UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

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

Defendant.
_____/

Civil Action No. 14-13710
Honorable Sean F. Cox
Magistrate Judge David R. Grand

ORDER GRANTING IN PART AND DENYING IN PART EEOC'S MOTION FOR PROTECTIVE ORDER [23]

Before the Court is the Equal Employment Opportunity Commission's ("EEOC") motion for a protective order. [23]. Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("R.G.") filed a response [25] and the EEOC filed a reply [28]. The motion was referred to the Court pursuant to 28 U.S.C. § 636(b)(1)(A). [24]. The Court conducted a hearing with respect to the motion on August 28, 2015.

I. BACKGROUND[1]

In this action, the EEOC has filed suit against R.G. claiming it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, after it allegedly terminated the employment of a transgender employee, Aimee Stephens ("Stephens"), on the basis of her sex.[2] [21]. The EEOC further maintains that R.G. unlawfully discriminates against female employees by failing

[1] Except where otherwise indicated, the Court will cite to the EEOC's amended complaint.

[2] Stephens claims to be a "transgender woman" who, during the relevant period, was transitioning from her originally assigned gender as a man to becoming a woman. [21 at ¶ 10].

to provide them with the same work clothing allowance that it provides to male employees. [*Id.* at 1].

R.G. employed Stephens as a funeral director/embalmer since October 2007. [*Id.* at ¶ 8]. The EEOC asserts that Stephens adequately performed her duties throughout her employment. [*Id.* at ¶ 9]. On or about July 31, 2013, Stephens composed a letter to her co-workers informing them that "she was undergoing a gender transition from male to female and intended to dress in appropriate business attire to work as a woman . . ." [*Id.* at ¶ 10, *see* 30]. According to the EEOC, about two weeks later, R.G. terminated Stephens, telling her that her intention of dressing as a woman was "unacceptable." [*Id.* at ¶ 11]. EEOC alleges that R.G.'s "decision to fire Stephens was motivated by sex-based considerations. Specifically, [R.G.] fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [R.G.'s] sex- or gender-based preferences, expectations, or stereotypes." [*Id.* at ¶ 15].

EEOC had included an identical allegation in its initial complaint, *cf.* 1 at ¶ 15 with 21 at ¶ 15, and R.G. had moved to dismiss the EEOC's original Title VII claim on the grounds that "gender identity disorder is not a protected class under Title VII." [7 at 9]. In an April 23, 2015 amended opinion and order [13], United States District Judge Sean F. Cox denied R.G.'s motion. However, far from permitting the EEOC's tripartite Title VII claim to go forward wholesale, Judge Cox wrote, "If the EEOC's complaint had alleged that [R.G.] fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with [R.G.] that the EEOC's complaint would fail to state a claim under Title VII." [13 at 7]. In other words, Judge Cox rejected the EEOC's claim that R.G. violated Title VII by firing Stephens "because she is transgender" and/or "because of Stephens's transition from male to female." The Title VII claim

survived, though – and R.G.'s motion to dismiss that claim was denied – because "…the EEOC's complaint does not allege that [R.G.] fired Stephens based solely upon Stephens's status as a transgender person. The EEOC's complaint also asserts that [R.G.] fired Stephens 'because Stephens did not conform to [its] sex- or gender-based preferences, expectations, or stereotypes.'" [*Id.* at 8 (citing 1 at ¶ 15)]. As noted above, notwithstanding the clear import of this ruling, when the EEOC filed its amended complaint, it again alleged that R.G. violated Title VII by firing Stephens: (1) "because she is transgender;" (2) "because of Stephens's transition from male to female;" and (3) "because Stephens did not conform to [R.G.'s] sex- or gender-based preferences, expectations, or stereotypes." [21 at ¶ 15].

The EEOC's inclusion of these three distinct allegations in its amended complaint[3] led R.G. to serve discovery requests addressed to the following topics: (1) the prior and current status of Stephens's sexual anatomy (including copies of her birth certificate); (2) the progress of Stephens's gender transition (including any conversations with defendant's employees, non-conforming gender behavior in the workplace, and medical and psychological records); and (3) Stephens's familial background and relationships. [*Id.*]. The EEOC now moves for a protective order to preclude discovery into these general areas on the grounds that: (1) to the extent R.G. seeks to ascertain whether Stephens is actually transgender, its discovery requests are not relevant because the touchstone of its gender-stereotyping claim (the "transgender" and "transitioning" claims having been rejected) is R.G.'s subjective perception of her gender identity; (2) the requested information is comparable to examining the psychological and sexual

[3] At oral argument on the instant motion (and in its reply brief), the EEOC conceded that, in light of Judge Cox's ruling, these portions of its alleged Title VII claim are not "live." Rather, EEOC admits that they were included only to preserve appellate rights. [28 at 2 (EEOC conceding that the Court "rejected" the transgender and transitioning claims "as stand-alone legal theories" and that its only "remaining theory of sex discrimination is sex stereotyping.")].

history of an accuser in a sexual harassment litigation, which numerous courts have found to be irrelevant; (3) even if the requested information is tangentially relevant, the humiliating nature of the discovery outweighs its relevance; and (4) the Court would discourage other individuals from reporting similar instances of discrimination if it allowed the requested discovery. [23 at 3-4; 28 at 5]. As discussed below, the Court agrees with the EEOC's position with respect to most, but not all, of the specific discovery requests. Accordingly, it will grant in part and deny in part the EEOC's instant motion.

II. ANALYSIS

Fed. R. Civ. P. 26(c) governs the issuance of protective orders and provides that, "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . [t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Under Sixth Circuit precedent, the moving party has the burden of demonstrating good cause for the issuance of a protective order by adducing "specific facts showing 'clearly defined and serious injury' resulting from the discovery sought." *Nix v. Sword*, 11 F. App'x 498, 500 (6th Cir. 2001) (quoting *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987)). Such injuries must take the form of "one of Rule 26(c)(1)'s enumerated harms." *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012). Ultimately, "the decision to issue a protective order is left to 'the broad discretion of the district court in managing the case.'" *Conti v. Am. Axle & Mfg.*, 326 F. App'x 900, 903-04 (6th Cir. 2009) (quoting *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989)).

On the other hand, Fed. R. Civ. P. 26(b)(1) provides that, unless limited by court order, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's

claim or defense . . . [r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Pursuant to FRE 401, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Courts "must attempt to strike the proper balance between the competing concerns and interests reflected in these rules." *Flagg v. City of Detroit*, 268 F.R.D. 279, 302 (E.D. Mich. 2010); *see also State Farm Mut. Auto. Ins. Co. v. Hawkins*, No. 08-10367, 2010 U.S. Dist. LEXIS 59531, at *3 (E.D. Mich. Jun. 26, 2010) (stating that Rule 26(c)(1) "requires the district court to balance the interests at issue, and to compare the hardship on both parties if the motion is either granted or denied."). Whether the relevance of the requested information overrides its oppressiveness depends upon the substance of the claims at issue.

The Court first addresses the discovery requests as they relate to the EEOC's "transgender" and "transitioning" claims. Both in its briefs and at the hearing, R.G. made clear that many of the disputed discovery requests sought information bearing directly on the veracity of the factual components of those two particular claims. For instance, R.G. asked for information about Stephens's genitalia, both presently and at birth. R.G. reasoned that since EEOC's amended complaint still (even after Judge Cox's ruling) alleges that R.G. terminated Stephens *because* she "is transgender" and *because* she "is transitioning from male to female," it "[had] to defend against them," *i.e.*, obtain information regarding whether she is, in fact, transgender and/or transitioning. While such requests may have been proper if Stephens's "transgender" and "transitioning" claims remained live, in light of Judge Cox's ruling and the EEOC's concession that her salient claim is limited to "gender stereotyping," the Court need only decide the requests' relevance vis-à-vis that particular claim.

With respect to gender-stereotyping claims, the Sixth Circuit has held that transgender individuals may bring Title VII sex discrimination claims if they are terminated from employment because they do not conform to their perceived sex or gender. *See generally Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). This line of cases adheres to the United States Supreme Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) that gender-stereotyping is a form of sex discrimination under Title VII.

The critical language governing the instant discovery dispute can be found in *Smith*. In that case, the Sixth Circuit held that, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." *Smith*, 378 F.3d at 575. Consequently, for purposes of discovery, the EEOC correctly asserts that it is irrelevant whether the alleged gender-stereotyping resulted from the fact that Stephens is *actually* transgender. What is material, however, is whether R.G. terminated Stephens because she *exhibited* characteristics or behaviors that her supervisors *perceived* to be inconsistent with her original male gender. *See Myers v. Cuyahoga Cnty, Ohio*, 182 F. App'x 510, 519 (6th Cir. 2006) (stating that "Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their *perceived* sex or gender.") (emphasis added).

To this end, R.G.'s discovery requests concerning Stephens's sexual anatomy, her familial background and relationships, and any medical or psychological records related to the progress of her gender transition, are all irrelevant because they do not demonstrate how R.G.'s supervisors actually perceived Stephens before the company terminated her. During oral

argument, R.G.'s counsel candidly admitted that he could not articulate the relevance of most of the requested information – *i.e.*, how it would bear, one way or another, on any fact at issue in the gender stereotyping claim. Rather, he argued that R.G. should be permitted to obtain as much information as possible because this is a case of first impression, and R.G. was uncertain as to the potential twists and turns its litigation strategy might take. While the Court appreciates counsel's candor on this point, the novelty of EEOC's legal theory alone does not warrant probing into Stephens's medical, psychological and familial history without some proffer as to the relevance of such information.

The Court also rejects R.G.'s argument that establishing Stephens's actual gender during the time of her employment is relevant because R.G. could not have unlawfully terminated Stephens for acting like a woman if she was, in fact, a woman. This argument misconstrues the very nature of the EEOC's gender-stereotyping claim and the case law discussed above. Again, the relevant inquiry underlying this theory of liability is a subjective one – whether R.G.'s supervisors perceived Stephens as a man who was acting like a woman – rather than an objective one – whether Stephens was ever actually a woman.

In view of the forgoing, the Court will grant the EEOC's motion for protective order insofar as R.G. seeks information regarding Stephens's sexual anatomy, her familial background and relationships, and any medical or psychological records related to the progress of her gender transition. Such information is of the most intimate and private nature, and it would be harassing and oppressive to require its disclosure, at least at this juncture, where the requesting party has failed to show its relevance to the disposition of the gender-stereotyping claim.[4]

[4] Neither party argues that this information is relevant to the EEOC's claim that R.G. discriminated against its female employees by not affording them a clothing allowance.

A protective order as to *all* of the discovery requests at issue would go too far, however. Although R.G.'s counsel seemed to suggest at oral argument that the information contained in Stephens's letter was a complete surprise to the company, and that no new facts about those matters came to light between the letter's issuance and Stephens's return to work (and termination) about two weeks later, it is possible that Stephens possesses contrary information which would be relevant to the gender stereotyping claim. For instance, the Court cannot discount the possibility that prior to Stephens's letter, R.G.'s employees either perceived alterations in Stephens's physical appearance, or learned of her intention to transition from male to female, which may have then contributed to R.G.'s decision to terminate her employment. In light of this prospect, the Court will deny the EEOC's motion for protective order with respect to the following two interrogatories, which bear directly on those matters:

> Interrogatory No. 9: Prior to August 2013, state whether Stephens informed any employee of the Defendant of any intention of altering Stephens's physical appearance and 'presenting' as a woman as expressed in the August 2013 letter? (attached hereto). If so, identify the employee(s), the manner of the communication, the date of the communication, the substance of the communication, and any other information relating directly or indirectly to this Interrogatory.
>
> Interrogatory No. 10: Prior to August 2013, state whether Stephens ever 'presented' as a woman at defendant's place of business while employed by defendant? If, yes, identify the date(s) when Stephens did so, any witnesses to the presentation, describe any alleged reaction, adverse or otherwise from Defendant, and any other information relating directly or indirectly to this Interrogatory.

Notably, these two interrogatories are also distinguishable from the prohibited discovery requests because they seek information that Stephens presented publicly or to third parties, *i.e.*, Stephens's physical appearance at work and her communications with other R.G. employees, as opposed to private facts of an intimate nature.

Accordingly,

IT IS ORDERED that EEOC's motion for protective order **[23]** is **GRANTED IN PART** and **DENIED IN PART;** EEOC shall respond to R.G.'s ninth and tenth interrogatories within 21 days of the date of this Order, but it shall not be required to respond to R.G.'s other discovery requests at issue in its motion.

Dated: September 24, 2015
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

The parties' attention is drawn to Fed. R. Civ. P. 72(a), which provides a period of fourteen (14) days from the date of receipt of a copy of this order within which to file objections for consideration by the district judge under 28 U.S.C. §636(b)(1).

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on September 24, 2015.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager