

No. 18-107

IN THE
Supreme Court of the United States

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

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF IN OPPOSITION
FOR RESPONDENT AIMEE STEPHENS**

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QUESTIONS PRESENTED

1. Given that Respondents prevailed below on an independent sex stereotyping ground accepted by every court of appeals, is this case the wrong vehicle for addressing the question whether discrimination on the basis of transgender status is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964, since a ruling on that question would not change the judgment below?

2. Is this case the wrong vehicle for deciding how sex-specific policies may be applied to transgender employees, given that the courts below found that the employee was terminated based on sex stereotypes about aspects of appearance and behavior other than Petitioner's dress code, the courts below did not adjudicate the legality of the dress code, and no other sex-specific policies were at issue?

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INTRODUCTION

Aimee Stephens was fired from her position as funeral director and embalmer because of her employer’s stereotypes about how women and men should appear and behave. Ms. Stephens was assigned a male gender at birth and initially presented in a stereotypically masculine way at work, although she has known that she is female for most of her life.¹ After close to six years of working for Petitioner Harris Funeral Homes, Ms. Stephens told her employer that she would begin living and working openly as a woman. Two weeks later, Petitioner’s owner, Thomas Rost, fired her because her appearance and behavior would no longer conform to his sex stereotypes.

Title VII protects employees from discrimination “because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1). The court of appeals held that Petitioner’s termination of Ms. Stephens was sex discrimination on two independent grounds. First, it concluded that it was sex discrimination because Mr. Rost fired Ms. Stephens based on his belief that her appearance and behavior would no longer match his stereotypes about how women and men should look and act. Second, it held in the alternative that it was

¹ To be transgender is to have a gender identity different from one’s assigned sex at birth. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018); Brief of Amici Curiae American Academy of Pediatrics, American Psychiatric Association, American College of Physicians, and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273, 2017 WL 1057281, at *5 (Mar. 2, 2017).

sex discrimination to fire her based on her transgender status.

Petitioner asks this Court to review two questions:

First, Petitioner asks this Court to decide whether discrimination based on transgender status is a form of sex discrimination under Title VII. But there is no reason to do so in this case because the court of appeals ruled for Respondents on the independent ground that Petitioner fired Ms. Stephens because her *appearance and behavior* failed to conform to its sex stereotypes. That type of sex discrimination claim, recognized in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is available to all employees and requires no determination of whether discrimination based on transgender *status* itself constitutes sex discrimination under Title VII. Moreover, there is no circuit split on whether transgender people, like everyone else, may bring sex discrimination claims where the discrimination is based on stereotypes about their sex-related appearance and behavior. Since that holding is sufficient to support the judgment below, resolving the first question presented would not affect the outcome of the case.

Second, Petitioner asks this Court to decide whether Title VII prohibits an employer from enforcing a sex-specific policy—such as Petitioner’s dress code—based on the employer’s perception of an employee’s sex. But this case does not properly present that question either. The court below found that Petitioner fired Ms. Stephens not merely for noncompliance with the dress code as the employer sought to enforce it, but based on a range of

appearance and behavior-related sex stereotypes that go well beyond the dress code. The court of appeals expressly did not rule on the legality of the dress code.

Finally, Petitioner asserts that the court of appeals erred in failing to limit the applicability of Title VII to situations where women or men are disadvantaged as a group, and where an employer's stereotypes are "fictional." Neither of these points is included in the questions presented, and neither identifies a conflict between the court of appeals and this Court's opinions.

In short, this case is not the right vehicle for addressing either of Petitioner's questions because the judgment below stands regardless of how the Court decides those questions.

STATEMENT OF THE CASE

A. Factual Background.

Aimee Stephens worked for nearly six years as a licensed funeral director and embalmer for Petitioner R.G. & G.R. Harris Funeral Homes, Inc., until the primary owner of the funeral home, Thomas Rost, fired her in August 2013.² Pet. App. 5a-6a, 9a. Resp. App. 27a-31a. Ms. Stephens had worked in the funeral services industry for nearly thirty years at the time of her termination. *Id.* at 34a.

Ms. Stephens's duties for Petitioner included "embalming, cosmetizing, casketing, [and] dressing"

² Thomas Rost owns 95.4% of the company; his children own the rest. Resp. App. 75a.

the bodies of the decedents, facilitating the family and public viewings, and taking the bodies from the families into Petitioner's custody. Resp. App. 81a. Mr. Rost testified that Ms. Stephens was "able to perform the jobs of funeral director and embalmer," and "showed sensitivity and compassion to the clients who came in." *Id.* at 50a. In "dealing with families," Ms. Stephens had been solicitous of their feelings, "had blended in well," and "had . . . been courteous and compassionate." *Id.* at 46a. She was a "very good embalmer," *Id.* at 72a, and "[f]amilies seemed very pleased" with her work. *Id.* It is undisputed that her termination was unrelated to her job performance. Pet. App. 100a.

Petitioner had a sex-specific dress code that required men to wear dark suits, white shirts, a tie, and dark socks and shoes, while women had to wear a conservative skirt suit or dress. *Id.* at 91a-93a. Mr. Rost required women to wear skirts even though it was not an industry standard. Resp. App. 65a-66a. He said that he was "just old-fashioned" and believes that "a male should look like a . . . man, and a woman should look like a woman." *Id.* at 62a, 63a. Petitioner purchased suits for men, but did not purchase any clothing for women. Resp. App. 65a, 58a-59a. When explaining the difference, Mr. Rost told an EEOC investigator, "You women are a strange breed." Resp. App. 11a. He also distinguished his "key employees" from his "lady attendants." Resp. App. 7a. After the EEOC sued, Petitioner began to offer women a small stipend toward the cost of their clothing, but paid less to women than it spent on the clothing it provided its male employees. Pet. App. 7a-8a.

Although she was assigned male at birth, Ms. Stephens has known from a young age that she is female. Resp. App. 1a. Four years prior to her termination by Petitioner, Ms. Stephens sought professional help from a counselor to address the “great despair” and “suffering” she had lived with. *Id.* After four years of counseling, she wrote a letter to her “Friends and Co-Workers” at Petitioner, and on July 31, 2013, provided that letter to Mr. Rost. Pet. App. 94a-95a.

In her letter, she explained:

I have known many of you for some time now, and I count you as my friends. What I must tell you is very difficult for me and is taking all the courage I can muster. . . . 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. . . . With the support of my loving wife, I have decided to become the person that my mind already is. . . . 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 [sic] 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. . . . 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. . . . It is my wish that I can continue to work at R.G. & G.R. Harris Funeral Homes doing what I have always done, which is my best!

Resp. App. 1a-2a.

On August 15, 2013, two weeks after Ms. Stephens informed Mr. Rost that she would come to work as her “true self,” “liv[ing] and work[ing] full-time as a woman,” *id.*, Mr. Rost told her “this is not going to work out,” making clear that her “services would no longer be needed here,” Pet. App. 96a. When asked “the specific reason that you terminated Stephens,” Mr. Rost responded “because he . . . was no longer going to represent himself as a man.” *Id.* at 109a.³ Mr. Rost also testified that he objected to Ms. Stephens’s use of the name “Aimee,” saying that this made him “uncomfortable . . . because he’s a man.” *Id.* at 61a.

While Mr. Rost had never seen Ms. Stephens dressed in a skirt suit, he believed that “there is no way that . . . the person [I] knew . . . would be able to

³ Mr. Rost consistently referred to Ms. Stephens as “he” and “a man,” refusing to respect her gender identity. We quote Mr. Rost’s actual words, but note that as a matter of accuracy and respect, Ms. Stephens is properly referred to as “she” and “a woman.”

present in such a way that it would not be obvious that it was [a man].” Resp. App. 45a. He expressed concerns regarding customers and his business, stating that families who patronized his business “don’t need some type of a distraction And [Ms. Stephens’s] continued employment would negate that.” *Id.* at 43a. Mr. Rost believed that Ms. Stephens’s feminine appearance and behavior “would have harmed [Petitioner’s] clients and its business.” *Id.* at 88a.

B. Proceedings Below.

Ms. Stephens filed a charge of discrimination with the EEOC soon after her firing. Resp. App. 3a. On September 25, 2014, the EEOC filed a complaint alleging that Petitioner violated Title VII by firing Ms. Stephens because she is transgender, because of her “transition from male to female, and/or because [she] did not conform to [Petitioner’s] sex- or gender-based preferences, expectations, or stereotypes.” Pet. App. 166a.

Petitioner moved to dismiss, arguing that Title VII does not protect transgender people from discrimination. The district court granted that motion in part, reasoning that “transgender . . . status is currently not a protected class under Title VII.” *Id.* at 172a.

The district court denied the rest of Petitioner’s motion to dismiss, ruling that the EEOC had stated a claim that Ms. Stephens was fired in violation of Title VII because Petitioner objected that her appearance and behavior departed from its sex stereotypes. *Id.* at 173a-184a, 187a. The district court reasoned that “any person—without regard to

labels such as transgender—can assert a sex-stereotyping gender-discrimination claim under Title VII, under a *Price Waterhouse* theory, if that person’s failure to conform to sex stereotypes was the driving force behind the termination.” *Id.* at 164a; *see also id.* at 183a (“[A] transgender person—just like anyone else—can bring a sex-stereotyping gender-discrimination claim under Title VII under a *Price Waterhouse* theory.”).

Following discovery, both the EEOC and Petitioner moved for summary judgment. The district court held that Mr. Rost’s testimony that he fired Ms. Stephens because she “was no longer going to represent himself as a man,” and would “dress as a woman” constituted “direct evidence to support a claim of employment discrimination.” *Id.* at 109a-110a. But the district court concluded that the Religious Freedom Restoration Act (RFRA) provided Petitioner an “exemption from Title VII . . . under the facts and circumstances of this unique case,” and therefore granted Petitioner summary judgment. *Id.* at 142a.

The EEOC appealed. *Id.* at 12a. Ms. Stephens filed a motion to intervene on appeal, because of her concerns about whether the EEOC would be able to continue fully representing her interests as the case progressed. *Id.* The court of appeals granted that motion and she participated in briefing and argument of the case. *Id.* at 12a-13a.

The court of appeals unanimously reversed. It first agreed with the district court that Petitioner violated Title VII by firing Ms. Stephens because of Mr. Rost’s sex stereotypes about her appearance and conduct. *Id.* at 15a-22a. It then went on to rule for

Respondents on an independent ground, finding that discrimination because of Ms. Stephens's transgender status is inherently a form of sex discrimination that violates Title VII. *Id.* at 22a-36a.

In concluding that firing Ms. Stephens for non-conformity with sex stereotypes violated Title VII, the court of appeals rejected Petitioner's argument that its purported reliance on a sex-specific dress code provided it a defense. The court found that Petitioner fired Ms. Stephens for her appearance and behavior well beyond the dress code, and concluded that Petitioner could "not rely on its [dress code] policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex." Pet. App. 21a-22a. As the court noted, "Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally." *Id.* at 65a. As a result, it expressly noted that it was "not considering . . . whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits." *Id.* at 18a.

Finally, the court of appeals rejected Petitioner's RFRA defense to Title VII liability. *Id.* at 36a-73a.⁴

⁴ The court of appeals also rejected an argument that Title VII's ministerial exception applied. Petitioner does not seek review of these rulings.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS A POOR VEHICLE FOR ADDRESSING PETITIONER'S FIRST QUESTION BECAUSE DECIDING IT WOULD NOT AFFECT THE JUDGMENT.

Since *Price Waterhouse*, the circuit courts have uniformly agreed that all people, including those who are transgender, may bring sex discrimination claims under Title VII if their employers discriminate against them because of sex stereotypes related to *behavior and appearance*. Applying that principle here, the court below first held that the funeral home discriminated against Ms. Stephens on the basis of sex when it fired her for failing to conform to her employer's expectations of how men and women should look and behave. It then held in the alternative that discrimination based on a person's transgender *status* is sex discrimination.

Petitioner's first question presented addresses *only* the court of appeals' alternative ground—whether discrimination based on transgender status, standing alone, is “discrimination ‘because of . . . sex’” under Title VII.⁵ Pet. i. But this case is an

⁵ Petitioners pose the question as whether the word “sex” in Title VII means “gender identity.” Pet. i. In fact, the courts that have concluded that discrimination based on transgender status violates Title VII have not done so on this ground. Rather, they have reasoned that discrimination based on transgender status is a form of “discrimination because of sex” because transgender status is an intrinsically sex-based characteristic. That reasoning does not depend on whether Congress was specifically contemplating “gender identity” when it enacted Title VII, any more than this Court's reasoning in *Oncale* relied on whether

inappropriate vehicle for reaching that question, because the judgment below rests on the independent holding that Petitioner fired Ms. Stephens because her appearance and behavior departed from sex stereotypes. That type of sex discrimination claim, accepted uniformly by the circuit courts, does not require the Court to decide whether discrimination based on transgender status is sex discrimination. This Court has made clear that Title VII encompasses disparate treatment motivated by sex stereotypes about an employee's appearance and behavior. Thus, even if this Court were to resolve the asserted circuit split regarding status-based claims in Petitioner's favor, the result in this case would not change. The Court should not grant certiorari to decide a question that will not affect the judgment below. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (declining to resolve split among circuits where doing so would not affect the outcome of the case); Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)) (certiorari denied where the resolution of a circuit conflict could not change the result reached below).

Congress had specifically contemplated same-sex sexual harassment. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

A. The Courts Below Held That Petitioner Fired Ms. Stephens Because of Its Sex Stereotypes About Her Appearance and Behavior.

Both the district court and the court of appeals squarely held that Petitioner subjected Ms. Stephens to sex discrimination under *Price Waterhouse* when it fired her because her appearance and behavior departed from Mr. Rost’s sex stereotypes. Pet. App. 21a-22a (agreeing with the district court that Petitioner had “engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the [Petitioner’s] perception of how she should appear or behave based on her sex”). Because that independent holding is in accord with all courts of appeals to address the issue, and not challenged by either of Petitioner’s questions presented, this case is not a proper vehicle for reaching Petitioner’s first question presented, which asks something else: whether discrimination on the basis of transgender status is discrimination because of sex under Title VII.

In *Price Waterhouse*, this Court concluded that Title VII’s prohibition on sex discrimination “mean[s] that gender must be irrelevant to employment decisions.” 490 U.S. at 240 (plurality opinion); *see also id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O’Connor, J., concurring). *Price Waterhouse* engaged in sex discrimination when it denied a partnership to Ann Hopkins in part because she did not “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235.

The district court and court of appeals both held that Petitioner fired Ms. Stephens because of its sex-stereotyped concerns about her appearance and behavior. The district court held that Mr. Rost’s testimony that he fired Ms. Stephens because she “was no longer going to represent himself as a man” and would “dress as a woman” constituted “direct evidence to support a claim of employment discrimination,” Pet. App. 109a-110a, in that it showed that Petitioner “fired Stephens ‘because of [Stephens’s] failure to conform to sex stereotypes[.]’” *Id.* at 109a (quoting *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005)). The court of appeals agreed, finding that “Rost’s decision to fire Stephens because Stephens was ‘no longer going to represent himself as a man’ and ‘wanted to dress as a woman’ . . . falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* . . . forbid[s].” Pet. App. 16a. Petitioner “engaged in improper stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the [Petitioner’s] perception of how she should appear or behave based on her sex.” *Id.* at 22a.

The lower courts’ holdings are amply supported by the record. Mr. Rost made clear his discomfort with Ms. Stephens’s appearance as a woman, declaring that he had “yet to see a man dressed up as a woman that I didn’t know was not a man dressed up as a woman.” Resp. App. 44a; *cf. Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1039 (8th Cir. 2010) (finding that terminating a front desk employee for having a masculine appearance rather than a “pretty” “Midwestern girl look” was sufficient to show wrongful sex stereotyping). And Mr. Rost felt that Ms. Stephens “present[ing]” herself

and “dressing” as a woman while some aspects of her appearance or behavior would be perceived as masculine would have been a “distraction to people.” Resp. App. 42a-45a.⁶

Thus, the courts below properly found that Mr. Rost himself admitted that his decision to fire Ms. Stephens was based on her departure from sex stereotypes about appearance and behavior. Notably, Petitioner does not challenge these findings.

B. The Circuits Are Uniform in Recognizing That Everyone Who Experiences Discrimination Motivated by Sex Stereotypes Related to Appearance and Behavior May Assert a Claim of Sex Discrimination, Including Transgender People.

The courts of appeals have developed extensive case law applying this Court’s sex discrimination decisions to anyone penalized for departing from sex stereotypes in appearance or behavior. The courts agree that federal laws banning sex discrimination provide persons who are transgender the same protection from discrimination based on sex stereotypes as anyone else.

⁶ Customer preference is not a defense here any more than it would be in other contexts. See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting defense that promoting a female employee would hurt business based on assumption that South American clients would not want to work with a female vice-president, since biased customer preferences did not make being a man a bona fide occupational qualification).

The courts are unanimous in holding that Title VII protects *everyone* from sex discrimination in employment. That includes men, *see Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) (men are protected from discrimination related to pregnancy benefits, since “Congress had always intended to protect *all* individuals from sex discrimination in employment”), victims of same-sex sexual harassment, *see Oncale*, 523 U.S. at 80-81, and people of any gender or sexual orientation who are perceived as gender nonconforming, *see Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009) (gay man with a “high voice” who “walk[ed] in an effeminate manner” and whose behavior was otherwise perceived as feminine could bring a claim of sex stereotyping); *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 453-62 (5th Cir. 2013) (en banc) (upholding jury verdict under Title VII for a man who was taunted because he was perceived as effeminate); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated on other grounds*, 118 S. Ct. 1183 (1998) (employee who faced harassment “in whole or in part because he wore an earring” could sue under Title VII for discrimination due to his non-conformity with sex stereotypes); *Lewis*, 591 F.3d at 1041 (ruling in favor of employee who was fired because she was perceived as “tomboyish”).

Every circuit court to address whether transgender people may state claims for discrimination based on gender non-conforming appearance and behavior after *Price Waterhouse* has agreed that they may—not only under Title VII, but also under other provisions of federal law that similarly prohibit sex discrimination.

Long before this case, the Sixth Circuit had concluded that a transgender fire department lieutenant who was fired for “expressing a more feminine appearance” could sue for sex discrimination under Title VII. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 568 (6th Cir. 2004). If “[a]n employer who discriminates against women because . . . they do not wear dresses or makeup, is engaging in sex discrimination” then “[i]t follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination.” *Id.* at 574. *See also Barnes*, 401 F.3d at 738 (affirming jury verdict in favor of a transgender woman based on evidence that her employer demoted her because her behavior and appearance failed to conform to its stereotypes of how males should look and act, including evidence that her “practice of dressing as a woman outside of work [was] well-known” among her co-workers and that “[o]ne of [her] supervisors told [her she] was not sufficiently masculine”).

There is no circuit split on this question. In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the Eleventh Circuit concluded it was sex discrimination where a transgender woman was fired after being told that “her appearance [was] not appropriate [b]ecause he was a man dressed as a woman and made up as a woman,” “it’s unsettling to think of someone dressed in women’s clothing with male sexual organs inside that clothing,” and that a male in women’s clothing is ‘unnatural.’” *Id.* at 1314. In *Schwenk v. Hartford*, the Ninth Circuit recognized that violence against a transgender prisoner because the perpetrator “believed . . . the victim was a man

who ‘failed to act like’ one” constituted sex discrimination prohibited by the Gender Motivated Violence Act. 204 F.3d 1187, 1202 (9th Cir. 2000). And in *Rosa v. Park West Bank & Trust Co.*, the First Circuit held that a transgender person could allege a claim of sex discrimination under the Equal Credit Opportunity Act after being turned away by a loan officer “because she thought that Rosa’s [feminine] attire did not accord with his male gender[.]” 214 F.3d 213, 215-16 (1st Cir. 2000). The Seventh Circuit found that a transgender student could bring a sex-stereotyping claim under Title IX. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047-49 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018).

The Tenth Circuit cited to *Smith* and assumed that Title VII permits transgender people to bring a claim based on “failure to conform to sex stereotypes” about how they “act and look.” *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223-24 (10th Cir. 2007). The Fifth and Eighth Circuits have also assumed that transgender people could bring sex discrimination claims. *See Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017); *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012)⁷; *Brandon v. Sage Corp.*, 808 F.3d 266, 270-71 & n.2

⁷ The Eighth Circuit’s decision that transgender people are not protected from discrimination under Title VII, *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), has not been revisited since this Court’s decision in *Price Waterhouse*, although the Eighth Circuit has, since *Price Waterhouse*, assumed that Title VII includes protection for transgender people from discrimination based on sex-stereotyped concerns about appearance and behavior. *See Hunter*, 697 F.3d at 704.

(5th Cir. 2015).

District courts in the circuits that have not directly considered the question (the Second, Third, Fourth, and District of Columbia Circuits) have uniformly taken the same position: that transgender people may bring Title VII claims based on evidence of sex stereotyping about their appearance and behavior. *See, e.g., Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 787-90 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

Thus, since *Price Waterhouse*, there has been no conflict among the courts of appeals over whether transgender people, like all others, can assert a Title VII claim when, like Ms. Stephens, they are subjected to adverse action because their employer objects that their appearance or behavior does not conform to sex stereotypes.

C. The Split Petitioner Identifies Is About a Legal Question That Is Not Necessary to the Judgment Below and in Any Event Merits Further Percolation.

Petitioner asks the Court to resolve a split among the courts of appeals about whether discrimination based on transgender status is sex discrimination. But because the court of appeals decision rests independently on a finding that Petitioner discriminated against Ms. Stephens based

on its sex-stereotyped concerns about her appearance and behavior, no resolution of this alleged split could alter the judgment below, making this a poor vehicle for addressing that issue. Shapiro et al., *supra* at 249. The split is also not nearly as extensive, mature, or complex as Petitioner suggests, and better opportunities will arise to address it.

The Seventh, Ninth, and Eleventh Circuits agree with the Sixth Circuit's alternative holding for Respondents that when a decision maker discriminates against someone for being transgender, that discrimination is inherently based on sex. See Pet. App. 22a-23a; *Whitaker*, 858 F.3d at 1049; *Schwenk*, 204 F.3d at 1201-02; *Glenn*, 663 F.3d at 1316.

Only the Tenth Circuit has ruled otherwise, finding that discrimination on the basis of transgender *status* is not a violation of Title VII. *Etsitty*, 502 F.3d at 1224. That court distinguished between claims based on sex stereotypes about appearance and behavior, which it assumed were available to transgender employees, and claims based on status alone. *Id.*

The other cases that Petitioner claims establish a circuit split show no such thing. On rehearing en banc, the Third Circuit removed the portion of the *Boyertown* decision that Petitioner cites. See *Boyertown Area Sch. Dist.*, 897 F.3d at 533. The ruling in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), was vacated by this Court and the case is still being litigated in the lower courts on remand. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017). *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and

Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662, 664 (9th Cir. 1977), two pre-*Price Waterhouse* decisions cited by Petitioner, have both already been overruled. See *Whitaker*, 858 F.3d at 1047 (acknowledging reasoning of *Ulane* cannot foreclose claim under *Price Waterhouse*); *Schwenk*, 204 F.3d at 1201 (“The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.”).

While resolving Petitioner’s first question would have no effect on the judgment in this case, it might be dispositive in other cases. For example, Petitioner’s first question might arise in cases that lack evidence that an employer was driven by sex-based concerns related to behavior and appearance. Such a case might involve an employer’s failure even to consider an applicant whose job application or background check reveals that she is transgender, where there is no other evidence of the employer’s sex-based appearance and behavior-related objections to employing her. In the absence of such evidence, a court might be required to decide a broader question about whether discrimination against transgender people because of their transgender status is a form of discrimination based on sex.

Thus far, it is only in the context of disputes over the use of sex-specific facilities where a decision about whether discrimination based on transgender status is a form of sex discrimination appears to have affected the outcome of a case. When the Tenth Circuit in *Etsitty* distinguished claims based on transgender status from those based on sex stereotypes about how a transgender person looks

and acts, it concluded that the use of sex-specific facilities fell on the status side of the line, and the plaintiff had no sex discrimination claim. In contrast, the Seventh Circuit held in *Whitaker* that discrimination against someone based on their transgender status by denying the use of sex-specific restrooms was a form of discrimination on the basis of sex. 858 F.3d at 1049. In contrast to *Whitaker* and *Etsitty*, however, this case does not present any issue regarding sex-specific facilities. *See infra* Section II.C.

Because the judgment below will not be affected by deciding whether discrimination on the basis of transgender status alone violates Title VII, this Court should deny review here.

**II. PETITIONER’S SECOND QUESTION—
WHETHER *PRICE WATERHOUSE*
PROHIBITS EMPLOYERS FROM
ENFORCING SEX-SPECIFIC POLICIES
ACCORDING TO THE EMPLOYERS’
VIEW OF THEIR EMPLOYEES’ SEX—
WAS NOT ADJUDICATED BELOW AND
IS NOT PROPERLY PRESENTED HERE.**

The second question on which Petitioner seeks review is whether *Price Waterhouse* “prohibits employers from applying sex-specific policies according to their employee’s sex rather than their gender identity.” Pet. i. But that question is also not properly presented, both because it was not decided below and because Petitioner admitted that Mr. Rost fired Ms. Stephens for far more than her intention not to follow Petitioner’s dress code as interpreted by Mr. Rost. Thus, even if the dress code by itself were a

legitimate basis for firing Ms. Stephens, the outcome of this case would not change.

A. The Sixth Circuit Held That Mr. Rost Fired Ms. Stephens Based on Multiple Sex Stereotypes, Not Only Those Related to the Dress Code.

The Sixth Circuit held that Petitioner fired Ms. Stephens because of a range of sex stereotypes that go well beyond the dress code. It ruled that the evidence did not permit a conclusion that the only sex stereotype that motivated the termination concerned clothing:

Though Rost does repeatedly say that he terminated Stephens because she ‘wanted to *dress* as a woman’ and ‘would no longer *dress* as a man’, the record also contains uncontroverted evidence that Rost’s reasons for terminating Stephens extended to other aspects of Stephens’s intended presentation. . . . The record . . . compels the finding that Rost’s concerns extended beyond Stephens’s attire and reached Stephens’s appearance and behavior more generally.

Pet. App. 65a (citations omitted).⁸

⁸ While the district court characterized the sex stereotyping as based only on clothing, the Sixth Circuit explicitly rejected that interpretation of the record. Because the case was resolved on

The record supports this conclusion. Mr. Rost's concern was not about which dress code Ms. Stephens would follow, but about having a woman working for him who would not "look like a woman." Resp. App. 62a-63a. He objected not only to Ms. Stephens dressing in a traditionally feminine way, but also to her using a traditionally feminine name or otherwise looking or acting in any way he believed only women should. Mr. Rost described himself as "just old-fashioned." *Id.* at 62a. He believed that "a male should look like a . . . man, and a woman should look like a woman." *Id.* at 62a-63a. He stated that he fired Ms. Stephens because she "was no longer going to represent himself as a man." Pet. App. 109a. He objected to Ms. Stephens calling herself "Aimee" because "he's a man." Resp. App. 61a. Petitioner went so far as to argue that the EEOC charge of discrimination should be dismissed because "Aimee" Stephens never worked there. *Id.* at 13a.

Mr. Rost was concerned that Ms. Stephens's appearance and behavior would be perceived as unacceptably masculine for a woman, regardless of how she dressed. He anticipated that if Ms. Stephens wore traditionally feminine clothing, she would still be perceived as masculine, and that would be "distracting to my clients." Pet. App. 198a. He testified that "[t]here is no way that . . . the person [I] knew as . . . Stephens would be able to present in such a way that it would not be obvious that it was [a man]." Resp. App. 45a.

cross motions for summary judgment, the district court made no factual findings entitled to deference on appeal.

Petitioner notes that Mr. Rost stated that if Ms. Stephens “would only present as a woman outside of work,” he would not have terminated her. Pet. App. 110a; *see also id.* at 104a-05a. But even if true, that statement is fully consistent with the court of appeals’ statement that Mr. Rost was concerned with multiple aspects of Ms. Stephens’s appearance and behavior because of sex.⁹ Given the extent of Mr. Rost’s stereotypes about how men and women should look and act, it is not plausible that Petitioner would have retained Ms. Stephens if she appeared at work using her new, traditionally feminine name, wearing makeup, styling her hair in a traditionally feminine way, and displaying traditionally feminine mannerisms, even if she complied completely with the dress code for men.

Thus, even if enforcing a sex-specific dress code against a transgender employee according to the employer’s view of the employee’s sex were lawful under Title VII, the judgment below would still stand because Mr. Rost fired Ms. Stephens for departing from sex stereotypes that extended well beyond Petitioner’s dress code. This case therefore does not present the question about sex-specific policies that Petitioner wants the Court to decide.

⁹ This is not in fact an accurate statement regarding the record below, since Mr. Rost testified that, “if a customer had seen Stephens . . . as female outside of work” and “that person had said that they were not going to come back,” then “perhaps, yes,” that “could have been reason to let Stephens go.” Resp. App. 66a.

B. The Court of Appeals Expressly Did Not Address the Lawfulness of Sex-Specific Dress Codes.

The legality of Petitioner’s dress code was never adjudicated below. For that reason, prudential considerations weigh against addressing the question Petitioner poses.

Ms. Stephens had no personal objection to the dress code and planned to comply with it as a woman. Pet. App. 95a. As the district court noted, “the dress code is only being injected because the Funeral Home is using its dress code as a defense to the Title VII sex-stereotyping claim.” *Id.* at 112a. And as the Sixth Circuit repeatedly emphasized, “[W]e are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits.” *Id.* at 18a. Ultimately, the Sixth Circuit concluded only that:

[T]he Funeral Home’s sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home’s dress code does not itself violate Title VII—*an issue that is not before this court*—the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home’s perception of how she should appear or behave based on her sex.

Id. at 21a-22a (emphasis added).¹⁰

It makes little sense to determine how a sex-specific dress code may be enforced as to transgender people when the Court has yet to consider whether sex-specific dress codes may be enforced as to anyone. The question Petitioner proposes might be better presented, for example, in a case that has addressed the threshold question of whether employers may force women to wear skirts and men to wear pants absent any bona fide occupational qualification.

C. Sex-Specific Restroom Policies Are Not at Issue in this Case.

Petitioner invokes concerns about the implications of this case for transgender people's use of sex-specific restrooms. Pet. 2, 5, 14, 17, 19-20, 24-25, 27, 30-33. But that issue was not argued, developed, or decided below, and, by Petitioner's own admission, played no part in Ms. Stephens's termination.

While questions regarding restroom use came up briefly during depositions, it is undisputed that the issue played no role in Petitioner's firing of Ms. Stephens. Mr. Rost himself testified that "there was no discussion of bathrooms with Stephens . . . [t]hat never came up at all." Resp. App. 47a. He also said:

¹⁰ The court's statement that "even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersion* or *Barker* to do so" and its subsequent discussion of those cases are dicta.

Q: So the bathroom thing is really hypothetical, I mean, because you never even got to that point?

A: That's true.

Id.

Petitioner did not raise the issue of restrooms before the court of appeals. Neither the district court nor the Sixth Circuit expressed any opinion, even in dicta, about whether Ms. Stephens should have been permitted to use the women's restrooms if she had continued to be employed. The Sixth Circuit mentioned restrooms once briefly as simply one more piece of evidence that Mr. Rost was not comfortable with any aspect of employing Ms. Stephens as a woman. *See* Pet. App. 65a.

III. THE SIXTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH *PRICE WATERHOUSE* OR ANY COURT OF APPEALS.

Petitioner does not identify as a question presented whether firing a transgender employee for failing to conform to sex stereotypes related to appearance and behavior violates Title VII. Yet it argues, in its "reasons for granting certiorari," that the Sixth Circuit's ruling conflicted with this Court's decision in *Price Waterhouse*. Pet. 21-25. That argument is not within the proper scope of the petition because it is not fairly included in either of the questions presented. *See Barr v. Matteo*, 355 U.S. 171, 172 (1957); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (declining to consider question not raised in petition for certiorari), Supreme Court Rule

14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”). In any event, Petitioner points to no actual conflicting decision, and cites almost exclusively dissenting opinions when asserting a conflict.¹¹ In fact, the court of appeals properly applied *Price Waterhouse*.

Petitioner first argues that *Price Waterhouse* finds sex discrimination only where employers advantaged one sex over another, and that the court of appeals eliminated that requirement. Pet. 22. But just as Price Waterhouse objected to promoting Ann Hopkins because it perceived her as too masculine, an objection it leveled against her only because it saw her as a woman, so Petitioner objected to retaining Ms. Stephens because it perceived her as too feminine, an objection it leveled against her only because it saw her as a man. In both cases, the employer penalized its employee for behavior that would have been acceptable if the employee’s perceived sex were different. So the same differential treatment that existed in *Price Waterhouse* is present here.

Moreover, Title VII makes it unlawful “to discriminate against any *individual* with respect to his . . . sex,” *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978), and has

¹¹ Petitioner cites *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1111-13 (9th Cir. 2006) (en banc) and *Etsitty*, but these cases involve issues not present in this case—whether a sex-specific appearance code violates Title VII and whether Title VII protects transgender women’s use of women’s restrooms, respectively. See *supra* Section I.C and Section II.B.

never been limited to cases where women, as a class, or men, as a class, are harmed. *Id.* The *Price Waterhouse* Court did not require Ms. Hopkins to show that her employer disadvantaged women as a group—only that sex stereotypes were a motivating factor in the way it treated her. *Price Waterhouse*, 490 U.S. at 251 (employer may not “assum[e] or insist[] that [women] match[] the stereotype associated with their group”). An interpretation of “because of sex” that limits it to situations where women as a group are treated worse than men or men worse than women would contradict the plain language of the statute and deny relief to many people who face discrimination because of sex. See, e.g., *Oncale*, 523 U.S. at 80-81 (ruling that man harassed by other men in an all-male work environment could state claim for sex discrimination if that harassment was motivated by sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (holding that policy of not hiring women with preschool age children violated Title VII even though most employees were women and “hence no question of bias against women as such was presented”).¹²

¹² In the equal protection context, the Court has often declared unconstitutional rules that harm both women and men, but that reinforce sex stereotypes, such as laws providing different benefits to widows and widowers based on stereotypes about women’s dependence on men. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980). These laws, the Court recognized, harmed both the surviving widower and his deceased spouse because of sex. The fact that the laws simultaneously harmed men and women did not mean that they were not discrimination on the basis of sex. See also *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (rejecting

Second, Petitioner claims that Title VII prohibits discrimination based on sex stereotypes only when they are “fictional.” Pet. 23-24. But *Manhart*’s discussion of stereotypes, relied on by Petitioner, condemns not only fictional differences but also “generalization[s] that the parties accept as unquestionably true[.]” *Manhart*, 435 U.S. at 707. This Court stated unequivocally that “[e]ven a *true* generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.” *Id.* at 708 (emphasis added); see also *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083 (1983) (“Title VII requires employers to treat their employees as *individuals*, not ‘as simply components of a racial, religious, sexual, or national class.’”) (quoting *Manhart*, 435 U.S. at 708).

In short, the court of appeals faithfully applied *Price Waterhouse* consistently with this Court’s other precedents. For good reason, Petitioner did not ask the Court to review whether the court of appeals properly held that Ms. Stephens, a transgender employee, could assert a Title VII claim where her employer expressly fired her based on its sex stereotypes about her appearance and behavior.¹³

gender-based peremptory jury strikes without requiring that a strike be shown to disadvantage women or men as a class).

¹³ If the Court grants certiorari in *Altitude Express, Inc. v. Zarda*, No. 17-1623, or *Bostock v. Clayton County*, No. 17-1618, the Court should not hold this case pending the issuance of a decision in those cases. While *Zarda* and *Bostock* also concern the scope of sex discrimination under Title VII, in neither case

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Dated: October 24, 2018

Counsel for Respondent Aimee Stephens

did the court of appeals base its holding on a separate claim of sex discrimination based on sex stereotypes about appearance and behavior, as the Sixth Circuit did in this case. The Court should deny review in this case because resolution of the petitions in *Zarda* or *Bostock* would not affect the type of sex discrimination claim under which Ms. Stephens prevailed.

APPENDIX

EXHIBIT A

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,

/s/ Anthony Stephens
Anthony Stephens

/s/ Amiee A. 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
[REDACTED]
[REDACTED]
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.*

<p align="center">CHARGE OF DISCRIMINATION</p> <p>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</p>	<p>Charge Presented To:</p> <p align="center"> <input type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC </p> <p align="center">Agency(ies) Charge No(s): 471-2013-03381</p>	
<p align="center">Michigan Department Of Civil Rights</p> <hr/> <p align="center">and EEOC</p> <p align="center"><i>State or local Agency, if any</i></p>		
<p>Name (<i>indicate Mr., Ms., Mrs.</i>) Aimee Stephens</p>	<p>Home Phone (<i>Incl. Area Code</i>) (586) 838-6623</p>	<p>Date of Birth 12-07-1960</p>
<p>Street Address City, State and ZIP Code 17730 Lennane, Redford, MI 48240</p>		
<p>Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (<i>If more than two, list under PARTICULARS below.</i>)</p>		
<p>Name R.G. & G. R. HARRIS FUNERAL</p>	<p>No. Employees, Members 15 - 100</p>	<p>Phone No. (Include Area Code) (734) 425-9200</p>
<p>Street Address City, State and ZIP Code 31551 Ford Rd., Garden City, MI 48135</p>		

Name	No. Employees, Members Phone No. (<i>include Area Code</i>)
Street Address	City, State and ZIP Code
DISCRIMINATION BASED ON (<i>Check appropriate box(es).</i>) <input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input checked="" type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN <input type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input type="checkbox"/> GENETIC INFORMATION <input type="checkbox"/> OTHER (Specify)	DATE(S) DISCRIMINATION TOOK PLACE Earliest 07-31-2013 Latest 08-15-2013 <input type="checkbox"/> CONTINUING ACTION
THE PARTICULARS ARE (<i>If additional paper is needed, attach extra sheet(s)</i>): I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer. On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition.	

<p>Moreover, during my entire employment I know there are no other female Funeral Director/Embalmers.</p> <p>I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.</p>	
<p>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</p>	<p>NOTARY - <i>When necessary for State and Local Agency Requirements</i></p>
<p>I declare under penalty of perjury that the above is true and correct.</p> <p><u>Sep 09, 2013</u> <i>Date</i></p> <p><u>X Aimee Stephens</u> <u>[SIGNATURE]</u> Charging Party Signature</p>	<p>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge information and belief.</p> <p>SIGNATURE OF COMPLAINANT</p> <p><u>X Aimee Stephens</u> <u>[SIGNATURE]</u></p> <p>SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (<i>month, day, year</i>)</p> <p>[SIGNATURE] 09 Sept 2013</p>

EEOC002748

for key people. Its mostly local. I would advertise on-line in local newspaper. God ~~people~~ 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 accept. 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 empathetic 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 ~~creation~~ cremations. Turning away from family owned towards corporation own business.

13. I have my mgmt people who run and over see daily actives that are 24/7 not 8 hrs a day. I have 3 rotating mgros running business. We don't have General Mgr. we don't 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
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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.

EEOC002760

REVERSE OF EEOC FORM 133 (Test 10/94)

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 between for family, they are the ^{representative} ~~customers~~, 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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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.)

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EEOC002761

REVERSE OF EEOC FORM 133 (Test 10/94)

4.

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)			
<p>18. He was here for a reasonably long time. 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.</p> <p>19. That's not my job - but I believe its just the attitude - job was getting close but over the last year it really became a problem. He was taking chemicals.</p> <p>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.</p>			

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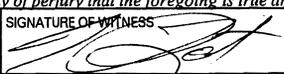
21. Everything is all about healing. We are all about healing ~~to~~ ~~body~~ is exempt from that. If you have something that is going to affect that process you don't belong. All male employees are provided uniform and thus it was going to be an impossibility. There is no question that dressing as woman would have interrupted business and business transactions. Dress is paramount here. We are one funeral home - 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 the 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. ~~Essentially 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
				

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.)

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REVERSE OF EEOC FORM 133 (Test 10/94)

EEOC002763

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)			
<p>24. No deviations with dress code.</p> <p>25. I never seen the charging Party presenting as a female.</p> <p>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.</p> <p>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.</p> <div style="text-align: right; margin-top: 20px;">  </div>			

EEOC002764

KIRKPATRICK LAW OFFICES, P.C.
Joel J. Kirkpatrick
Attorney at Law
Admitted to practice in Michigan & Ohio

AIMEE STEPHENS

v.

**R. G. & G. R. HARRIS FUNERAL HOME,
INC.**

EEOC CHARGE NO. 471-2013-03381

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

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

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

Identification of Complainant: The Complainant is identified as “Aimee Stephens.”

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

2. The Funeral Home *has* employed an employee by the name of “Wm. Anthony B. Stephens.” If this is the person who filed the Complaint under the name “Aimee Stephens,” then the Complaint must be dismissed as not having been filed under the Complainant’s legal name. If the real Complainant is Wm. Anthony B. Stephens, then the name “Aimee Stephens” is a fictitious name concealing the Complainant’s true and legal identity. It is hornbook law that complaining parties are required to file complaints under their legal names so as to clearly identify who the parties are and so as to avoid fraud and confusion. See, for example, Doe v. Frank, 951 F.2d 320 (11th Cir. 1992) quoting Southern Methodist University Ass’n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979) (basic fairness dictates that party plaintiffs must participate in suits under their real names); Doe v. State of Alaska, 122 F.3d 1070 (9th Cir. 1997) (a plaintiff must file a complaint in his own name).

Statement of Nonwaiver of Defenses:

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

Facts

The Funeral Home has never employed at any time or in any capacity anyone by the name of “Aimee Stephens.” Therefore, the Funeral Home denies in their entirety all facts and claims asserted by any such person.

The Funeral Home did employ a “Wm. Anthony B. Stephens” – a male – from September 2007 until August 2013. Mr. Stephens was an at will employee employed as a funeral director. In the summer of 2013, Mr. Stephens advised the Funeral Home in no uncertain terms that he would no longer comply with the Funeral Home’s Dress Code, which requires men to wear suits and ties. Due to Mr. Stephens’ refusal to abide by the Funeral Home’s Dress Code, the Funeral Home terminated Mr. Stephens’ employment.

Claims

The Complainant claims he was discharged “*due to my sex and gender identity, female, in violation of Title VII 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)(l.)

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 sanctions 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 Service License issued by the State of Michigan, his employment tax records, his driver's license issued by the State of Michigan, his 08/2912013 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.

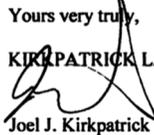
But Mr. Stephens is not a female. He is biologically, anatomically and legally a male. He may claim he is a female. He may intend to undergo therapy and surgery that would to some extent change his physical appearance to resemble a female. But doing so would not make him a female and, in any event, he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

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

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

Therefore, the Complainant’s sex discrimination claim must fail.

Please contact me if you have any questions

Yours very truly,

KIRKPATRICK LAW OFFICES, P.C.
Joel J. Kirkpatrick

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

4

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

5

Plaintiff,

6

-vs- No. 2:14-cv-
13740

7

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

9

Defendants.

10

11 -----

12

13 **The Deposition of AIMEE A.
STEPHENS**

14

Taken at 39111 Six Mile Road,

15

Livonia, Michigan,

16

Commencing at 9:28 a.m.,

17

Wednesday, December 16, 2015,

18

Before Deborah A. Culver

19

20

21

22

23

24

25

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
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- 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

1. BRADLEY ABRAMSON
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- 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

P4

1. TABLE OF CONTENTS

2

WITNESS

4 AIMEE A. STEPHENS

5

6 EXAMINATION

7 BY MR. KIRKPATRICK:

8 EXAMINATION

9 BY MR. PRICE:

10 RE-EXAMINATION
11 BY MR. KIRKPATRICK:
12
13 EXHIBITS
14
15 EXHIBIT
16 (Exhibits attached to transcript.)
17
18 D E P O S I T I O N EXHIBIT 1
19 (Resumé)
20 D E P O S I T I O N EXHIBIT 2
21 (Employee Manual)
22 D E P O S I T I O N EXHIBIT 3
23 (Letter)
24 D E P O S I T I O N EXHIBIT 4
25 (Plaintiff's Witness List)

P49

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.

P50

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?

P51

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 D E P O S I T I O N
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.

P52

1. Q. And this resumé, you prepared

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

down there.
25 Q. Would that be Tom Rost?

P53

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?

P54

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.

P55

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 D E P O S I T I O N
EXHIBIT 2
24 (Employee Manual)
25 10:44 a.m.

P90

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
19 where they, they,
20 being a funeral home, have not followed
21 any kind of
22 professional clothing dress code?
23 A. Other than the ones I've mentioned,
24 no, but it was
25 still perceived.
26 Q. So there's an understanding of
27 presenting yourself, if
28 you work in the industry, in a
29 professional --
30 A. Manner, yes.

P91

1. Q. Would the term conservative
2 clothing mean something in
3 the industry? If you understand what
4 I'm saying. I
5 could explain that if you need me to.
6 A. Please do.
7 Q. Well, I have what I would
8 consider more of a
9 conservative suit on, it's a dark suit,
10 you know, not
11 a very loud tie, at least I don't think it's
12 loud, and
13 shirt, whereas you may see people
14 where wild colors.
15 I say wild colors, they could be orange,
16 whatever,
17 things that might be offensive that still
18 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?

1. **IN THE UNITED STATES DISTRICT**
 COURT
2 **EASTERN DISTRICT OF MICHIGAN**
3 **SOUTHERN DIVISION**
4
5 **EQUAL EMPLOYMENT OPPORTUNITY**
)
6 **COMMISSION,)**
7 **COMMISSION,)**
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
18
19
20
21
22
23
24 **REPORTED BY: QUENTINA R.**
 SNOWDEN, CSR NO. 5519
25 **JOB NO.: 276003-A**

1. 30(B)(6) DEPOSITION OF
THOMAS ROST, taken at
2 the offices of Joel J. Kirkpatrick, PC,
located
3 at 843 Penniman Avenue, Suite 201,
Plymouth,
4 Michigan on Thursday, November 12,
2015, at 9:30
5 a.m., before Quentina R. Snowden,
Certified Court
6 Reporter, in and for the State of Michigan.
7

8 APPEARANCES:

9 For the Plaintiff:

10 EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

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1. I N D E X
- 2 WITNESS: THOMAS ROST
- 3 EXAMINATION PAGE
- 4 BY: Mr. Price 05
- 5 EXAMINATION
- 6 BY: Mr. Kirkpatrick 132

7	RE-EXAMINATION		
8	BY: Mr. Price		140
9	(No further examination.)		
10	E X H I B I T S		
11	NUMBER	DESCRIPTION	PAGE
12	EX. NO. 1	DEFENDANT'S	12
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13		PLAINTIFF'S	
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		COMPLAINT	
14	EX. NO. 2	CHARGE OF	18
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22			
23			
24			
25			

P5

1. PLYMOUTH, MICHIGAN;
 THURSDAY, NOVEMBER 12, 2015
 2 9:40 A.M.
 3 -oOo-
 4 Whereupon --

5 THOMAS ROST,
6 having been first duly sworn to testify to
the
7 truth, the whole truth, and nothing but
the
8 truth, was examined and testified as
follows:
9 EXAMINATION
10 BY MR. PRICE:
11 Q Good morning.
12 A Good morning to you.
13 Q Yeah, my name is Dale Price, I'm an
attorney
14 with the Equal Employment Opportunity
15 Commission here in Detroit and we have
two
16 purposes here today. We'll do them in
order.
17 One, we're going to take your
18 30(b)(6) deposition, what's known as. We
sent
19 out a Notice with respect to that
designating
20 certain subjects upon which we wish to
have a
21 company representative brought forward
to
22 testify to.
23 And then secondly, we'll be doing a
24 deposition of you in your personal
capacity.
25 Hopefully there won't be a whole lot of

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

P60

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?

P61

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.

P75

1. [Text omitted.]
2 [Text omitted.]
3 [Text omitted.]
4 [Text omitted.]
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.

P76

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 --

P107

1. [Text omitted.]

2 [Text omitted.]

3 [Text omitted.]

4 [Text omitted.]

5 Now, were -- you were involved in
6 the hiring of Stephens, correct?

7 A I was.

8 Q What role did you play?

9 A I believe, if I remember, he -- he just
came in

10 looking for a job. I don't think he came
in

11 from an advertisement. I don't
remember the

12 circumstances. But, I believe I was the
13 initial one that interviewed him.

14 Q Okay. And what job was this for?

15 A For a funeral director/embalmer, I
guess.

16 Q Did you check-out the resume and
references?

17 A Don't know.

18 Q Did you ever have any reason to
believe that

19 Stephens did not have the
certifications or

20 background to do the job?

21 A No.

22 Q In fact Stephens was able to perform
the jobs

23 of a funeral director and embalmer,
correct?
24 A He was. Uh-huh.
25 Q All right. Now, was there somebody
already

P108

1. working as a funeral director and
embalmer at
2 that time?
3 A Don't know.
4 (Mr. Schrameck exited the
5 conference room at 12:19 p.m.)
6 BY MR. PRICE:
7 Q Okay. What location was this?
8 A This is at the Garden City location.
9 (Jeffrey Schrameck entered the
10 conference room at 12:19 p.m.)
11 BY MR. PRICE:
12 Q All right. Do you recall whether or
not
13 Stephens replaced somebody at that
location?
14 A I don't recall. I don't know.
15 Q Is it possible?
16 A Oh sure, it's possible.
17 Q Okay. During your interview with
Mrs.
18 Dickinson, I believe you said that
Stephens
19 could do the job, correct?
20 A Yes.
21 Q All right. We've already talked
earlier about,

22 you know, that Stephens showed
sensitivity and
23 compassion to the clients who came in,
correct?
24 A Yes.
25 Q Okay. And that there were no – is it
safe to

P109

1. say then that there were no
performance-related
2 reasons for termination of
employment?
3 A Not at that time, but we did have
some issues
4 beforehand.
5 Q But they didn't motivate the
decision to
6 terminate the employment, correct?
7 A No. No.
8 Q So performance was not the basis for
discharge?
9 A That's right.
10 [Text omitted.]
11 [Text omitted.]
12 [Text omitted.]
13 [Text omitted.]
14 [Text omitted.]
15 [Text omitted.]
16 [Text omitted.]
17 [Text omitted.]
18 [Text omitted.]
19 [Text omitted.]
20 [Text omitted.]

- 21 [Text omitted.]
- 22 [Text omitted.]
- 23 [Text omitted.]
- 24 [Text omitted.]
- 25 [Text omitted.]

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**

17
18
19
20
21
22
23
24 **REPORTED BY: QUENTINA R.**
 SNOWDEN, CSR NO. 5519
25 **JOB NO.: 276003-B**

1. DEPOSITION OF THOMAS ROST,
taken at the
2 offices of Joel J. Kirkpatrick, PC, located
at
3 843 Penniman Avenue, Suite 201,
Plymouth,
4 Michigan on Thursday, November 12,
2015, at 2:14
5 p.m., before Quentina R. Snowden,
Certified Court
6 Reporter, in and for the State of Michigan.

7

8 APPEARANCES:

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10 EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

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- 25

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9	(No further examination.)	
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25		

P13

1. Do you know who updated it the last time it was done?
- 2
- 3 A Do not know.
- 4 Q Okay. Now, with respect to -- we talked about
- 5 a dress code and I'll get back to that in a
- 6 little bit, but there is a clothing

allowance
7 policy at R.G. G.R. Harris, correct?
8 A Well, not for men. No, because we
give them
9 the suits.
10 Q Okay.
11 A They don't buy -- we buy the suits. We
tell
12 them what to wear.
13 Q Okay. So the men are told what to
wear?
14 A And we give it to them, we provide it.
15 Q Okay. Where do you get this -- what
are the
16 men given?
17 A This is what they're given right here.
18 Q So it's a blue --
19 A It's a blue striped shirt and they get a
tie.
20 Q Blue striped suit and tie?
21 A Yeah.
22 Q Where do you get the suits from?
23 A A place on 12 Mile and Middlebelt
called Sam
24 Michael's.
25 Q And how often are suits issued to the
male

P14

1. employees?
2 A Well, it's different for -- let's say -- I get
3 suits, we'll say, like every three or four
4 years because I'm not very hard, but I
have

5 some people that are -- they're like
animals,
6 you know, they're --
7 Q They wear their suits out?
8 A They wear their suits out, so they
require --
9 Q Okay. So you get -- how many suits are
issued
10 at hire?
11 A Well, for a full-time person, he gets
two. For
12 a part-time person he gets one.
13 Q So a full-time male employee gets one -
- or two
14 suits?
15 A Right.
16 Q And two ties?
17 A And two ties.
18 Q Okay. And the part-time gets one?
19 A One, right.
20 Q And then as they wear out they're
replaced, is
21 that correct?
22 A Well, it's like every couple years
normally.
23 Q Every two years?
24 A Yeah. But sometimes people have an
emergency
25 or something.

P15

1. Q But generally speaking every
two years?
2 A Two or three years, yeah.

3 Q Okay. Now, how much does a suit cost
you?
4 A I'm going to say about 225.
5 Q And how much does a tie cost?
6 A Ten bucks.
7 Q Do you get the ties from the same
place?
8 A Yep.
9 Q Are they ordered all at once or just
kind of --
10 A No.
11 Q Just periodically?
12 A No. We used to do that, but we don't
anymore,
13 no.
14 Q When did that cease to happen?
15 A Oh, probably 20 years ago.
16 Q Okay. With respect to female
employees, what
17 do they get?
18 A They get a little allowance.
19 Q Okay. And how is the allowance, how
is it
20 doled out?
21 A They get a check.
22 Q Annually?
23 A They get it annually.
24 Q Okay. How much -- how is it
determined how
25 much a female employee will get?

P16

1. A A female gets 150 bucks --
dollars, and a

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

1. Q Let's double check.
- 2 MR. KIRKPATRICK: Here it is.
- 3 THE WITNESS: Okay. So he signs
- 4 both names. Okay.
- 5 BY MR. PRICE:
- 6 Q Okay. So, was there any confusion on
your end
- 7 as to who was bringing this charge?
- 8 A Either Anthony or Aimee Stephens.
- 9 Q It would have been the same person,
though --
- 10 A Would be the same person.
- 11 Q -- the person you knew as Anthony
Stephens was
- 12 filing it, right?
- 13 A Yes.
- 14 Q There's no question as to that?
- 15 A That's true.
- 16 Q Now, did you -- okay, I apologize. Did
you see
- 17 it before it went out or not?
- 18 A Did I see?
- 19 Q The position statement?
- 20 A Yes.
- 21 Q Okay.
- 22 A Correct.
- 23 Q Did you recommend any changes to it,
that you
- 24 can remember?
- 25 I don't believe so.

1. Q Okay. Does it fairly reflect your

views as to
2 the case and the position of the company?
3 A Yes. Yes. Uh-huh.
4 Q Were you uncomfortable with the fact
that the
5 name Aimee Stephens was being
used in the
6 charge?
7 A I'm uncomfortable with the name
because he's a
8 man.
9 Q Okay. And you wanted to keep
referring to
10 Stephens as Anthony Stephens, correct?
11 A That's who the employee was.
12 Q I'm sorry, the employee?
13 A Yeah. He was the employee.
14 Q Okay. And we have already talked a
little bit
15 about the fact it doesn't talk about
religious
16 freedom or free exercises and it was that
-- it
17 was your belief that you didn't have to
raise
18 this at this point?
19 A Yes.
20 Q Okay. Have you ever disciplined
anyone for a
21 violation of the dress code?
22 A No. I wouldn't say discipline, no.
23 Q Okay. Have you ever counseled
somebody that
24 they're -- they weren't adhering to the

25 dress
code?

P24

1. A We have done that.
- 2 Q Okay. How recently?
- 3 A It hasn't been very recent.
- 4 Q Okay. What was the issue?
- 5 A Hard to say. It might be a
woman, possibly, on
- 6 her dress, or -- pretty hard for a man
since we
- 7 dress them.
- 8 Q Okay. What is the woman's dress code,
what do
- 9 they have to wear?
- 10 A Well, they wear a skirt and usually a
jacket.
- 11 Q Okay.
- 12 A A professional-looking suit.
- 13 Q Okay. What about pants, no pants?
- 14 A No pants.
- 15 Q Why is that?
- 16 A I guess I'm just old-fashioned and I
believe
- 17 this is a funeral home and there's a
certain
- 18 tradition that we want to keep there. We
- 19 want -- and I think the consumer out
there,
- 20 families believe that they -- a male
should
- 21 look like a particular individual, like a
man,

22 and a woman should look like a woman.
And
23 dress accordingly.
24 Q And you think so as well?
25 A And I think so as well.

P49

1. Q Okay. Thanks. Now, Mr. Price
asked you about
2 what would happen and the speculation
of
3 perhaps a customer may have seen
Stephens after
4 work, let's say, outside of the funeral
home
5 wearing a dress or presenting as a
woman and
6 they might be upset what you might do,
correct,
7 do you remember that?
8 A Yes.
9 Q I think you said you would be
uncomfortable,
10 right?
11 A I would be uncomfortable.
12 Q Would you fire him for that?
13 A Probably not, but I would ask him
some
14 questions.
15 Q Okay. How about if a customer maybe
saw
16 another employee outside of the funeral
home on
17 their own time carrying a -- several

18 pornographic videotapes, would that
make you
19 uncomfortable?
20 A Make me uncomfortable, but I wouldn't
fire
21 them.
22 Q Okay. Why do you have a dress code?
23 A Well, we have a dress code because it
allows us
24 to make sure that our staff is -- is dressed
in
25 a professional manner that's acceptable
to the

P50

1. families that we serve, and that is
understood
2 by the community at-large what these
3 individuals would look like.
4 Q Is that based on the specific profession
that
5 you're in?
6 A It is.
7 Q And again, tell us why it fits into the
8 specific profession that you're in that you
9 have a dress code?
10 A Well, it's just the funeral profession in
11 general, if you went to all funeral homes,
12 would have pretty much the same look.
Men
13 would be in a dark suit, white shirt and a
tie
14 and women would be appropriately
attired in a

15 professional manner.
16 Q And why do you provide suits to your
funeral
17 directors?
18 A Well, because we want them all
dressed exactly
19 the same. We want them to look the
same.
20 Q Is it to comply with the dress code?
21 A It is to comply with the dress code, yes.
22 MR. KIRKPATRICK: That's it, guys.
23 MR. PRICE: Okay.
24 RE-EXAMINATION
25 BY MR. PRICE:

P51

1. Q It's not just the funeral directors
that gets
2 suits, though, it's the funeral director
3 assistants, correct?
4 A That's what -- yes, the men's, yes.
5 Q Okay.
6 A Yeah, because they're -- to the
consumer they
7 think they're funeral directors, I mean,
any
8 male person.
9 Q Okay. Now, have you been to funeral
homes
10 where there have been women wearing
11 businesslike pants before?
12 A I believe I have.
13 Q Okay. So, the fact that you require
women to

14 wear skirts is something that you prefer,
it's
15 not necessarily an industry requirement?
16 A That's correct.
17 Q Okay. But women could look
businesslike and
18 appropriate in pants, correct?
19 A They could.
20 Q Okay. Now you were asked about what
if a
21 customer had seen Stephens in this
hypothetical
22 about, you know, Stephens only
presented as
23 female outside of work, if that person had
said
24 that they were not going to come back --
they
25 were not going to use the services of the

P52

1. Harris Funeral Homes what would
you have done?
2 A Don't know.
3 Q Okay. But that would have been a
factor to
4 consider in how you addressed Stephens'
5 situation in that case, correct?
6 A It probably would have been.
7 Q And it could have been reason to let
Stephens
8 go if --
9 A Perhaps, yes.
10 Q Okay. Now, you were asked about 3

and it's
11 true this was -- letter was drafted by Mr.
12 Kirkpatrick, but you hired him to
represent
13 you?
14 A That is true.
15 Q You hired him to represent Harris in
defense
16 against this charge?
17 A Yes.
18 Q Okay. And if you had any questions
about what
19 was in the letter, you certainly were
20 encouraged to ask questions; is that the
case?
21 A Yes.
22 Q Did you choose to ask any questions?
23 A Do not know.
24 Q You do not recall?
25 A I do not recall.

BY: DALE R. PRICE, JR. (P55578)
20 MILES E. SHULTZ (P73555)
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Job no. 285887-A

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P3

1. Plymouth, Michigan
2 January 22, 2016
3 9:29 a.m.
4 - - -
5 - DAVID CASH-
6 called as a witness, being first duly sworn,
was
7 examined and testified as follows:
8 EXAMINATION
9 BY MR. PRICE:
10 Q. Gooding morning, Mr. Cash.
11 A. Good morning.
12 Q. My name is Dale Price. We just
introduced
13 ourselves a minute ago. I'm an attorney
with the
14 Equal Opportunity Employment
Commission in
15 Detroit, and we're here today for your
16 deposition.
17 Have you ever given testimony before?
18 A. Never.
19 Q. Okay. What's going to happen is I'm

going to ask
20 you a series of questions about what you
do or do
21 not know about the circumstances
underlying this
22 lawsuit.
23 If you understand my answers -- excuse
24 me -- if you do not understand my
question,
25 please ask me and I'll try to rephrase. I'm
the

P31

1. ·with funerals at Livonia?
2 A. · · He would help in the parking lot
lining up cars.
3 He would help in the dismissal of the
funeral,
4 opening doors, generally whatever
needed to be
5 ·done as we do working a funeral.
6 ·Q. · · Can you think about anything else
specifically
7 besides helping out in the parking lot and
8 dismissals of the families and friends?
9 ·A. · · No.
10 ·Q. · · Now, you would come over to -- you
said you would
11 come over to Garden City. · You would be
helping
12 with funerals there?
13 ·A. · · Well, as a manager, all of us
managers cover for
14 each other on our days off. · So if the

manager at
15 Garden City was off I would come there
and make
16 funeral arrangements or direct a
funeral.
17 ·Q. · Do you recall how often you would
be covering at
18 ·Garden City while Stephens was
employed?
19 ·A. · Once or twice a week.
20 ·Q. · So you would have fairly regular
contact with
21 ·Stephens, then; is it safe to say?
22 ·A. · Yes.
23 ·Q. · What did you ever see -- obviously,
then you
24 would have a chance to see Stephens
work as an
25 embalmer and director, correct?

Line

P32

1. A. · Yes.
2 Q. · How would you describe Stephens'
performance in
3 that role that you observed?
4 ·A. · He was a very good embalmer. ·
He was very, very
5 thorough. · Had obviously had a
lot of practice
6 prior to coming to the Harris Funeral
Home.
7 ·Families seemed very pleased with his
work. · He
8 did a good job.

9 (A pause was had in the proceedings.)
10 ·BY MR. PRICE:
11 ·Q. · · All right. · Back on. · At some point
did you
12 ·become aware of Stephens
communicating to people
13 ·at R.G. & G.R. that she had intended
to present
14 · ·as female and not as a male?
15 ·A. · · I did hear rumors, yes.
16 ·Q. · · Okay. · Now, was this before
Stephens was fired?
17 ·A. · · Yes.
18 Q. · · Okay. · What did you hear?
19 ·A. · · I had heard that he was
beginning the process of
20 changing, whatever that includes,
hormones or
21 ·whatever.
22 ·Q. · · Whatever is involved in that
process?
23 ·A. · · Whatever is included.
24 ·Q. · · Sure.
25 ·A. · · Right.

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

Equal Employment
Opportunity Commission,

Plaintiff,

v.

Civil Action No.
2:14-cv-14-13710

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

Defendant.

Hon. Sean F. Cox

**DEFENDANT R.G. & G.R. HARRIS FUNERAL
HOMES, INC.'S STATEMENT OF MATERIALS
FACTS NOT IN DISPUTE**

Defendant R.G. & G.R. Harris Funeral Homes, Inc. (hereinafter "R.G.") asserts that the following material facts are not in dispute in this case and support its Motion for Summary Judgment.

R.G.'s History and General Operations

1. R.G. is a closely held for-profit corporation owned and operated by Thomas Rost (hereinafter "Rost"). (T. Rost 30(b)(6) Dep. 28:10-15 (Ex. 4)).

2. R.G. has been in business since 1910. (T. Rost 30(b)(6) Dep. 79:19-80:9 (Ex. 4)).

3. Tom Harris, Rost's uncle, was the previous president of R.G. (T. Rost 30(b)(6) Dep. 78:10-13 (Ex. 4)).

4. R.G. has three locations: Detroit, Livonia, and Garden City. (Kish Dep. 33:24-34:3 (Ex. 5)).

5. The company averages around thirty funerals a month. (T. Rost Dep. 43:3-16 (Ex. 3)).

6. Preferred Funeral Directors International gave R.G. the Parker award in 2011 for demonstrating exemplary service. (T. Rost Aff. ¶ 5 (Ex. 1)).

7. R.G.'s Livonia location was recognized as best hometown funeral home of the year in 2016 by Livonia residents in a survey by Friday Musings newspaper. (T. Rost Aff. ¶ 6 (Ex. 1)).

Rost's Experience and Role at R.G.

8. Rost owns 94.5% of R.G., and the remaining 5.5% is split between his two children. (T. Rost 30(b)(6) Dep. 26:20-28:25 (Ex. 4)).

9. Rost has been the owner of R.G. for over thirty years. (T. Rost 30(b)(6) Dep. 28:10-15 (Ex. 4); T. Rost Aff. ¶ 2 (Ex. 1)).

10. Rost has been the president of R.G. for thirty-five years and is the sole officer of the corporation. (T. Rost 30(b)(6) Dep. 78:2-9 (Ex. 4)).

11. Rost received a mortuary science degree from Wayne State in 1967, and a Bachelor of Science in Business from Wayne State in 1968. (T. Rost Dep. 7:9-23 (Ex. 3)).

12. Rost has served thousands of grieving families and arranged thousands of funerals during the time that he has operated R.G. (T. Rost Aff. ¶ 3 (Ex. 1)).

13. Rost served as the President of Preferred Funeral Directors International in 1992. (T. Rost Aff. ¶ 4 (Ex. 1)).

14. Rost or his location-managers handle the hiring for R.G. (T. Rost 30(b)(6) Dep. 53:19-20 (Ex. 4)). Rost personally oversees the hiring and discipline of funeral director embalmers. (Crawford Dep. 11:11-23 (Ex. 6)).

15. R.G. has never before been subject to a charge by the EEOC or Michigan Department of Civil Rights. (T. Rost 30(b)(6) Dep. 19:11-18 (Ex. 4)).

16. Rost has never previously been subject to allegations of discrimination in the workplace. (T. Rost Dep. 11:24-12:1 (Ex. 3)).

R.G.'s and Rost's Religious Beliefs

17. Rost has been a Christian for over sixty-five years. (T. Rost 30(b)(6) Dep. 30:13-22 (Ex. 4)). He attends both Highland Park Baptist Church and Oak Pointe Church. (T. Rost 30(b)(6) Dep. 29:20-30:3 (Ex. 4)).

18. For a time, Rost was on the deacon board at Highland Park Baptist Church. (T. Rost Dep. 10:2-11 (Ex. 3)).

19. Rost is on the board of the Detroit Salvation Army, a Christian nonprofit ministry, and has been for 15 years; he was the former Chair of the advisory board. (T. Rost Dep. 8:21-9:17 (Ex. 3)).

20. Rost's faith informs the way he operates his business, and he "practice[s] [his] faith through [his] businesses." (T. Rost 30(b)(6) Dep. 86:20-22, 87:3-24 (Ex. 4); T. Rost Aff. ¶¶ 7, 10 (Ex. 1)).

21. R.G.'s mission statement is published on its website (T. Rost 30(b)(6) Dep. 80:20-81:3 (Ex. 4)), which reads: "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)).

22. The R.G. website also contains a Scripture verse at the bottom of the mission statement page. (R.G. Webpage (Ex. 15)).

23. Rost ensures that all R.G.'s customers have access to spiritual guidance by placing throughout his funeral homes Christian devotional booklets called "Our Daily Bread" and small cards with Bible verses on them called "Jesus Cards," and by making a Bible available to visitors at all of his funeral homes. (T. Rost 30(b)(6) Dep. 39:23-40:17 (Ex. 4); 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)).

24. Rost leads prayer at R.G. business meetings and corporate events. (Kowalewski Dep. 60:13-61:18 (Ex. 9); M. Rost Dep. 27:6-15 (Ex. 10)).

25. Funerals are events of deep spiritual significance for many people. (T. Rost Aff. ¶¶ 10, 20, 26, 30 (Ex. 1); EEOC Deliberative After Action Memo at EEOC002785 (Ex. 23); EEOC T. Rost Aff. ¶ 11 (Ex. 16); T. Rost 30(b)(6) Dep. 32:3-13 (Ex. 4)).

26. Having worked at R.G. for over twenty-five years, Livonia location-manager David Cash believes it is a Christian business based on the mission statement, the Bible verse on the website, and his knowledge that Rost has been “affiliated with the church over the years.” (Cash Dep. 8:25-9:25, 46:5-18 (Ex. 8); Kish Dep. 35:14-15 (Ex. 5)).

27. Garden City location-manager David Kowalewski considers R.G. to be a Christian business. (Kowalewski Dep. 29:8-10 (Ex. 9); Kish Dep. 35:14-18 (Ex. 5)).

28. Rost sincerely believes that the Bible teaches 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, 44 (Ex. 1)).

29. Rost sincerely believes that he would be violating God’s commands if he were to pay for or otherwise permit one of R.G.’s funeral directors to wear the uniform for members of the opposite sex while at work. (T. Rost Aff. ¶¶ 43-46 (Ex. 1)).

R.G.’s Ministry to the Grieving

30. Rost operates R.G. as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives. (T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4); T. Rost Aff. ¶ 7 (Ex. 1)).

31. Rost sincerely believes that God has called him to serve grieving people. He sincerely believes that his purpose in life is to minister to the grieving, and his religious faith compels him to do that important work. (T. Rost Aff. ¶ 10 (Ex. 1); T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4)).

32. Rost describes R.G.'s ministry as one of healing—to help families on the “worst day of their lives” by “meet[ing] their emotional, relational and spiritual needs . . . in a religious way.” (T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4)).

33. R.G. 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. (T. Rost Aff. ¶ 8 (Ex. 1)).

34. Part of R.G.'s ministry is performing religious rites, customs, and rituals for families. (T. Rost 30(b)(6) Dep. 32:3-13 (Ex. 4)).

Charging Party Stephens's Employment at R.G.

35. Charging Party Stephens (hereinafter “Stephens”) started at R.G. on October 1, 2007 as an apprentice. (Stephens Dep. 50:8-17 (Ex. 14)).

36. After completing the apprenticeship, Stephens was hired as funeral director embalmer. (Stephens Dep. 50:18-51:4 (Ex. 14); Crawford Dep. 16:1-3 (Ex. 6)).

37. Funeral director embalmers' duties include body removal; embalming; dressing, cosmetizing, and casketing bodies; and conducting visitations and funerals. (Stephens Dep. 22:14-24:14

(Ex. 14); Kowalewski Dep. 69:20-70:11, 70:21-24 (Ex. 9); T. Rost Aff. ¶¶ 14-15, 24-31 (Ex. 1)).

38. Funeral director embalmers often meet and interact with grieving families. (Shaffer Dep. 48:23-49:14, 53:4-54:16 (Ex. 12); T. Rost Aff. ¶¶ 14-31 (Ex. 1); EEOC T. Rost Aff. ¶¶13-14 (Ex. 16); EEOC Kish Aff. ¶ 15 (Ex. 17)).

39. Funeral director embalmers are sometimes responsible for meeting with families to set up funeral arrangements (Cash Dep. 27:13-28:9 (Ex. 8); T. Rost Aff. ¶¶ 16-17, 24-25 (Ex. 1)), and for directing funeral ceremonies. (Cash Dep. 28:10-22 (Ex. 8); T. Rost Aff. ¶¶ 28-31 (Ex. 1)).

40. Funeral arrangements involve “meeting with the family, gathering information necessary for death certificates, newspaper notices, making arrangements for services, be it in the funeral home or the church of the family’s choice, arranging for visitations if that’s something the family has chosen.” (Crawford Dep. 14:8-18 (Ex. 6)).

41. Funeral directors are R.G.’s most prominent public representatives. (EEOC T. Rost Aff. ¶¶ 13-14, EEOC 002761 (Ex. 16); T. Rost Aff. ¶ 32 (Ex. 1); EEOC Kish Aff. ¶ 15 (Ex. 17)). They are the face that R.G. presents to the world. (T. Rost Aff. ¶ 32 (Ex. 1)).

42. “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." (Def.'s Resp. to Pl.'s First Set of Discovery at Interrogatory No. 6 (Ex. 27)).

43. R.G. requires that "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." (Def.'s Resp. to Pl.'s First Set of Discovery at Interrogatory No. 6 (Ex. 27)).

44. Stephens's duties at R.G. included "embalming, cosmetizing, casketing, [and] dressing" the bodies of the decedents, facilitating the family and public viewings, and taking the bodies from the families into R.G.'s custody. (Stephens Dep. 66:4-17 (Ex. 14); T. Rost Aff. ¶¶ 14-31 (Ex. 1)).

45. Stephens's duties included contact and interaction with the decedents' family members (Stephens Dep. 66:18-20 (Ex. 14); T. Rost Aff. ¶¶ 14-31 (Ex. 1)), and at times involved meeting with families to set up funeral arrangements and directing funeral ceremonies. (Cash Dep. 27:13-28:22 (Ex. 8); T. Rost Aff. ¶¶ 16-31 (Ex. 1)).

46. When hired at R.G., Stephens's immediate supervisor was David Cash. Rost would make rounds to the different locations every day, but was not at Stephens's location full time. (Stephens Dep. 56:14-57:6 (Ex. 14)).

47. David Cash was Stephens's supervisor only for six months before Stephens moved to the Garden City location where George Crawford was the manager. (Stephens Dep. 58:3-17 (Ex. 14)).

48. Within six months prior to Stephens's final day at R.G., Stephens had been reprimanded for job performance issues such as a bad attitude and insubordination. The situation had become so bad that Stephens's immediate supervisor asked Rost to fire Stephens. Rost talked with Stephens about the issue. (EEOC T. Rost Aff. ¶ 18, EEOC002762 (Ex. 16); EEOC Crawford Aff. ¶¶ 23, 25, EEOC002772-74 (Ex. 18)).

R.G.'s Dress Code

49. R.G.'s handbook outlines a general dress code for men requiring that they 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. & G.R. Harris Funeral Home Employee Manual, EEOC002717-19 (Ex. 19)).

50. R.G.'s handbook outlines a general dress code for women requiring "a suit or a plain conservative dress" in muted colors. (R.G. & G.R. Harris Funeral Home Employee Manual, EEOC002717-19 (Ex. 19)).

51. Apart from the handbook, R.G. employees understand that men who interact with the public are to wear suits and ties, and that women who interact with the public are to wear skirts and business jackets. (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)).

52. R.G. administers its dress code based on its employees' biological sex. (T. Rost Aff. ¶ 35 (Ex. 1)).

53. R.G.'s employees understand that the dress code for funeral directors is to wear company-provided suits. (Kish Dep. 17:8-22 (Ex. 5); Crawford Dep. 18:3-11 (Ex. 6)).

54. R.G.'s dress code is consistent with the standard for the industry. (T. Rost 30(b)(6) Dep. 57:20-58:6 (Ex. 4) (stating that R.G.'s "dress code conforms to what is acceptable attire in a professional manner for the services that [R.G.] provide[s]"); T. Rost Dep. 49:22-50:15 (Ex. 3) (stating that 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]")).

55. Maintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process. (T. Rost Aff. ¶ 34 (Ex. 1); T. Rost Dep. 49:22-50:21 (Ex. 3); T. Rost 30(b)(6) Dep. 59:13-60:5 (Ex. 4); Kish Dep. 63:19-64:7 (Ex. 5)).

56. R.G.'s dress code ensures that R.G. does not violate Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift or his religious belief that R.G. cannot pay for or otherwise permit one of its funeral directors to wear the uniform for members of the opposite sex while at work. (T. Rost Aff. ¶¶ 41-46 (Ex. 1); T. Rost 30(b)(6) Dep. 57:20-59:12, 69:12-24 (Ex. 4)).

57. Stephens has been involved in the funeral industry for nearly 30 years, and every place Stephens has worked has had a dress code. (Stephens Dep. 90:1-6 (Ex. 14)).

58. Stephens agrees that the industry standard is to dress professionally because of the grieving process. (Stephens Dep. 90:7-25, 91:22-92:9 (Ex. 14)).

59. Stephens agrees that R.G. is entitled under industry standards to require a sex-specific dress code for its employees. (Stephens Dep. 90:7-25, 91:22-92:9, 102:19-103:14, 118:19-25 (Ex. 14)).

60. Employees have been disciplined in the past for failing to abide by R.G.'s dress code. (Kish Dep. 54:1-16, 68:22-69:8 (Ex. 5); M. Rost Dep. 37:22-39:6 (Ex. 10)).

Stephens's Sex

61. Stephens's assigned sex at birth was male. Stephens's legal name was William Anthony Beasley Stephens from the time of birth throughout Stephens's employment at R.G. (Stephens Dep. 49:5-13, 79:22-80:10 (Ex. 14); Order and Petition for Name Change, EEOC002816-17 (Ex. 24)).

62. Stephens was married to a woman, Donna, while employed by R.G. (Stephens Dep. 41:14-21 (Ex. 14)).

63. All R.G.'s employment records regarding Stephens—including driver's license, insurance policy, tax records, unemployment insurance claim, and mortuary-science license—identify "Anthony Stephens" as a male. (T. Rost Dep. 21:1-25 (Ex. 3);

Def.'s Resp. to Charge at 5, EEOC002744-45 (Ex. 22); Kish Dep. 67:9-68:21 (Ex. 5)).

64. Stephens dressed in accordance with the male uniform for funeral directors during Stephens's employment at R.G. (Kowalewski Dep. 57:18-20, 68:11-13 (Ex. 9); Pl.'s First Supp. Resp. to Def.'s First Set of Discovery at Interrogatory No. 10 (Ex. 26)).

65. One of Stephens's supervisors George Crawford always understood Stephens to be a man, and Stephens never indicated to Crawford that Stephens was not a man. (Crawford Dep. 42:1-4 (Ex. 6)).

66. R.G. purchased men's suits for Stephens to wear, and Stephens wore them. (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) (stating that at "all times during Stephens's employment with [R.G.] Stephens . . . received professional male clothing" from R.G.)).

Stephens's Refusal to Comply with the Dress Code

67. On July 31, 2013, Stephens approached Rost in the Chapel at R.G.'s Garden City location and presented Rost with a letter (hereinafter "the letter") that stated Stephens's intent to transition from presenting as a man to presenting as a woman, including Stephens's intent (starting a few weeks later on August 26, 2013) to wear female attire at work. (T. Rost 30(b)(6) Dep. 110:3-111:15 (Ex. 4); Stephens Dep. 67:3-68:17 (Ex. 14); Stephens's Letter, EEOC000040-41 (Ex. 20)).

68. Before receiving the letter, Rost had no indication that Stephens wanted to dress as a woman. (T. Rost 30(b)(6) Dep. 109:10-19 (Ex. 4); Stephens Dep. 103:16-104:24, 107:20-25 (Ex. 14)).

69. After Stephens gave Rost the letter, Rost told Stephens that he would get back to Stephens about the letter before Stephens's planned vacation. (T. Rost 30(b)(6) Dep. 111:11-112:10 (Ex. 4)).

70. Rost understood from the letter and conversation that Stephens refused to comply with the dress code for male funeral directors. (T. Rost 30(b)(6) Dep. 136:14-23 (Ex. 4)).

71. After considering Stephens's proposal, Rost told Stephens approximately two weeks later, on August 15, 2013, that Stephens could not violate R.G.'s dress code for male funeral directors, and Rost offered Stephens a severance package. (T. Rost 30(b)(6) Dep. 126:1-25 (Ex. 4); Stephens Dep. 74:13-75:24, 76:2-10, 79:22-80:10 (Ex. 14); Charge of Discrimination, EEOC002748 (Ex. 21)).

72. Stephens did not offer to continue to comply with the dress code for male funeral directors, and Stephens planned to return to work in two weeks "wearing . . . female attire." (Stephens Dep. 81:9-16 (Ex. 14)).

73. Stephens rejected the severance package, expressed sorrow "that it wasn't going to work out," and indicated a tentative plan to contact an attorney. Rost replied, "[Y]ou do whatever you feel you have to do." Then the conversation ended, and Stephens left the facility. (T. Rost 30(b)(6) Dep. 127:5-12 (Ex. 4); Stephens Dep. 76:3-12 (Ex. 14)).

74. Stephens was at an attorney's office days later and subsequently filed the EEOC claim that resulted in this suit. (Stephens Dep. 79:12-21 (Ex. 14)).

**Reasons for R.G.'s Decision to Dismiss
Stephens**

75. The specific reasons that Rost dismissed Stephens were (1) that Stephens "refus[ed] to comply with [R.G.'s] male dress/grooming policy" and (2) that allowing Stephens to wear the uniform for female funeral directors would have "violated . . . [Rost's] sincerely held religious beliefs." (Def.'s Resp. to Pl.'s First Set of Discovery at Interrogatory No. 3 (Ex. 27); T. Rost 30(b)(6) Dep. 54:1-17, 55:1-14, 135:24-136:3 (Ex. 4)).

76. Stephens testified that the reason R.G. dismissed Stephens "was that me coming to work dressed as a woman was not going to be acceptable." (Stephens Dep. 80:11-19 (Ex. 14)).

77. Rost would not have dismissed Stephens if Stephens had expressed a belief in being a woman and an intent to dress or otherwise present as a woman outside of work. (T. Rost Aff. ¶ 50 (Ex. 1); T. Rost 30(b)(6) Dep. 137:11-15 (Ex. 4)). 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 the employment decision. (T. Rost Aff. ¶¶ 50-51 (Ex. 1)).

78. Based on Rost's lengthy professional experience in the funeral industry and his many years interacting with Stephens at work, Rost believed that if Stephens violated the dress code by

wearing a female uniform in the role of funeral director, it would have been distracting to R.G.'s clients mourning the loss of their loved ones, would have disrupted their grieving and healing process, and would have harmed R.G.'s clients and its business. (T. Rost Aff. ¶¶ 39-40 (Ex. 1); T. Rost 30(b)(6) Dep. 54:8-17, 59:13-60:9, 61:2-18, 139:5-23, 142:23-143:12 (Ex. 4); EEOC T. Rost Aff. ¶ 21, EEOC002763 (Ex. 16)).

79. Allowing Stephens to contravene the dress code by wearing a female uniform in the role of funeral director would have violated Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift and his religious belief that R.G. cannot pay for or otherwise permit one of its representatives to wear the uniform of the opposite sex while at work. (T. Rost Aff. ¶¶ 41-46 (Ex. 1); T. Rost 30(b)(6) Dep. 54:8-17, 55:1-14 (Ex. 4)).

80. Because R.G. provides suits for all its funeral directors, if Rost would have agreed that Stephens could continue to work at R.G. while dressing in the female uniform, Rost would have been paying for Stephens to wear the female uniform, which would have violated his faith. (T. Rost Aff. ¶¶ 46-47 (Ex. 1)).

81. If Rost were to be compelled as the owner of R.G. to violate his sincerely held religious beliefs by paying for or otherwise permitting one of his employees to dress inconsistently with his or her biological sex at work, he would feel significant pressure to sell the business and give up his life's calling of ministering to grieving people as a funeral home director and owner. (T. Rost Aff. ¶ 48 (Ex. 1)).

82. Rost was also concerned about requiring female customers, grieving family members, and employees to share restroom facilities with a biological male dressed as a woman. (T. Rost 30(b)(6) Dep. 73:17-74:20 (Ex. 4)).

83. Two of R.G.'s three funeral homes have only sex-specific restrooms. They do not have separate employee restrooms. Stephens worked at all three facilities. (T. Rost 30(b)(6) Dep. 76:25-77:14 (Ex. 4); McKie Dep. 13:21-14:22 (Ex. 13); Cash Dep. 30:11-31:5 (Ex. 8)).

R.G.'s Provision of Clothing for Funeral Directors

84. R.G. provides dress-code-conforming suits for all funeral directors, whether male or female (T. Rost Dep. 13:4-14, 47:23-48:11 (Ex. 3); Kish Dep. 64:12-24 (Ex. 5); Def.'s Resp. to Pl.'s Second Set of Discovery at Interrogatory No. 14 (Ex. 28); McKie Dep. 38:19-23 (Ex. 13)).

85. R.G. also provides ties for its male funeral directors. (T. Rost Dep. 13:15-24 (Ex. 3)).

86. R.G. initially provides full-time funeral directors with two suits and two ties and part-time funeral directors with one suit and one tie. These are replaced by R.G. as they wear out, which generally occurs every one to four years for full-time funeral directors (T. Rost Dep. 14:9-15:2, 18:10-19:8 (Ex. 3); Crawford Dep. 19:1-3 (Ex. 6); Kowalewski Dep. 22:21-23:1 (Ex. 9)), and much less frequently (approximately once every five to ten years) for part-time funeral directors. (T. Rost Dep. 18:10-24 (Ex. 3)).

87. R.G. has not employed a female funeral director since 1950. (T. Rost Aff. ¶ 52 (Ex. 1); Def.'s Resp. to Pl.'s First Set of Discovery at Request for Admission No. 5 (Ex. 27); EEOC Kish Aff. ¶ 19, EEOC002768 (Ex. 17); Stephens Dep. 102:4-14) (Ex. 14)).

88. Throughout all Rost's years owning and operating R.G., he has never had a qualified female apply for an open funeral director position. (T. Rost Aff. ¶ 53 (Ex. 1)). During that time, he has had only one female applicant apply for an open funeral director position, but she was not qualified. (T. Rost Aff. ¶ 53 (Ex. 1)).

89. If R.G. one day has the opportunity to hire female funeral directors, R.G. will provide them with skirt suits in the same manner that it provides pant suits to male funeral directors. (T. Rost Aff. ¶ 54 (Ex. 1)).

R.G.'s Clothing Allowance for Other Employees

90. R.G. gives an annual clothing allowance to female employees who interact with the public in positions other than funeral director. The allowance is \$150 per year for full-time employees and \$75 per year 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)).

91. 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.'s dress code for those positions. (Kish Aff. ¶ 5 (Ex. 2)).

92. An outfit that one of these female employees purchases with the clothing allowance typically lasts at least one year. (Kish Aff. ¶ 6 (Ex. 2)).

93. R.G. provides a suit similar to the funeral director suit for male employees who interact with the public in positions other than funeral director. (T. Rost Aff. ¶ 56 (Ex. 1)).

94. 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. when it is no longer serviceable. (T. Rost Aff. ¶ 57 (Ex. 1)).

95. R.G. does not provide a clothing allowance or suit to employees who are not expected to have client contact such as maintenance personnel (whether male or female). (Kish Dep. 56:14-58:4, 65:17-66:18 (Ex. 5)).

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Respectfully submitted,

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