Ohio dismissing his claims against his employer, Defendant–

Appellant City of Salem, Ohio, and various City officials, and granting judgment on the pleadings to Defendants, pursuant to [Federal Rule of Civil Procedure 12\(c\)](#). Smith, who considers himself a transsexual and has been diagnosed with Gender Identity Disorder, alleged that Defendants discriminated against him in his employment on *568 the basis of sex. He asserted claims pursuant to Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e et seq.](#), and [42 U.S.C. § 1983](#). The district court dismissed those claims pursuant to [Rule 12\(c\)](#). Smith also asserted state law claims for invasion of privacy and civil conspiracy; the district court dismissed those claims as well, having declined to exercise pendent jurisdiction over them.

For the following reasons, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

[1] In reviewing a motion for judgment on the pleadings pursuant to [Rule 12\(c\)](#), we construe the complaint in the light most favorable to the plaintiff and accept the complaint's factual inferences as true. [Ziegler v. IBP Hog Market, Inc.](#), [249 F.3d 509, 511–12 \(6th Cir.2001\)](#). The following facts are drawn from Smith's complaint.

Smith is—and has been, at all times relevant to this action—employed by the city of Salem, Ohio, as a lieutenant in the Salem Fire Department (the “Fire Department”). Prior to the events surrounding this action, Smith worked for the Fire Department for seven years without any negative incidents. Smith—biologically and by birth a male—is a transsexual and has been diagnosed with Gender Identity Disorder (“GID”), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 576–582 (4th ed.2000). After being diagnosed with GID, Smith began “expressing a more feminine appearance on a full-time basis”—including at work—in accordance with international medical protocols for treating GID. Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not “masculine enough.” As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment. He also informed Eastek of the likelihood that his treatment would eventually include

complete physical transformation from male to female. Smith had approached Eastek in order to answer any questions Eastek might have concerning his appearance and manner and so that Eastek could address Smith's co-workers' comments and inquiries. Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamy, Chief of the Fire Department. In short order, however, Eastek told Greenamy about Smith's behavior and his GID.

Greenamy then met with Defendant C. Brooke Zellers, the Law Director for the City of Salem, with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his employment. On April 18, 2001, Greenamy and Zellers arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment. The executive body included Defendants Larry D. DeJane, Salem's mayor; James A. Armeni, Salem's auditor; and Joseph S. Julian, Salem's service director. Also present was Salem Safety Director Henry L. Willard, now deceased, who was never a named defendant in this action.

Although [Ohio Revised Code § 121.22\(G\)](#)—which sets forth the state procedures pursuant to which Ohio municipal officials may meet to take employment action against a municipal employee—provides that officials “may hold an executive session to consider the appointment, employment, *569 dismissal, discipline, promotion, demotion, or compensation of a public employee only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of [considering such matters],” the City did not abide by these procedures at the April 18, 2001 meeting.

During the meeting, Greenamy, DeJane, and Zellers agreed to arrange for the Salem Civil Service Commission to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, Defendants reasoned, they could terminate Smith's employment on the ground of insubordination. Willard, who remained silent during the meeting, telephoned Smith afterwards to inform him of the plan, calling Defendants' scheme a “witch hunt.”

Two days after the meeting, on April 20, 2001, Smith's counsel telephoned DeJane to advise him of Smith's legal

representation and the potential legal ramifications for the City if it followed through on the plan devised by Defendants during the April 18 meeting. On April 22, 2001, Smith received his “right to sue” letter from the U.S. Equal Employment Opportunity Commission (“EEOC”). Four days after that, on April 26, 2001, Greenamyre suspended Smith for one twenty-four hour shift, based on his alleged infraction of a City and/or Fire Department policy.

At a subsequent hearing before the Salem Civil Service Commission (the “Commission”) regarding his suspension, Smith contended that the suspension was a result of selective enforcement in retaliation for his having obtained legal representation in response to Defendants’ plan to terminate his employment because of his transsexualism and its manifestations. At the hearing, Smith sought to elicit testimony from witnesses regarding the meeting of April 18, 2001, but the City objected and the Commission’s chairman, Defendant Harry Dugan, refused to allow any testimony regarding the meeting, despite the fact that [Ohio Administrative Code § 124–9–11](#) permitted Smith to introduce evidence of disparate treatment and selective enforcement in his hearing before the Commission.

The Commission ultimately upheld Smith’s suspension. Smith appealed to the Columbiana County Court of Common Pleas, which reversed the suspension, finding that “[b]ecause the regulation [that Smith was alleged to have violated] was not effective[,] [Smith] could not be charged with violation of it.”

Smith then filed suit in the federal district court. In his complaint, he asserted Title VII claims of sex discrimination and retaliation, along with claims pursuant to [42 U.S.C. § 1983](#) and state law claims of invasion of privacy and civil conspiracy. In a Memorandum Opinion and Order dated February 26, 2003, the district court dismissed the federal claims and granted judgment on the pleadings to Defendants pursuant to [Federal Rule of Civil Procedure 12\(c\)](#). The district judge also dismissed the state law claims without prejudice, having declined to exercise supplemental jurisdiction over them pursuant to [28 U.S.C. § 1367\(c\)\(3\)](#).

II. ANALYSIS

On appeal, Smith contends that the district court erred in holding that: (1) he failed to state a claim of sex stereotyping; (2) Title VII protection is unavailable to transsexuals; (3)

even if he had stated a claim of sex stereotyping, he failed to demonstrate that he suffered an adverse employment action; and (4) he failed to state ***570** a claim based on the deprivation of a constitutional or federal statutory right, pursuant to [42 U.S.C. § 1983](#).

We review *de novo* the dismissal of a complaint pursuant to [Rule 12\(c\)](#). [Grindstaff v. Green](#), 133 F.3d 416, 421 (6th Cir.1998). A motion for judgment on the pleadings shall be granted only where, construing the complaint in the light most favorable to the plaintiff, and accepting all of its factual allegations as true, the plaintiff can prove no set of facts in support of the claims that would entitle him to relief. *Id.* (citation omitted).

A. Title VII

The parties disagree over two issues pertaining to Smith’s Title VII claims: (1) whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court’s pronouncements in [Price Waterhouse v. Hopkins](#), 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and (2) whether Smith alleged that he suffered an adverse employment action.

[2] Defendants do not challenge Smith’s complaint with respect to any of the other elements necessary to establish discrimination and retaliation claims pursuant to Title VII. In any event, we affirmatively find that Smith has made out a *prima facie* case for both claims. To establish a *prima facie* case of employment discrimination pursuant to Title VII, Smith must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position in question; and (4) he was treated differently from similarly situated individuals outside of his protected class. [Perry v. McGinnis](#), 209 F.3d 597, 601 (6th Cir.2000). Smith is a member of a protected class. His complaint asserts that he is a male with Gender Identity Disorder, and Title VII’s prohibition of discrimination “because of ... sex” protects men as well as women. [Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.](#), 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983). The complaint also alleges both that Smith was qualified for the position in question—he had been a lieutenant in the Fire Department for seven years without any negative incidents—and that he would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man.

[3] [4] To establish a *prima facie* case of retaliation pursuant to Title VII, a plaintiff must show that: (1) he

engaged in an activity protected by Title VII; (2) the defendant knew he engaged in this protected activity; (3) thereafter, the defendant took an employment action adverse to him; and (4) there was a causal connection between the protected activity and the adverse employment action. *DiCarlo v. Potter*, 358 F.3d 408, 420 (6th Cir.2004) (citation omitted). Smith's complaint satisfies the first two requirements by explaining how he sought legal counsel after learning of the Salem executive body's April 18, 2001 meeting concerning his employment; how his attorney contacted Defendant DeJane to advise Defendants of Smith's representation; and how Smith filed a complaint with the EEOC concerning Defendants' meeting and intended actions. With respect to the fourth requirement, a causal connection between the protected activity and the adverse employment action, "[a]lthough no one factor is dispositive in establishing a causal connection, evidence ... that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000); see also *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110 (1st Cir.1988) (employee's discharge "soon after" engaging in protected activity *571 "is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation."); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir.1986) ("Causation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge."). Here, Smith was suspended on April 26, 2001, just days after he engaged in protected activity by receiving his "right to sue" letter from the EEOC, which occurred four days before the suspension, and by his attorney contacting Mayor DeJane, which occurred six days before the suspension. The temporal proximity between the events is significant enough to constitute direct evidence of a causal connection for the purpose of satisfying Smith's burden of demonstrating a *prima facie* case.

We turn now to examining whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and whether Smith alleged that he suffered an adverse employment action.

1. Sex Stereotyping

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... 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).

In his complaint, Smith asserts Title VII claims of retaliation and employment discrimination "because of ... sex." The district court dismissed Smith's Title VII claims on the ground that he failed to state a claim for sex stereotyping pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The district court implied that Smith's claim was disingenuous, stating that he merely "invokes the term-of-art created by *Price Waterhouse*, that is, 'sex-stereotyping,' " as an end run around his "real" claim, which, the district court stated, was "based upon his transsexuality." The district court then held that "Title VII does not prohibit discrimination based on an individual's transsexualism."

Relying on *Price Waterhouse*—which held that Title VII's prohibition of discrimination "because of ... sex" bars gender discrimination, including discrimination based on sex stereotypes—Smith contends on appeal that he was a victim of discrimination "because of ... sex" both because of his gender non-conforming conduct and, more generally, because of his identification as a transsexual.

We first address whether Smith has stated a claim for relief, pursuant to *Price Waterhouse*'s prohibition of sex stereotyping, based on his gender non-conforming behavior and appearance. In *Price Waterhouse*, the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." 490 U.S. at 235, 109 S.Ct. 1775. She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted). Six members of the Court agreed that such comments bespoke gender discrimination, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping—that is, discrimination because she failed to *act* *572 like a woman. *Id.* at 250–51, 109 S.Ct. 1775 (plurality opinion of four Justices); *id.* at 258–61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272–73, 109 S.Ct. 1775 (O'Connor, J., concurring) (accepting plurality's sex stereotyping analysis and characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion; concurring separately to clarify the separate issues of causation and allocation of the burden of proof). As Judge Posner has pointed out, the term "gender" is one

“borrowed from grammar to designate the sexes as viewed as social rather than biological classes.” Richard A. Posner, *Sex and Reason*, 24–25 (1992). The Supreme Court made clear that in the context of Title VII, discrimination because of “sex” includes gender discrimination: “In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775. The Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251, 109 S.Ct. 1775.

Smith contends that the same theory of sex stereotyping applies here. His complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. Smith's complaint states that, after being diagnosed with GID, he began to express a more feminine appearance and manner on a regular basis, including at work. The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough; and that his supervisors at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance. The complaint then describes a high-level meeting among Smith's supervisors and other municipal officials regarding his employment. Defendants allegedly schemed to compel Smith's resignation by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior. The complaint makes clear that these meetings took place soon after Smith assumed a more feminine appearance and manner and after his conversation about this with Eastek. In addition, the complaint alleges that Smith was suspended for twenty-four hours for allegedly violating an unenacted municipal policy, and that the suspension was ordered in retaliation for his pursuing legal remedies after he had been informed about Defendants' plan to intimidate him into resigning. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

[5] Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

In so holding, we find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because “Congress had a narrow view of sex in mind” and “never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.” *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir.1984); *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir.1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on “gender” rather than “sex”). It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on “sex” (referring to an individual's anatomical and biological characteristics), but not on “gender” (referring to socially-constructed norms associated with a person's sex). *See, e.g., Ulane*, 742 F.2d at 1084 (construing “sex” in Title VII narrowly to mean only anatomical sex rather than gender); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (holding that transsexuals are not protected by Title VII because the “plain meaning” must be ascribed to the term “sex” in the absence of clear congressional intent to do otherwise); *Holloway*, 566 F.2d at 661–63 (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on “gender” rather than “sex;” and “sex” should be given its traditional definition based on the anatomical characteristics dividing “organisms” and “living beings” into male and female). In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*)—as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity—were denied Title VII protection by courts because they were considered victims of “gender” rather than “sex” discrimination.

However, the approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir.2000) (“The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.”). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure

to conform to stereotypical gender norms. See *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775; see also *Schwenk*, 204 F.3d at 1202 (stating that Title VII encompasses instances in which “the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one” and that “sex” under Title VII encompasses both the anatomical differences between men and women and gender); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir.2002) (en banc) (Pregerson, J., concurring) (noting that the Ninth Circuit had previously found that “same-sex gender stereotyping of the sort suffered by Rene —i.e. gender stereotyping of a male gay employee by his male co-workers” constituted actionable harassment under Title VII and concluding that “[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, ‘like a woman’ constitutes ample evidence of gender stereotyping”); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir.2001) (stating that a plaintiff may be able to prove a claim of sex discrimination by showing that the “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir.2001) (holding that harassment “based upon the perception that [the plaintiff] is effeminate” is discrimination because of sex, in violation of Title VII), *overruling DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir.1979); *Doe v. Belleville*, 119 F.3d 563, 580–81 (7th Cir.1997) (holding that “Title VII does not permit an employee to be *574 treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles” and explaining that “a man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of his sex’ ”), *vacated and remanded on other grounds*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex. See, e.g., *Nichols*, 256 F.3d 864 (Title VII sex discrimination and hostile work environment claim upheld where plaintiff’s male co-workers and supervisors repeatedly

referred to him as “she” and “her” and where co-workers mocked him for walking and carrying his serving tray “like a woman”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir.1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity.” (internal citation omitted)); see also *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir.2000) (applying *Price Waterhouse* and Title VII jurisprudence to an Equal Credit Opportunity Act claim and reinstating claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because was dressed in “traditionally feminine attire”).

Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). 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 non-conformity by formalizing the non-conformity into an ostensibly unprotected classification. See, e.g., *Dillon v. Frank*, No. 90–2290, 1992 WL 5436 (6th Cir. Jan.15, 1992).

Such was the case here: despite the fact that Smith alleges that Defendants’ discrimination was motivated by his appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex, the district court expressly declined to discuss the applicability of *Price Waterhouse*. The district court therefore gave insufficient consideration to Smith’s well-pleaded claims concerning his contra-gender behavior, but rather accounted for that behavior only insofar as it confirmed for the court Smith’s status as a transsexual, which the district court held precluded Smith from Title VII protection.

Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping *575 conditional or provide any reason to

exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Finally, we note that, in its opinion, the district court repeatedly places the term “sex stereotyping” in quotation marks and refers to it as a “term of art” used by Smith to disingenuously plead discrimination because of transsexualism. Similarly, Defendants refer to sex stereotyping as “the *Price Waterhouse* loophole.” (Appellees' Brief at 6.) These characterizations are almost identical to the treatment that *Price Waterhouse* itself gave sex stereotyping in its briefs to the U.S. Supreme Court. As we do now, the Supreme Court noted the practice with disfavor, stating:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. Although the parties do not overtly dispute this last proposition, the placement by *Price Waterhouse* of “sex stereotyping” in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities.

Price Waterhouse, 490 U.S. at 250, 109 S.Ct. 1775.

2. Adverse Employment Action

Despite having dismissed Smith's Title VII claim for failure to state a claim of sex stereotyping—a finding we have just rejected—the district court nevertheless addressed the merits of Smith's Title VII claims *arguendo*. Relying on *White v. Burlington Northern & Sante Fe Ry. Co.*, 310 F.3d 443

(6th Cir.2002), the district court held that Smith's suspension was not an adverse employment action because the Court of Common Pleas, rendering the “ultimate employment decision,” reversed the suspension, and that accordingly, Smith's Title VII claim could not lie. Because this Circuit has since vacated and overruled *White*, 364 F.3d 789 (6th Cir.2004) (en banc), and joined the majority of other circuits in rejecting the “ultimate employment decision” standard, we hold that the district court erred in its analysis and that Smith has successfully pleaded an adverse employment action in support of his employment discrimination and retaliation claims pursuant to Title VII.

[6] Common to both the employment discrimination and retaliation claims is a showing of an adverse employment action, which is defined as a “materially adverse change in the terms and conditions of [plaintiff's] employment.” *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999). A “bruised ego,” a “mere inconvenience or an alteration of job responsibilities” is not enough to constitute an adverse employment action. *White*, 364 F.3d at 797 (quoting *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 886 (6th Cir.1996)). Examples of adverse employment actions include firing, failing to promote, reassignment with significantly different responsibilities, a material *576 loss of benefits, suspensions, and other indices unique to a particular situation. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *White*, 364 F.3d at 798. Here, the Fire Department suspended Smith for twenty-four hours. Because Smith works in twenty-four hour shifts, that twenty-four hour suspension was the equivalent of three eight-hour days for the average worker, or, approximately 60% of a forty-hour work week. Pursuant to the liberal notice pleading requirements set forth in *Fed.R.Civ.P. 8*, this allegation, at this phase of the litigation, is sufficient to satisfy the adverse employment requirement of both an employment discrimination and retaliation claim pursuant to Title VII.¹

It is irrelevant that Smith's suspension was ultimately reversed by the Court of Common Pleas after he challenged the suspension's legality. In *White*, this Court recently joined the majority of other circuits in rejecting the “ultimate employment decision” standard whereby a negative employment action is not considered an “adverse employment action” for Title VII purposes when the decision is subsequently reversed by the employer, putting the plaintiff in the position he would have been in absent the negative action. *White*, 364 F.3d 789 (holding that the suspension of a railroad employee without pay, followed thirty-seven

days later by reinstatement with back pay, was an “adverse employment action” for Title VII purposes). Even if the “ultimate employment decision” standard were still viable, the district court erred in concluding that, because the Court of Common Pleas overturned the suspension, it was not an adverse employment action. There is no legal authority for the proposition that reversal by a *judicial* body—as opposed to the employer—declassifies a suspension as an adverse employment action.

Accordingly, Smith has stated an adverse employment action and, therefore, satisfied all of the elements necessary to allege a *prima facie* case of employment discrimination and retaliation pursuant to Title VII. We therefore reverse the district court's grant of judgment on the pleadings to Defendants with respect to those claims.

B. 42 U.S.C. § 1983 Claims

The district court also dismissed Smith's claims pursuant to 42 U.S.C. § 1983 on the ground that he failed to state a claim based on the deprivation of a constitutional or federal statutory right.

42 U.S.C. § 1983 provides a civil cause of action for individuals who are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under color of state law. Smith has stated a claim for relief pursuant to § 1983 in connection with his sex-based claim of employment discrimination. Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. *577 *Davis v. Passman*, 442 U.S. 228, 234–35, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). To make out such a claim, a plaintiff must prove that he suffered purposeful or intentional discrimination on the basis of gender. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). As this Court has noted several times, “the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section § 1983.” *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir.1988) (citing *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1011 (6th Cir.1987)); *Daniels v. Bd. of Educ.*, 805 F.2d 203, 207 (6th Cir.1986); *Grano v. Dep't of Dev.*, 637 F.2d 1073, 1081–82 (6th Cir.1980); *Lautermilch v. Findlay City Schs.*, 314 F.3d 271, 275 (6th Cir.2003) (“To prove a violation of the equal protection clause under § 1983, [a plaintiff] must prove the same elements as are required to establish a disparate

treatment claim under Title VII.”) (quotation and citation omitted). The facts Smith has alleged to support his claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117–21 (2d Cir. 2004) (holding that claims premised on *Price Waterhouse* sex stereotyping theory sufficiently constitute claim of sex discrimination pursuant to § 1983).

Defendants urge us to hold otherwise, on the ground that Smith's complaint fails to refer specifically to the Equal Protection Clause of the U.S. Constitution. But the Federal Rules of Civil Procedure provide for a liberal system of notice pleading. Fed.R.Civ.P. 8(a). A plaintiff need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). “Such a statement must simply ‘give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.’ ” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Claims made pursuant to 42 U.S.C. § 1983 are not subject to heightened pleading standards. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 165–66, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (rejecting heightened pleading standard for § 1983 claims); *Jones v. Duncan*, 840 F.2d 359 (6th Cir.1988) (holding that § 1983 claims need not set forth in detail all the particularities of a plaintiff's claim against a defendant). Moreover, legal theories of recovery need not be spelled out as long as the relevant issues are sufficiently implicated in the pleadings; in considering motions pursuant to Fed.R.Civ.P. 12(c), we ask not whether a complaint points to a specific statute, but whether relief is possible under any set of facts that could be established consistent with the allegation. Because Smith's sex discrimination claim so thoroughly and obviously sounds in a constitutional claim of equal protection, Defendants had fair notice of his claim and the ground upon which it rests. As such, we hold that Smith has satisfied the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8 with respect to his claim of sex discrimination, grounded in an alleged equal protection violation, and we therefore reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim.

[7] In his appellate brief, Smith also contends that his complaint alleges a violation of his constitutional right to due process, based on the City's failure to comply

with the state statutory and administrative procedures that an Ohio municipality must ***578** follow when taking official employment action against a public employee. His complaint outlines the statutory procedures, governed by [O.R.C. § 121.22\(G\)](#), pursuant to which members of an Ohio municipality may meet for purposes of taking official employment action against a public employee, and it alleges that those procedures were not followed. The complaint also discusses [O.A.C. § 124-9-11](#), which would have permitted Smith to call witnesses at his post-suspension hearing in front of the Salem Civil Service Commission; and the complaint alleges that he was barred from calling witnesses. Smith contends that these allegations implicate his right to due process pursuant to the Fourteenth Amendment of the U.S. Constitution.

However, it is well-settled that state law does not ordinarily define the parameters of due process for Fourteenth Amendment purposes, and that state law, by itself, cannot be the basis for a federal constitutional violation. See *Purisch v. Tennessee Technological Univ.*, 76 F.3d 1414, 1423 (6th Cir.1996) (“Violation of a state’s formal [employment grievance] procedure ... does not in itself implicate constitutional due process concerns.”). Neither Smith’s complaint nor his brief specifies what deprivation of property or liberty allegedly stemmed from the City’s

failure to comply with state procedural and administrative rules concerning his employment. Accordingly, he has failed to state a federal due process violation pursuant to [§ 1983](#).

In sum, we hold that Smith has failed to state a [§ 1983](#) claim based on violations of his right to due process. However, he has stated a [§ 1983](#) claim of sex discrimination, grounded in an alleged equal protection violation, and, for that reason, we reverse the district court’s grant of judgment on the pleadings dismissing Smith’s [§ 1983](#) claim.

III. CONCLUSION

Because Smith has successfully stated claims for relief pursuant to both Title VII and [42 U.S.C. § 1983](#), the judgment of the district court is REVERSED and this case is REMANDED to the district court for further proceedings consistent with this opinion.

All Citations

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Footnotes

- * The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.
- 1 Smith’s complaint does not state whether he was suspended with or without pay. Because we must construe the complaint in the light most favorable to the plaintiff, [Ziegler](#), 249 F.3d at 512, and given the liberal pleading standards of [Federal Rule of Civil Procedure 8](#), we do not find this failure dispositive. A “materially adverse change” in employment conditions often involves a material loss of pay or benefits, but that is not always the case, and “other indices that might be unique to a particular situation” can constitute a “materially adverse change” as well. [Hollins](#), 188 F.3d at 662. Because no discovery has been conducted yet, we do not know the full contours of the suspension. For now, however, for the reasons just stated, we find that Smith has sufficiently alleged an adverse employment action.