



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

October 31, 2017

Deborah S. Hunt, Clerk of Court
United States Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

Re: *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424

Dear Ms. Hunt,

EEOC argued in its opening brief (pp.47-50), reply brief (pp.19-21), and at oral argument that the Funeral Homes failed to show that that this Title VII action imposed a “substantial burden” on its religious exercise. Specifically, the company did not establish that continuing to employ Ms. Stephens would place significant pressure on it to act contrary to its religious beliefs. EEOC submits *Real Alternatives, Inc. v. Secretary Department of Health & Human Services*, 867 F.3d 338 (3d Cir. 2017), as supplemental authority for this argument. Fed.R.App.P.28(j).

In *Real Alternatives*, the Third Circuit rejected a RFRA challenge brought by three employees who argued that their religious exercise was substantially burdened by the ACA’s “Contraceptive Mandate,” which required their employer’s insurance plan to cover contraceptives. *See id.* at 346-66. Consistent with EEOC’s argument, the panel stated that although *Burnell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014), requires courts to defer to the reasonableness of claimants’ religious beliefs, “this does not bar our objective evaluation of the *nature* of the claimed burden and the *substantiality* of that burden on the [claimant’s] religious exercise.” *Id.* at 356 (internal quotation marks, footnote, and citation omitted). In other words, “[c]ourts are not to accept every allegation of substantial burden.” *Id.* at 357; *see id.* at 358 (substantial-burden inquiry “is the very essence of a RFRA claim”). The panel stressed *Hobby Lobby*’s holding that “a substantial burden . . . exists only where the Government ‘demands that [an individual] *engage* in conduct that seriously violates [*his or her*] religious beliefs.’” *Id.* at 359 (quoting *Hobby Lobby*, 134 S.Ct. at 2775). The panel rejected the employees’ argument that purchasing their employer’s insurance enabled “the provision of contraceptives, thereby substantially burdening their religious exercise.” *Id.* There must be some “connection between the conduct and the religious belief,” the panel stated, and “the act complained of—the filling out of a form that triggers eligibility for reimbursement for services the employee choose to use (or not) . . . in no way amounts to the sort of ‘substantial’ burden consistently found contrary to RFRA.” *Id.* at 361 (footnote omitted).

Sincerely,

s/Anne Noel Occhialino
Senior Appellate Attorney
EEOC, Office of General Counsel
131 M St., NE
Washington, DC
20507