

**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’S MEMORANDUM IN OPPOSITION TO PLAINTIFF’S
MOTION FOR LEAVE TO FILE SURREPLY**

Plaintiff Equal Employment Opportunity Commission (the “EEOC”) has filed a motion alleging that Defendant R.G. & G.R. Harris Funeral Homes, Inc. (“R.G.”) improperly raised four new issues for the first time in its reply brief and asking the Court to either deem those issues forfeited or allow the EEOC to file a surreply. *See* Plaintiff’s Motion for Leave to File Surreply to Response to New Arguments in Defendant’s Reply Brief (Dkt. 70) (“Pl. Mot.”) at 2-3. The EEOC is incorrect—R.G. did not improperly raise any new issues in its reply brief. Consequently, the EEOC’s motion should be denied.

Certainly, a reply brief should not be used to “provide the moving party with a new opportunity to present yet another issue for the court’s consideration.” *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) (quoting *Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (finding that an issue not raised in a party’s principal summary judgment brief was waived for purposes of appeal)). But, as demonstrated below, this is not what R.G.’s reply brief does. R.G.’s reply brief raises no new issues for the Court’s consideration. Rather, each of the four contentions in R.G.’s reply brief that the EEOC describes as “new” are in fact legitimate arguments that reply to arguments raised by the EEOC. This is entirely proper; after all, “reply briefs *reply* to arguments made in the response brief.” *Id.*

First, the EEOC asserts that R.G. “for the first time” “relies on the revised *Smith* [*v. City of Salem*, 369 F.3d 912 (6th Cir. 2004),] opinion to rehash arguments the Court already ruled on in its Order Denying RG[]’s Motion to Dismiss.” Pl. Mot. ¶ 5(a). Whether R.G. has ever before cited the revised *Smith* opinion is beside the point because R.G.’s reliance on it directly responds to the EEOC’s argument that “requiring Stephens to comply [with R.G.’s dress code] based on . . . biological gender rather than . . . gender identity is discrimination because of sex.” Memorandum in Support of Plaintiff EEOC’s Answer to Defendant’s Motion for Summary Judgment (Dkt. 63) (“Pl. Opp. Mem.”) at 12-13. In its reply, R.G. points out that the EEOC’s argument is “tantamount to arguing that transgender employees should receive greater protection under Title VII than non-transgender employees do.” Defendant R.G. &

G.R. Harris Funeral Homes, Inc.’s Reply Memorandum of Law in Support of Defendant’s Motion for Summary Judgment (Dkt. 67) (“Def. Reply Mem.”) at 2. R.G. then observes that the EEOC’s argument conflicts with the Sixth Circuit’s revision of its opinion in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), where the court deleted a paragraph that extended Title VII to cover transgender status. Def. Reply Mem. at 2-3. R.G.’s reply brief merely pointed to and discussed controlling precedent in order to directly respond to an argument asserted by the EEOC in its response brief. That does not amount to raising a new issue. This conclusion is buttressed by the fact that the *Smith* opinion is cited in both the principal and response briefs on each party’s motion for summary judgment.

Next, the EEOC alleges that R.G., in its reply brief, “for the first time” “relies on *Holt* [*v. Hobbs*, 135 S. Ct. 853 (2015)] to support its argument that RFRA protects religious belief and not just religious exercise.” Pl. Mot. ¶ 5(b). Nothing prevents a party from citing a new case in a reply brief in order to respond to an argument raised by the opposing party in its response brief. But here, the case isn’t even “new” because R.G. cited *Holt* in support of its RFRA argument in its principal summary judgment brief. *See* Memorandum of Law in Support of Defendant R.G. & G.R. Harris Funeral Homes, Inc.’s Motion for Summary Judgment (Dkt. 54) (“Def. SJ Mem.”) at 18.

Third, the EEOC contends that R.G. impermissibly “relies on a string of cases that allegedly support its argument that enforcing Title VII is not a compelling

governmental interest.” Pl. Mot. ¶ 5(c). Here again, R.G. has not raised a new issue; R.G. is simply responding to the EEOC’s argument that “eliminating workplace sex discrimination is a compelling government interest” in this case. Pl. Opp. Mem. at 22.

Finally, the EEOC asserts that it is impermissible for R.G. to argue “for the first time” in its reply brief “that the EEOC could simply hire Stephens as a less restrictive means to achieve the EEOC’s” purportedly compelling interest in enforcing Title VII. Pl. Mot. ¶ 5(d). But R.G. presents this less restrictive option in direct response to the EEOC’s contention in its response brief that ruling for the EEOC “is the least restrictive means to achieve the government’s goal of eradicating sex discrimination.” Pl. Opp. Mem. at 27. It was therefore entirely proper for R.G. to raise this less restrictive alternative in its reply brief in order to debunk the EEOC’s contrary claims.

Because R.G. has not improperly raised any new issues in its reply brief, it has not forfeited any arguments, and there is no reason to allow the EEOC to file a surreply. R.G. thus respectfully asks the Court to deny the Commission’s Motion for Leave to File Surreply to Respond to New Arguments in Defendant’s Reply Brief in its entirety.

Dated: July 6, 2016

Respectfully submitted,

/s/ Douglas G. Wardlow

Douglas G. Wardlow

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 July 6, 2016, I electronically filed the foregoing document, entitled Defendant's Memorandum in Opposition to Plaintiff's Motion for Leave to File Surreply, with the Clerk of the Court using the ECF system, which will send notification of this filing to all parties in the case.

/s/ Douglas G. Wardlow
Douglas G. Wardlow