

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

AMBER CREED,)	
a/k/a/ CHRISTOPHER CREED)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:06-cv-0465-RM
)	
FAMILY EXPRESS CORPORATION)	
)	
Defendant.)	

**PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Amber Creed (Plaintiff) filed suit against her former employer Family Express Corporation (Defendant or Family Express) for violating the provision of Title VII of the Civil Rights Act of 1964 (Title VII) that prohibits discrimination “because of ... sex.” This action does not challenge the right of employers to maintain fair and reasonable appearance codes that relate to employees’ sex. Rather, Plaintiff argues that Defendant’s insistence that she violated its appearance code for males by not appearing “conservative” enough was a pretext for discrimination based on her femininity. Plaintiff has an intrinsic female gender identity that she has been aware of since childhood, and in adulthood has moved with increasing confidence towards a feminine gender expression. Defendant terminated Plaintiff for her failure to revert to a masculine gender expression Defendant’s Motion for Summary Judgment must be denied because there is record evidence from which a reasonable jury could conclude that Plaintiff was terminated for failing to conform to Defendant’s stereotypical expectations of how males should appear, which constitutes sex discrimination in violation of Title VII.

II. STATEMENT OF FACTS

Plaintiff's Gender Identity Disorder

Throughout her entire life, Plaintiff has been moving towards fully expressing her intrinsic female gender identity, which she has been aware of since early childhood. (See Declaration of Amber Creed attached as Exhibit 1, ¶ 8).¹ Plaintiff became aware that her core gender identity was female around the age of six (6). (Id.) Plaintiff realized that the gender assigned at her birth (male) does not correspond with her gender identity, which is female. (Id.) In February 2005, Plaintiff was hired by Defendant as a Sales Associate for its Kingsford Heights store. (Dec. Creed ¶ 4, Ex. A). Plaintiff started her gender transition prior to being hired by Defendant and the transition continued after she was hired by Defendant. (Dec. Creed ¶ 8).

After Defendant hired Plaintiff, she continued the ongoing process of coming to terms with her gender identity. (Dec. Creed ¶ 10). Plaintiff began to research transgender issues, and made friends with other members of the transgender community. (Dec. Creed ¶¶'s 10-11). Plaintiff learned that under the World Professional Association for Transgender Health's Standards of Care for Gender Identity Disorder (GID),² in order to begin hormone therapy she needed to go through counseling with a qualified counselor to evaluate whether she had GID. (Id.) Plaintiff also learned that GID is a serious health condition recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. (Dec. Creed ¶ 12, Ex. C). Plaintiff learned that GID is characterized by a strong and persistent cross-gender identification, persistent discomfort with one's sex, and clinically significant distress or impairment in social, occupational, or other important areas of functioning. (Id.)

¹ Subsequent references to Plaintiff's Declaration and all other Declarations will be designated by the Declarant's last name with reference to the paragraph and/or Exhibits as follows: Dec. Creed ¶ ___ Ex. ___. All Declarations and Exhibits are included in Plaintiff's Summary Judgment Appendix.

Plaintiff learned that the Standards of Care for the treatment of GID include a therapeutic protocol called the Real-Life Experience, which involves living full-time as a member of the sex that the person identifies with. (Dec. Creed ¶ 13). The Real-Life Experience is described in this way: “After the diagnosis of GID is made the therapeutic approach usually includes three elements or phases: a real-life experience in the desired role, hormones of the desired gender, and surgery to change the genitalia and other characteristics...The act of fully adopting a new or evolving gender role or gender presentation in everyday life is known as the real-life experience.” (Id.) Plaintiff learned that the real-life experience is essential to the transition to the gender role that is congruent with the patient’s gender identity. (Id.) Plaintiff also learned that “since changing one’s gender presentation has immediate profound personal and social consequences, the decision to do so should be preceded by an awareness of what the familial, vocational, interpersonal, educational, economic, and legal consequences are likely to be.” (Id.)

Starting on April 26, 2005, Plaintiff sought counseling with Porter-Starke Services, Inc., relating to her gender transition. (Dec. Creed ¶ 14, Ex. D). Plaintiff went to her initial intake appointment presenting as a female and asked to be called Amber. (Id.) Thereafter, Plaintiff was diagnosed with Gender Identity Disorder. (Id.) Plaintiff went to counseling approximately three (3) times, but stopped going because she could not afford the cost. (Id.) By the time Plaintiff went to counseling at Porter-Starke in April 2005, she was seeking assistance in living as a female on a full-time basis. (Dec. Creed ¶ 15). Plaintiff has been living and working as a female full-time for the past four (4) years. (Dec. Creed ¶ 41).

² The Standards of Care published by the World Professional Association for Transgender Health, formerly known as the Harry Benjamin International Gender Dysphoria Association, are sometimes referred to as the Harry Benjamin Standards of Care. (Dec. Creed ¶ 11, Ex. B).

Plaintiff's Store Manager and Co-Workers' Knowledge of Plaintiff's GID

Dan Arthur (Arthur), Plaintiff's store manager, knew that she identified as female and that she was struggling with her gender identity. (Dec. Creed ¶ 5). Plaintiff spoke to Arthur on several occasions about her gender transition. (Id.) A couple of months after working for Defendant, Plaintiff spoke with Arthur about fully transitioning. (Dec. Creed ¶ 9). For instance, Plaintiff talked with Arthur about getting a name badge that said "Amber." (Id.) Arthur was supportive and urged Plaintiff to continue her employment with Defendant as a female. (Id.)

Plaintiff's co-worker and sales associate, Janice Dankert (Dankert), knew that Plaintiff identified as female prior to getting hired by Defendant. (Dec. Creed ¶ 6). On one occasion before Plaintiff was hired she went to the store with a local acquaintance while Dankert was on duty. (Id.) Dankert noticed a change in Plaintiff's voice and asked her about it. Plaintiff disclosed to Dankert that she identified as female and showed Dankert pictures taken of her as a female. (Id.) Over the course of several weeks, whenever Plaintiff visited the store and Dankert was working, they discussed Plaintiff's transition. (Id.) Justin Mosely (Mosely), a part-time stocker, also knew that Plaintiff identified as female and was going through a gender transition. (Dec. Creed ¶ 7). Plaintiff spoke with Mosely on several occasions about her gender transition. (Id.)

Over the course of Plaintiff's employment, her appearance gradually became more feminine, in accordance with her female gender identity. (Dec. Creed ¶ 16). Plaintiff wore clear nail polish, plucked and trimmed her eyebrows, and wore black mascara. (Id.) Plaintiff wore foundation to even out her complexion. (Id.) Plaintiff started growing her hair out. (Id.) She understood that in order to proceed with her transition she had to live full-time as a female, including at work. (Id.) During this time Plaintiff also increasingly used the name "Amber." (Id.)

Plaintiff's Performance While Employed By Defendant

Dan Arthur, Plaintiff's Store Manager, was responsible for evaluating Plaintiff's performance during her employment. (See Excerpts from Deposition of Michael Alan Berrier attached as Exhibit 2, pg. 28).³ During her employment Plaintiff performed her duties in a satisfactory manner. (Dep. Berrier 63). From the beginning of Plaintiff's employment with Defendant she received positive feedback about her job performance. (Dec. Creed ¶ 18, Ex. E). For instance, in March 2005, Plaintiff received a passing mark in each category identified by Defendant in the "Family Express Culture Audit." (Id.).

In May 2005 Plaintiff received her first "Family Express Professional Development Review." (Dec. Creed ¶ 19, Ex. F). Plaintiff received an overall rating of 3.42 out of 4.00, which is a "Very Good." Some of the comments that Plaintiff received on her May 2005 review include "very neat in appearance" and "great attendance." (Id.). Plaintiff also received a .15¢ raise. (Id.). In August 2005, Plaintiff received her second "Family Express Professional Development Review." (Dec. Creed ¶ 20, Ex. G). Plaintiff received an overall rating of 2.50 out of 4.00, which is an "Effective." (Id.). Plaintiff also received a .10¢ raise. (Id.).

During her employment with Defendant, Plaintiff also received several positive customer comment cards and earned the "Greeter of Month" award three (3) times. (Dec. Creed ¶ 21).⁴

³ Subsequent references to deposition testimony will be designated by the last name of the deponent with reference to the page and/or deposition exhibit number as follows: Dep. Berrier ____, Dep. Ex. ____. All deposition excerpts and deposition exhibits are included in Plaintiff's Summary Judgment Appendix.

⁴ Mike Berrier, the Director of Operations, testified that each Family Express store is equipped with a computer and a store email account. (Dep. Berrier 55). The store manager determines which employee gets awarded with the "greeter of the month" and then emails the field consultant. (Dep. Berrier 54-55). During discovery in this matter, Plaintiff requested "Copies of any and all documents regarding Plaintiff being awarded "Greeter of the Month" during her employment with Defendant." Defendant was not able to locate any responsive documents. (See Defendant's Answers to Plaintiff's First Set of Requests for Production attached as Exhibit 3, Request No. 9 pg. 4).

The Dress and Grooming Policy & Alleged Discussions with Plaintiff

On December 2, 2005 (two weeks before Plaintiff's termination), Plaintiff received a copy of the Family Express employee handbook. (Dec. Creed ¶ 27, Ex. H). Page 12 of the handbook sets forth the "Conduct Policy." The Conduct Policy provides, in part:

Family Express Retail Employees: ...

C. Are required to wear an approved Family Express uniform with name tag. His/her general appearance must be clean, neat, socially acceptable and maintain our Company image. (See Dress & Grooming Code Policy)...

(Id.) The Dress & Grooming Code Policy referenced in the handbook is kept in the operations manual and provides, in part:

Female Employees

Hair style shall be neat and conservative. Makeup and jewelry, if worn, shall be conservative and business-like. No body piercing jewelry, except for earrings, is allowed.

Male Employees

Hair style must be neat and conservative, and hair length should not extend beyond the bottom of the collar. Sideburns should be neat and well-trimmed. Neatly trimmed beards and mustaches will be permitted. Male employees are not permitted to wear earrings or other jewelry that accompanies body piercing.

(Dep. Berrier 56, 58, Dep. Ex. 2). The operations manual is a detailed policy and procedure manual maintained by the company. (Dep. Berrier 58). Sales associates do not get a copy of the operations manual or a copy of the Dress & Grooming Code Policy that is in the manual. (Dep. Berrier 58-59, Dep. Ex. 2). Employees going through company training do not receive a copy of the Dress & Grooming Code used by the trainer. (Dep. Berrier 61-62, Dep. Ex. 3). Throughout Plaintiff's employment with Defendant, she wore the company uniform, which was always neat and clean. (Dec. Creed ¶ 25). Plaintiff's shirt was always pressed and tucked in and she wore a belt. (Id.) Plaintiff always carried her feather duster and wore her nametag. (Id.)

During Plaintiff's employment, Arthur, the Store Manager, never told Plaintiff to change her appearance and dress more conservatively. (Dec. Creed ¶ 22). Plaintiff never told Arthur that she was not bound by the dress and grooming policy. (Id.). In addition, Arthur never told Plaintiff that she was in violation of the dress and grooming policy. (Id.). Throughout her employment, Arthur and Plaintiff never discussed Defendant's dress and grooming policy. (Id.). Arthur never expressed any concern to Plaintiff that she would be terminated because of her appearance. (Id.). During her employment, Plaintiff did not have any conversations with Mosely about Defendant's dress and grooming policy and Plaintiff never told Mosely that she was not bound by Defendant's dress and grooming policy. (Dec. Creed ¶ 23).

Alleged Customer Complaints Received by Defendant

Plaintiff never received any complaints from customers about her feminine appearance, nor did her co-workers (including Arthur, sales associate Bobbi Jo Krause, and Mosely) ever tell her that they had received complaints about her appearance. (Dec. Creed ¶¶ 22-24, 26).

Many customers were extremely supportive of Plaintiff's transition and pleased with her performance. (Dec. Creed ¶¶'s 17, 26). Some customers perceived Plaintiff as a female, consistent with her identity because they referred to Plaintiff as "ma'am." (Dec. Creed ¶ 17). Many customers told Plaintiff that they only felt comfortable when she was working, which was almost every night. (Dec. Creed ¶ 26). Many customers told Plaintiff that they filled out positive comment cards and submitted the comment cards to Defendant recommending that Plaintiff receive a promotion. (Id.). Many police officers made special visits to the store late at night to make sure that Plaintiff was safe and treated her with respect regardless of her appearance. (Id.). One of the store's most regular customers even started a business with Plaintiff repairing computers, and customers often called Plaintiff to repair their computers. (Id.).

Events Leading to Plaintiff's Termination

Around December 13, 2005, LeAnn McKinney (McKinney), a field consultant employed by Defendant, went to Plaintiff's store while she was working. (Dec. Creed ¶ 28). McKinney noticed Plaintiff's feminine appearance and hairstyle and told Plaintiff that her hairstyle looked good. (*Id.*). Later that day Plaintiff's Store Manager, Dan Arthur, told Plaintiff that she had been summoned to meet with Mike Berrier (Berrier), the Director of Operations, on December 15, 2005 at 9:00 a.m. at the corporate offices in Valparaiso, Indiana. (Dec. Creed ¶ 29). Plaintiff asked Arthur if he knew what the meeting was about and Arthur⁵ told Plaintiff that the meeting was a standard meeting that everyone in the store had to attend. (*Id.*).

Berrier testified that he received a customer complaint from a female customer on December 13, 2005 about Plaintiff. (Dep. Berrier 30-31). Berrier testified that the customer said she visited the Kingsbury store frequently and thought Plaintiff is a wonderful employee, but felt uncomfortable with Plaintiff's appearance. (Dep. Berrier 31). He further testified that, when he asked the customer what she meant, she stated that Plaintiff was wearing make up, wearing nail polish and had changed hairstyles. (Dep. Berrier 31).

Berrier testified that he did not directly receive any other calls or complaints from customers about Plaintiff's appearance, but that he was aware of other customer complaints. (Dep. Berrier 32). Berrier testified that a customer complaint regarding Plaintiff came in through the company website and Cynthia Carlson (Carlson), the Director of Human Resources, showed Berrier the website complaint. (Dep. Berrier 33).⁶ He testified that this occurred on either December 12 or December 13. (Dep. Berrier 34). Berrier testified that the website complaint

⁵ Sometime after Plaintiff's termination, Arthur was terminated for falsifying his timesheets. (Dep. Berrier 44-45).

⁶ During discovery in this matter Defendant could not produce a copy of the customer complaint received through the website prior to Plaintiff's termination. However, Defendant did produce a comment received about Plaintiff following her termination. (Dep. Berrier 70, Dep. Ex. 9).

mentioned that the employee at the store was dressing in a way that was a “male person, but female in appearance” and specifically mentioned the hairstyle. (Dep. Berrier 33-34).

Berrier testified that on December 14, 2005, he received an email from Carlson regarding a call she received from Arthur. (Dep. Berrier 67-68, Dep. Ex. 7). The December 14, 2005, email provided that Arthur called Carlson “regarding customer comments about [Plaintiff’s] hair and occasional use of makeup.” (*Id.*). Berrier testified that he did not speak to Carlson about Arthur contacting her, but he did speak with her after lunch that day. (Dep. Berrier 67-68).

Berrier testified that no employees who worked at the store ever complained to him about Plaintiff’s appearance. (Dep. Berrier 48). Berrier never spoke with Krause, Mosely or Dukart about Plaintiff. (Dep. Berrier 50-52).⁷

Plaintiff’s Termination

On December 14, 2005, Plaintiff met with Berrier and Carlson. (Dec. Creed ¶ 30). Plaintiff arrived to the meeting wearing her Family Express uniform because she was scheduled to work later in the afternoon until 11:00 p.m. (*Id.*).

Berrier testified to his clear memories of Plaintiff’s gender expression both before and at the termination meeting. (Dep. Berrier 27-30, 40, 52-53, 59-61, 78-79). He remembers having seen Plaintiff during employee training and a store visit, and recalled that she had a “male appearance.” (Dep. Berrier 27-30). On the other hand, at the termination meeting, Berrier thought that Plaintiff’s femininity had increased to the point that she did not look like the same person he had previously seen. (Dep. Berrier 40). Berrier testified that Plaintiff “looked like a girl that was doing something with her hair, not curly, very styled, makeup, meaning mascara, and guess you’d call it base or something on your face.” (Dep. Berrier 40). Berrier testified that

⁷ During discovery in this matter, Plaintiff requested “Copies of any and all documents regarding customer complaints received by Defendant regarding Plaintiff.” (Ex. 3, Request No. 16, pg. 5). Defendant produced no documents regarding customer complaints about Plaintiff’s performance.

when he saw Plaintiff at the meeting she looked more female to him because of the make-up, nail polish and hairstyle. (Dep. Berrier 52).

Berrier stated that when he thinks about what a female looks like or what a male looks like he thinks about hairstyle, body, physique, and voice. (Dep. Berrier 53). In Berrier's mind, the kind of characteristics a female has "are a different hairstyle than a typical male, a lesser physique, more of a soft-spoken voice and breasts." (Dep. Berrier 53). He believes that a typical female would have long hair, but not always, and would not have as much muscle mass. (Dep. Berrier 53). Berrier testified that he does not consider wearing makeup or painting fingernails to be masculine characteristics. (Dep. Berrier 78-79).

Although Berrier acknowledged that there is nothing in the Dress & Grooming Code regarding an overall conservative appearance, he testified that he thought Plaintiff violated the "interpreted language of the policy" that general appearance be conservative (Dep. Berrier 60). Berrier testified that nail polish and makeup worn by a male employee, as he perceived Plaintiff to be, is not conservative. (Dep. Berrier 60). Berrier testified that nail polish for a female employee would be "absolutely ok," and makeup and jewelry are fine for women as long as they are conservative. (Dep. Berrier 60-61). Berrier also testified that he believed Plaintiff was violating the part of the Dress & Grooming Code stating "hair length should not extend below the bottom of the collar." (Dep. Berrier 59, Dep. Ex. 2).

Berrier and Carlson started the termination meeting by telling Plaintiff that they had received a complaint about her feminine appearance and that she could no longer present herself in a feminine manner at work. (Dec. Creed ¶ 31). Plaintiff informed Berrier and Carlson that her appearance was feminine because she was transgender, that she has a female gender identity, and that she was going through the process of a gender transition. (Dec. Creed ¶ 32). Carlson asked

Plaintiff whether “it would kill” her to appear masculine for 8 hours each day. (Dec. Creed ¶ 33). Carlson also asked Plaintiff why she applied for a job if she knew she would be undergoing gender transition. (Id.). Plaintiff explained to Carlson and Berrier that her gender identity could not be altered, and that she had applied for a job because she needed a job. (Id.)

At that point, Berrier and Carlson told Plaintiff that if she did not report to work “as a male” she would be terminated. (Dec. Creed ¶ 34). Carlson and Berrier informed Plaintiff that she had twenty-four hours to decide if she would present herself in a masculine way at work. (Id.). Plaintiff informed Carlson and Berrier that she could not do so. (Id.)

During the meeting, neither Carlson nor Berrier told Plaintiff that she was “required to conform to the dress code policy” or would be terminated. (Dec. Creed ¶ 35). The only statement made to Plaintiff during the meeting that possibly reflected on the dress code occurred when Carlson said “I noticed that your hair is slightly below your collar.” (Id.). However, Carlson did not make this statement until after Plaintiff explained that she was going through a gender transition and after Carlson and Berrier told Plaintiff that if she did not report to work as a male she would be terminated. (Id.)

After Carlson commented about the length of Plaintiff’s hair, Plaintiff stated to Carlson and Berrier that it would be appropriate for them to treat her like they treat all female employees. (Dec. Creed ¶ 36). Plaintiff asked Berrier and Carlson to apply Defendant’s female employee appearance standard to her. (Id.). Plaintiff asked Berrier and Carlson to relocate her to another position if there were concerns about public perception. (Id.). Berrier and Carlson declined the requests and said if Plaintiff did not report to work as a male, she was terminated. (Id.). Plaintiff informed Carlson and Berrier that she could not do so because she is not a male. (Dec. Creed ¶ 37). At that point, Carlson and Berrier terminated Plaintiff’s employment. (Id.)

Berrier stayed in the meeting the entire time and at the end of the meeting Plaintiff turned her store keys over to him. (Dec. Creed ¶ 38). During the meeting, neither Berrier nor Carlson made any statements about Plaintiff's job performance being deficient. (Dec. Creed ¶ 39). The meeting with Berrier and Carlson lasted well over thirty (30) minutes. (Dec. Creed ¶ 40).

Berrier's Testimony Regarding Plaintiff's Termination Meeting

Almost all aspects of Berrier's testimony about the termination meeting are in direct contradiction to Plaintiff's testimony about that meeting. (Dep. Berrier 37-42). Berrier testified that Plaintiff never explained that she was transgender and going through a gender transition. (Dep. Berrier 41, 43). Berrier also testified that neither he nor Carlson told Plaintiff that she could not longer present herself in a feminine manner at work. (Dep. Berrier 41-42). Berrier denied hearing Carlson ask Plaintiff whether it would kill her to appear as a man for eight (8) hours a day. (Dep. Berrier 42). Berrier denied that Plaintiff asked to be treated like all other female employees. (Id.). He denied that Plaintiff asked to relocate to another position if the company was concerned with public perception. (Id.). He also denied that Plaintiff was told if she did not report to work as a male she would be terminated. (Id.).

Berrier testified that he was asked to be a witness at the meeting and that Carlson did most of the talking. (Dep. Berrier 38, 42). Berrier testified that Carlson told Plaintiff the company had received complaints "in regards to his [sic] appearance, specifically in regards to hair, makeup, nail polish, that that was not within the guidelines of the uniform policy, that the uniform policy is not negotiable and they need to know today that he [sic] will be following the policy." (Dep. Berrier 38). Berrier testified that Plaintiff said that she would not be able to comply with the uniform policy, but did not explain why. (Dep. Berrier 39). Berrier testified that he was then excused from the meeting and Carlson stayed in the meeting with Plaintiff. (Id.).

II. ARGUMENT

A. Summary Judgment Standard and Burden Of Proof In Title VII Cases.

Summary judgment must be granted only if the record shows “that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). When ruling on the motion, the court must view all the evidence in record in the light most favorable to the non-moving party and resolve all factual disputes in the non-moving party’s favor. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000). On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for the factfinder. Betaco, Inc. v. Cessna Aircraft Co., 32 F.3d 1126, 1138 (7th Cir. 1994).

Plaintiff’s claims can survive summary judgment if she presents either direct or circumstantial evidence of discrimination (the direct method) or indirect evidence that satisfies the three-part, burden shifting test outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(the indirect method). *See also* Phelan v. Cook County et. al., 463 F.3d 773 (7th Cir. 2006).

Plaintiff can prevail using the direct method by setting forth direct evidence, which is evidence that if believed by the trier of fact would prove discriminatory conduct on the part of Defendant without reliance on inference or presumption. Rogers v. City of Chicago, 320 F.3d 748, 753 (7th Cir. 2003). Direct evidence essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus. Rogers, 320 F.3d at 753.

“A plaintiff can also prevail under the direct method of proof by constructing a convincing mosaic of circumstantial evidence that allows a jury to infer intentional discrimination by the decision-maker.” Phelan, 463 F.3d at 779 (quoting Rhodes v. Ill. Dep’t of Transp., 359 F.3d 498, 504 (7th Cir. 2004)). For Plaintiff to defeat summary judgment in this

manner, “[a]ll that is required is evidence from which a rational trier of fact could reasonably infer that the defendant had fired the plaintiff because the latter was a member of a protected class.” Phelan, 463 F.3d at 780 (quoting Troupe v. May Dep’t Stores Co., 20 F.3d 734, 736 (7th Cir. 1994)). The Seventh Circuit has recognized three (3) categories of persuasive, circumstantial evidence: (1) dubious coincidences, such as suspicious timing, ambiguous statements oral or written, and comments or behavior directed at employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn; (2) evidence that the employer systematically treated employees outside the protected class better; and (3) evidence that the employee was qualified and that the employer’s reason for treating her differently was pretext. Phelan, 463 F.3d at 781 (citing Troupe, 20 F.3d at 736.⁸

B. Defendant’s Motion For Summary Judgment Should Be Denied Because There Is Evidence From Which A Reasonable Jury Could Conclude That Defendant Terminated Plaintiff For Failing To Conform To Sex Stereotypes.

Title VII provides, in relevant part, that “it shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s...sex...” 42 U.S.C. § 2000e-2(a). Pursuant to Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989), Plaintiff is entitled to protection as a male who was discriminated against for failing to conform to sex stereotypes about how a man should act and appear. This protection exists alongside, and distinct from, precedent upholding employers’ freedom to adopt reasonable grooming codes that

⁸ Using the indirect method of proof, Plaintiff must meet the elements of a *prima facie* case of discrimination showing that (1) she is a member of a protected class; (2) she was meeting Defendant’s legitimate performance expectations; (3) she suffered a material, adverse action; and (4) she was treated less favorably than similarly situated individuals outside the protected class. Pantoja v. American NTN Bearing Manufacturing Corp., 495 F.3d 840, 845 (7th Cir. 2007). Once the *prima facie* case is offered, Defendant must state a legitimate, non-discriminatory reason for the adverse employment action. If a legitimate non-discriminatory reason is offered, Plaintiff must come forward with evidence that the stated reason is not the true reason one but only a false pretext, thus allowing an inference of discrimination. *See* Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 792 (7th Cir. 2007).

recognize sex-based differences between employees.

The plaintiff in Price Waterhouse was denied partnership in an accounting firm at least in part because she was “macho,” “somewhat masculine,” and “overcompensated for being a woman.” 490 U.S. at 235. One partner advised her she could improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” Id. The Court held that such comments bespoke gender discrimination and that Title VII prohibits sex stereotyping - - that is, discrimination because Hopkins failed to act like a stereotypical woman. Id. at 250-251. The Court explained that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” Id. at 250. The Court further stated that “we are beyond the day when an employer can evaluate employees by assuming or insisting that they match the stereotype associated with their group.” Id. at 251.

Defendant relies on Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), in arguing that Plaintiff must be considered a male for Title VII purposes. (Def’s Brief pgs. 11, 13-14). In Ulane, the Seventh Circuit refused to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on “gender” rather than “sex”. 742 F.2d at 1084. The Seventh Circuit’s view was similar to other courts prior to Price Waterhouse. *See* Holloway v. Arthur Anderson & Co., 566 F.2d 659, 661-63 (9th Cir. 1977); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982). In this earlier jurisprudence, male-to-female transsexuals were denied Title VII protection by courts because they were considered victims of “gender” rather than “sex” discrimination. The approach in Ulane, Sommers, and Holloway has been eviscerated by Price Waterhouse. *See* Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (“The initial judicial approach taken in cases such as Holloway [and Ulane] has been

overruled by the local and language of Price Waterhouse.”). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Court established that Title VII’s reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. Price Waterhouse, 490 U.S. at 251.⁹

The Sixth Circuit relied on Price Waterhouse in holding that transgender status is irrelevant to the merits of a sex stereotyping claim. See Smith v. City of Salem, 378 F.3d 566, 572-75 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause 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 nonconformity.”) The Smith court explained that just as an employer who discriminates against women for not wearing dresses or makeup is engaging in sex discrimination under the rationale of Price Waterhouse, “employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.” 378 F. 3d at 574. *And see* Barnes v. City of Cincinnati, 401 F.3d 729, 737-38 (6th Cir.

⁹ A number of courts have relied on Price Waterhouse to recognize a Title VII cause of action for discrimination based on an employee’s failure to conform to stereotypical gender norms whether an employee is transgender or not. See Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262-64 (3rd Cir. 2001) (a plaintiff may be able to prove a claim of sex discrimination by showing that the “harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n. 4 (1st Cir. 1999) (“Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity”); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (under Title VII, “a man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed, ‘because of his sex’”) (vacated on other grounds) 523 U.S. 1001 (1998). See also Schroer v. Billington, 525 F. Supp. 2d 58, 63-64 (D.C. 2007) (“[Plaintiff’s] transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer”); Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Texas 2008) (same).

2005) (holding that transgender police sergeant who was treated adversely because she had a French manicure, had arched eyebrows, came to work with makeup or lipstick on some occasions, and was told to be more “masculine” to comply with the grooming and uniform standards had presented evidence of sex stereotyping prohibited by Title VII).

Given these principles, Plaintiff has presented evidence of discrimination by setting forth a mosaic of direct and circumstantial evidence that will allow a jury to infer that Defendant terminated Plaintiff for failing to meet its masculine stereotype – that is, she failed to comport with Defendant’s stereotypical expectations of how a male should appear. Because there are numerous genuine issues of material fact in the record, and because the decision of Family Express to terminate Plaintiff because of her femininity is a form of sex stereotyping that is prohibited by Title VII, the Court should deny Defendant’s motion for summary judgment.

1. Statements Made By Berrier And Carlson.

The statements that Berrier and Carlson made to Plaintiff during the termination meeting are direct evidence of discrimination. After Plaintiff told Carlson and Berrier that she was going through a gender transition, Carlson asked Plaintiff, “Will it kill you to appear masculine for 8 hours each day?” Carlson also asked Plaintiff why she even applied for the job if she knew she would be undergoing a gender transition. Berrier and Carlson also told Plaintiff that if she did not report to work “as a male” she would be terminated.

These statements are direct evidence of discrimination and, viewed in the light most favorable to Plaintiff, suggest that discriminatory animus served as the basis for Plaintiff’s termination. *See Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994). Even if Berrier and Carlson’s statements are not considered direct evidence of sex discrimination, the statements are certainly relevant circumstantial evidence within the first category outlined by Troupe and could be relied

on by a reasonable jury in concluding that Plaintiff was terminated for failing to conform to sex stereotypes.¹⁰ See Fuka v. Thomson Consumer Electronics, 82 F.3d 1397 (7th Cir. 1996).

Second, Berrier's own testimony could allow a reasonable jury to conclude that Berrier did not believe Plaintiff looked the way a male is supposed to look. Berrier testified that prior to the December 15 meeting he remembered seeing Plaintiff on three (3) occasions and on all three (3) occasions Plaintiff had a "male appearance." He testified that at the termination meeting Plaintiff did not look like the same person he had previously seen and "looked like a girl that was doing something with her hair, not curly, very styled, makeup, meaning mascara, and guess you'd call it base or something on your face." Berrier said that Plaintiff looked more female to him because of the makeup, nail polish and hairstyle, and that he does not consider wearing makeup or painting fingernails to be masculine characteristics. The Dress and Grooming Code on which Defendants rely does not mention or prohibit the clear nail polish and subtle makeup that Plaintiff acknowledges wearing. Berrier's statements reveal his stereotypical expectations of what a male should look like and Plaintiff's failure to live up to them.

In short, a reasonable jury could conclude that Berrier and Carlson did not believe Plaintiff appeared sufficiently masculine – what they now call "conservative" -- and that in order for Plaintiff to keep her job she had to meet Berrier and Carlson's expectations of masculinity.

2. The Timing of Plaintiff's Termination.

The timing of Plaintiff's termination is also evidence of discrimination. The record shows that as Plaintiff's employment with Defendant progressed she appeared more feminine. Defendant's own witnesses attest to the fact that they noticed changes in Plaintiff in October or November, including makeup, fingernail polish, changes in hairstyle. (See Affidavits of Dan

¹⁰ Defendant may argue the statements are ambiguous. However, "the task of disambiguating ambiguous statements is for trial, not summary judgment." See Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990). On summary

Arthur, Justin Mosely and Bobbi Krause). These individuals also attest to the fact that Plaintiff's appearance started changing more drastically thereafter. (*Id.*) Plaintiff was terminated shortly after her co-workers and manager noticed these changes, and days after the changes were brought to the attention of Berrier and Carlson. When Berrier and Carlson told Plaintiff to cease the changes and revert to a more masculine appearance, Plaintiff refused and was terminated.

3. Defendant's Shifting Reasons for Plaintiff's Termination and Document Destruction.

Throughout this case Defendant has alleged that Plaintiff was terminated for violating the Dress and Grooming Code. Although Defendant does not directly argue that Plaintiff was terminated for performance-related reasons in its motion for summary judgment, Defendant dances around the notion that Plaintiff's performance played a role in her termination. For instance, Defendant submitted Affidavits from Plaintiff's co-workers who testified that Plaintiff's appearance was affecting her performance. (See Affidavits of Justin Mosely and Bobbi Krause). However, Mosely and Krause's subjective beliefs about Plaintiff's performance are not material or relevant in this matter on this issue of performance. *See Burks v. Wisconsin Dept. of Trans.*, 464 F.3d 744, 753 (7th Cir. 2006) (citations omitted).

Moreover, the record is replete with evidence showing that Plaintiff's performance was satisfactory during her employment with Defendant. For example, Plaintiff's manager, Dan Arthur, rated Plaintiff as passing Defendant's culture audit. Arthur also rated Plaintiff's performance in two (2) evaluations as "very good" and "effective." Plaintiff received a raise following each performance evaluation. Plaintiff also received the greeter of the month award on three (3) occasions. Berrier, the Director of Operations, also testified that Plaintiff performed her duties in a "satisfactory" manner. Defendant's attempt to revise or add to its reasons for

judgment, all factual disputes must be resolved in Plaintiff's favor. *Reeves*, 530 U.S. at 150.

Plaintiff's termination is evidence of pretext. Appelbaum v. Milwaukee Metro. Sewerage Dist., 340 F.3d 573 (7th Cir. 2003) (one can reasonably infer pretext from an employer's shifting or inconsistent explanations for the challenged employment decision). Plaintiff also testified that her gender transition is making her happier and less miserable – in other words, a more effective employee.

Defendants' attempt to revise its alleged reason for calling Plaintiff to the termination meeting on December 15 also serves as further evidence of pretext. While the record reflects Defendants' fears and projections about customer reactions, actual evidence of customer complaints is sparse. The only such document Defendant produced is an email from Carlson to Berrier regarding a call from Arthur "regarding customer comments about [Plaintiff's] hair and occasional use of makeup." Defendant has now submitted testimony from Arthur who stated that he received approximately 50 comments about Plaintiff's appearance. Defendant also submitted testimony from Krause who stated she received 10 to 20 comments about Plaintiff's appearance. The single "customer complaint" that Plaintiff was told about on December 15 has now turned 60 to 70 customer comments. At a minimum a reasonable jury could conclude that Defendant has revised or added to its explanation, which is evidence of pretext. Moreover, even if customers complained about Plaintiff's gender expression, such complaints do not give Family Express a green light to engage in otherwise-prohibited discrimination (See Section C below).

Further, during discovery in this case Plaintiff specifically requested "copies of all documents regarding customer complaints received by Defendant regarding Plaintiff." (Ex. 3). Despite Berrier's testimony that he reviewed at least one (1) complaint through the website, Defendant produced no customer complaints about Plaintiff's appearance. Defendant claims the website complaint was deleted. However, Defendant managed to produce a copy of a positive

customer comment sent via the website about Plaintiff the day following her termination. (Dep. Berrier 70-71, Dep. Ex. 9).

In addition, during discovery Plaintiff also requested copies of “all documents relating to Plaintiff’s termination,” “copies of any and all documents regarding the meeting held between Plaintiff, Mike Berrier and Cynthia Carlson at Defendant’s corporate office on December 14, 2005,” and “a log of any and all documents classified by the Defendant as privileged on any basis including the basis of the privilege and/or any documents lost, stolen, misplaced or not available for any reason, including the reason any document is lost, stolen, misplaced or not available for any reason.” (Ex. 3). Berrier testified during his deposition that he took notes while he was speaking with the customer on the phone about Plaintiff. (Dep. Berrier 45). However, Berrier cannot locate his notes because he believes they were shredded. (Dep. Berrier 45-46). Berrier also testified that Plaintiff’s store had a computer with an email account. (Dep. Berrier 54-55). Defendant has informed Plaintiff that the computer and the backup tapes were destroyed.

The Court should draw a negative inference from the fact that Defendant did not produce the above-referenced documents and/or destroyed the documents because those documents either never existed or would have been unfavorable to Defendant. Moreover, the negative inference should serve as evidence of pretext in this case. *See Minnesota Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001); *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985).

In summary, Plaintiff has presented sufficient evidence from which a reasonable jury could conclude that she was terminated for failing to conform to Defendant’s stereotypical expectations of a male should appear. The record is thick with genuine issues of material fact about Defendant’s sex stereotypes and its concerns about Plaintiff’s gender expression, and Defendant’s motion should be denied.

C. Defendant’s “Customer Preference” Argument is Without Merit.

Although not entirely clear, Defendant seems to argue that Plaintiff’s termination resulted from a so-called customer preference for gender-conforming employees. The customer preference argument is based on Title VII, 42 U.S.C. § 2000e-2(e), which permits sex discrimination in employment where sex “is a bona fide occupational qualification reasonably necessary to the normal operation” of the particular business. Similar customer preference arguments have been made under Title VII and repeatedly rejected as a justification for discrimination, and this Court should not entertain them. *See Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.) (cert. denied) 404 U.S. 950 (1971) (rejecting customer preference for female flight attendants as justification for sex discrimination); *EEOC v. St. Anne’s Hospital of Chicago, Inc.*, 664 F.128, 133 (7th Cir. 1981); *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1181 (7th Cir. 1982). *See also Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971) (bona fide occupational qualification is not established by assumption or stereotyped characterization that very few women could perform the particular job). In addition, stereotypic impressions of male and female roles do not qualify gender as a BFOQ. *See City of Los Angeles Dept. of Water v. Manhart*, 435 U.S. 702, 707 (1978); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979). Nor does stereotyped customer preference justify a sexually discriminatory practice. *See Diaz*, 442 F.2d at 389. In this case Defendant has never asserted or relied on a “BFOQ” defense, nor does conformity with a male stereotype constitute a bona fide occupational qualification for the position of Sales Associate. Therefore, the implication that Plaintiff’s termination somehow occurred as a result of Defendants customers’ preference, and would be permissible if it did, is without merit.

D. Defendant's Reliance on *Jespersen* is Misplaced.

Likewise, *Jespersen v. Harrah's Operating Co. Inc.*, 444 F.3d 1104 (9th Cir. 2006), is not applicable to the facts of this case. In *Jespersen*, the plaintiff challenged a sex-differentiated grooming policy imposed on Harrah's employees. *Jespersen*, 444 F.3d at 1107-08. Among other things, the policy required female, but not male, bartenders to tease, curl, or style their hair and wear stockings and nail polish. Id. The plaintiff also found the requirements inconsistent with her gender identity and she ultimately declined to comply with them and was terminated. Id.

Following her termination, the plaintiff in *Jespersen* brought two (2) claims against Harrah's. First, the plaintiff claimed that the grooming policy imposed an unequal burden on women. *Jespersen*, 444 F.3d at 1108. Second, she claimed that the grooming policy required women to conform to sex-based stereotypes as a condition of employment. The Ninth Circuit held that the plaintiff failed to present evidence sufficient to survive summary judgment on her claim that the grooming policy imposed an unequal burden on women. *Jespersen*, 444 F.3d at 1106. With respect to sex stereotyping, the Court held that "appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record *Jespersen* has failed to create any triable issue of fact..." [Emphasis supplied].

Defendant's reliance on *Jespersen* in this case is misplaced. Defendant wants to simplify and pigeon-hole Plaintiff's claim into a standard dress code case. A cursory review of the Plaintiff's Statement of Facts, however, illustrates that this is not a case about Defendant's "Dress and Grooming Code Policy," which Plaintiff does not challenge, except as purportedly applied to her. Here, the Plaintiff has alleged that she was terminated for failing to conform to Defendant's stereotypical expectations of how a male should appear. Moreover, with respect to

Plaintiff's claim for sex stereotyping, unlike the plaintiff in Jespersen, here the Plaintiff has developed the record and has put forth a triable issue of fact.

Furthermore, the record evidence in this case is substantially different from the evidence in the Jespersen case. Specifically, Plaintiff testified that neither Carlson nor Berrier told Plaintiff that she was "required to conform to the dress code policy" or would be terminated. Plaintiff testified that the only statement made to her during the meeting that possibly reflected on the dress code occurred when Carlson said "I noticed that your hair is slightly below your collar." Plaintiff stated, however, that Carlson did not make this statement until after Plaintiff explained that she was going through a gender transition and after Carlson and Berrier told Plaintiff that if she did not report to work as a male she would be terminated. Plaintiff does not ask this Court to overturn established dress code jurisprudence. Such jurisprudence is not implicated by her claim, which seeks to hold Defendant accountable for its impermissible use of sex stereotypes in firing her when she did not revert to the masculine appearance Defendant preferred..

Notably, Plaintiff testified that after Carlson commented about the length of her hair, Plaintiff asked Berrier and Carlson to apply Defendant's female employee appearance standard to her. Plaintiff also asked them to relocate her to another position if they were concerned about public perception. Berrier and Carlson declined both requests and specifically stated that if Plaintiff did not report to work with a masculine gender expression, she was terminated. Thus, a reasonable jury could conclude that the true reason for the December 15 meeting was to require Plaintiff to conform to Defendant's stereotypical notions about how a male should appear.

Assertions about the application of the “dress and grooming code policy” are pretextual or, at least, present a genuine issue of material fact that should be resolved at trial.¹¹

III. CONCLUSION

For the foregoing reasons, Plaintiff Amber Creed respectfully requests that the Court deny Defendant’s Motion for Summary Judgment.

Respectfully Submitted,

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¹¹ Defendant’s reliance on purported examples of other employees terminated for alleged dress code violations is misplaced. (Def’s Appx. Ex. J). First, documents FE000307-308, 310 concern alleged violations that occurred in 2006 and 2008, well after Plaintiff’s termination. Second, many of the documents are merely warnings and do not show that the employees were terminated. (FE000295-296, 299-301, 303-305, 307-309, 311-319). In this case, Plaintiff received no warnings, verbal or written, prior to her termination. Third, the dress code and uniform issues addressed in the documents are not similar to the sex-stereotypical expectations Defendant applied to Plaintiff. Moreover, unlike this case, many of the documents contain conduct violations in addition to alleged uniform violations. For instance, several of the Culture Evaluation Reports underline the word “feather duster” (See FE000297 and 299) and several others address employees not tucking their shirts in. (See FE000304, 308, 313, 318). Notably, documents FE000295, 298, 306, 311-312, 314-315, 317 and 319 do not address any specific uniform issues or indicate that the employee “passed” the uniform portion of the culture audit.

CERTIFICATE OF SERVICE

I hereby certify that on the **20th** day of **August, 2008**, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following party by operation of the Court's electronic filing system. Parties may access this filing through the Court's System.

Dale M Schowengerdt
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s/ Kimberly D. Jeselskis _____
Kimberly D. Jeselskis