Nos. 17-1618, 17-1623

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

ALTITUDE EXPRESS, INC. AND RAY MAYNARD,

Petitioners,

v.

MELISSA ZARDA AND WILLIAM MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH AND SECOND CIRCUITS

BRIEF OF *AMICUS CURIAE* KARL OLSON IN SUPPORT OF PETITIONER GERALD LYNN BOSTOCK AND RESPONDENT MELISSA ZARDA

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June 27, 2019

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INTEREST OF AMICUS CURIAE[1]

Mr. Karl Olson is a retired United States Department of State ("DOS") Foreign Service Officer who served in the DOS for 30 years from 1985 to 2015, went through mandatory retirement, and was reappointed for an additional year to complete his final assignment in September 2016. He is gay. He now resides in Tampa, Florida.

His Foreign Service career included both consular assignments, mostly in Latin America, and political-military affairs, working alongside our military in Iraq and Afghanistan. His final assignment was as Foreign Policy Advisor (POLAD) at U.S. Special Operations Command South (SOCSOUTH), Homestead Air Reserve Base, Florida.

Mr. Olson earned a Bachelor of Arts degree in Ancient History and Mathematics from Columbia University, a Master of Arts degree in National Security Studies from Georgetown University, and a Master's in Military Arts and Sciences (M.M.A.S.) from the U.S. Army Command and General Staff College at Fort Leavenworth, Kansas. His foreign languages include Spanish and Portuguese,

1. Pursuant to Sup. Ct. R. 37.6, the amicus curiae and his counsel state that none of the parties to this case nor their counsel authored this brief in whole or part, and that no person, party, party's counsel or entity made a monetary contribution intended to fund the preparation or submission of this brief; and no one other than the amicus curiae and his counsel have contributed money for this brief. The amicus curiae files this brief with the written consent of all parties. All parties received timely notice of amicus curiae's intention to file this brief.

with limited French and German. He has also studied Pashto.

On April 22, 1994, then Secretary of State Warren Christopher issued a clear prohibition against discrimination in the State Department, including discrimination based on sexual orientation. This policy of barring discrimination based on sexual orientation was the result of gay employees being hounded from their offices at the DOS and forced to resign, resulting in a number of suicides.[2]

Despite this new prohibition, while Mr. Olson was serving in Rio de Janeiro, Brazil, from 1993 to 1996, he experienced sexual orientation discrimination and consequently filed two grievances under non-Title VII standard procedures of the Foreign Service Act, 22 U.S.C. § 4131(a)(1)(E). This section of the Foreign Service Act had a deadline of three years (later reduced, prospectively, to two years) per 22 U.S.C. § 4134(a), rather than a Title VII grievance, 22 U.S.C. § 4131(a)(1)(H)(i), which was not then available to Mr. Olson as a gay male alleging sexual orientation discrimination.

The basis for his first grievance was the Foreign Service promotion board's erroneous assumption that he was heterosexual. The Board accused him of lacking EEO sensitivity because in his Employee Evaluation Report ("EER") he mentioned his enthusiasm for the beaches of Rio and their "beautiful Cariocas," a gender neutral term

2. See David K. Johnson, The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government (2006) (also a documentary film).

meaning inhabitants of Rio. Mr. Olson's second grievance featured allegations of a security investigation targeting him for being a fan of entertainer RuPaul. He also suffered embarrassment and humiliation in the workplace in Rio when his supervisor mocked and joked about him and even presented him with a $3.00 "Queer Reserve Note," featuring a picture of then President Clinton.

On May 12, 1999, the Foreign Service Grievance Board ("FSGB") ruled against Mr. Olson, dismissing his first grievance. Mr. Olson sought judicial review under 22 U.S.C. § 4140(a), within 180 days of the final FSGB action. The United States District Court for the District of Columbia ruled that his grievance, alleging sexual orientation discrimination, was actually Title VII sex discrimination, and dismissed his Complaint as untimely under 22 U.S.C. § 4140(b)(2). The U.S. Court of Appeals for the District of Columbia Circuit affirmed.[3]

Mr. Olson is filing this Amicus Curiae brief to ensure that the Supreme Court and the parties on both sides of the issue are aware of the lower courts' prior rulings in his case that sexual orientation discrimination is, in fact, prohibited under Title VII. He believes that Title VII and its strict deadlines should not be used to disadvantage a person who has suffered the harms of sexual orientation discrimination in the workplace. The judicial rulings applying Title VII to his case and causing him to lose his

3. Mr. Olson timely sought judicial review of his second grievance, also alleging sexual orientation discrimination. The District Court this time ruled that the second grievance was not covered under Title VII, another example of conflicting and uneven application of Title VII regarding sexual orientation discrimination.

grievance because of timeliness should be used to benefit people who have been subjected to such discrimination rather than to harm them.

SUMMARY OF THE ARGUMENT

The U.S. District Court for the District of Columbia decided as early as 2001 that the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 against an employee "because of such individual's sex" included discrimination based on an individual's sexual orientation. In a Memorandum Opinion ("Mem Op"), filed October 15, 2001, the U.S. District Court for the District of Columbia in *Karl Olson v. Colin Powell, et al.,* Civil Action No. 99- 2957, determined that sexual orientation discrimination pursuant to Title VII was a form of gender stereotyping. Appendix B at 10a, 11a. See Appendix A and B - Order and Memorandum Opinion. Mr. Olson appealed this decision the United States Court of Appeals for the District of Columbia Circuit, case no. 01-5441. On February 25, 2003, the Court of Appeals for the D.C. Circuit granted Defendants' motion for summary affirmance and dismissed the case.

Mr. Olson had followed the requirements under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* and filed his case 176 days after the issuance of the Final Agency Decision, instead of meeting the 90-day statute of limitations for a Title VII complaint against the federal government. At that time, there was no other option open to him. No legal precedent existed for him to have filed a Title VII complaint because sexual orientation was not considered by the courts at the time to be a protected category under Title VII's ban on sex discrimination.

The Supreme Court should now follow the precedent of these two courts, agree with the prior position of the Federal Government, specifically the State and Justice Departments, and decide that Title VII rightfully protects those who have been discriminated against in the workplace based on their sexual orientation.

ARGUMENT

I. THIS COURT SHOULD FOLLOW THE PRECEDENT OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND HOLD THAT TITLE VII PROHIBITS SEXUAL ORIENTATION DISCRIMINATION.

A. Mr. Olson Filed Suit Under The APA, Because, As A Gay Male, Legal Precedent to File A Title VII Complaint Was Presumed Not To Be An Option In 1999.

After exhausting his internal administrative remedies both within the DOS and the Foreign Service Grievance Board ("FSGB"), Mr. Olson filed a civil suit in the U.S. District Court for the District of Columbia against the then Secretary of State under the APA, 5 U.S.C. § 701 *et seq.*, *Olson v, Colin Powell, et al.*, Civil Action No. 99-2957. Pursuant to 22 U.S.C. § 4140(a), he timely requested judicial review within 180 days of the FSGB final decision against him. Indeed, there was no legal precedent for him to file a Title VII complaint because sexual orientation discrimination was not considered prohibited under Title VII at that time. Mr. Olson's claim was, therefore, not

filed, accepted, investigated, adjudicated, or decided by the DOS or the FSGB as a sex discrimination complaint and neither the DOS nor the FSGB ever provided him with the mandatory notifications and requirements under Title VII, 42 U.S.C. § 2000e-16(c).

B. Mr. Olson's Suit Was Based On The Consular Promotion Board's Violation Of DOS Precepts Against Sexual Stereotyping In Not Promoting Him.

Mr. Olson's grievances were based on events that occurred when he served as Chief of the Non-Immigrant Visa Section at the U.S. Consulate in Rio de Janeiro, Brazil between September 1993 and August 1996. His grievance concerned an enthusiastic statement he made in this 1993-94 EER about "watching the beautiful Cariocas on the beach" of Rio. The Consular Promotion Board ("CPB") reviewed the EER containing Mr. Olson's statement and erroneously concluded that he presented "an outmoded stereotype of women as objects to be ogled" that was "certain to offend most women." It criticized the remark as being "inappropriate and sexist," ranked him below other candidates, recommended EEO sensitivity training, and did not promote him. Mr. Olson explained that the CPB thought his comment was sexist only because it incorrectly assumed he was a heterosexual male, when in fact he is gay. The FSGB initially agreed with Mr. Olson and issued an "Interim Decision," concluding that the CPB erred and violated its own precepts, prohibiting stereotyping and group assumptions. Another CPB was convened, but ranked Mr. Olson last of eight candidates. Mr. Olson was consequently not promoted.[4]

4. This was the first of two sexual orientation discrimination cases that Mr. Olson filed in the District Court. The court ruled that

C. Defendants Filed A Motion To Dismiss The Olson Claim As Untimely Under Title VII.

Even though Mr. Olson's claim was not filed, accepted, investigated, adjudicated, or decided by the DOS or the FSGB as a sex discrimination complaint, on April 10, 2000, Defendants countered with a motion to dismiss, arguing that Mr. Olson's grievance was actually based on a violation of DOS rules or policies in furtherance of the purpose of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. His Complaint was, therefore, untimely in that it should have been filed within 90 days from the date of his receipt of the final agency action. Defendants provided no case law to support their argument. Defendants' Memorandum In Support of Motion to Dismiss ("Defs' Mem") at pp. 4-5.

In order to have the Olson case dismissed, Defendants asserted that 22 U.S.C. § 4131(a)(1(H) refers to "any discrimination prohibited by – (i) section 2000e-16 of Title 42" or "(v) any rule, regulation, or policy directive prescribed under" that section, 22 U.S.C. § 4131(a)(1(H) (i, v). They stated further that Section 2000e of Title 42 prohibits discriminatory practices in employment by the federal government and requires that "[a]ll personnel actions affecting employees . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16. Defs' Mem at p.5. Defendants argued that Mr. Olson's first grievance

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the grievance underlying the other claim, CA 02-1371 and later 06-1205, affirmed by the Court of Appeals in 09-5295, timely filed under the restrictive standard in 22 U.S.C. § 4140(b)(2), was nevertheless sexual orientation discrimination and, therefore, not covered under Title VII. Neither court explained its conflicting decisions in Mr. Olson's two sexual orientation discrimination cases.

rested on his allegation that DOS policies and FSGB precepts relating to non-discrimination with regard to sex and sexual stereotyping were not followed during his promotion board review. They said DOS policies and FSGB precepts furthered the purpose of Section 2000e-16 of Title 42. Since the final decision in his first grievance was issued on May 12, 1999, Defendants said that Mr. Olson should have filed his Complaint on or before August 11, 1999, instead of November 8, 1999. Defs' Mem at p. 6.

D. The District Court for the District of Columbia Agreed With Defendants' Argument that Mr. Olson's Grievance Was Based A Theory Of Gender Discrimination, Under Title VII, and, Therefore, Dismissed The Grievance As Untimely.

In the District Court's Mem Op, dated October 15, 2001, the court agreed with Defendants that Mr. Olson's grievance was based on a theory of gender discrimination under Title VII and, therefore, untimely. It noted that "[u]nder the Foreign Service Act ("FSA"), 22 U.S.C. § 4140 *et seq.*, judicial review of any decision by the FSGB may be obtained by filing a district court action within 90 or 180 days from the date of notice of final agency action, depending on the nature of the underlying grievance. Actions that must be filed within 90 days are those involving grievances alleging violations of rights that are protected under Title VII, namely the right to be 'free from any discrimination based on race, color, religion, sex, or national origin.'" 42 U.S.C. § 2000e-16. Appenidx B at 7a-8a.

Citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250-51, (1989) (plurality opinion) and *Nichols v. Azteca*

Restaurant Enterprises, Inc., 256 F.3d 864, 874 (9th Cir. 2001), the court concluded that Mr. Olson's grievance was essentially a challenge to gender stereotyping. Appendix B at 10a. It quoted *Nichols v. Azteca* that "*Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes." It said "claims challenging gender stereotyping in employment decisions are exactly the sort of claim contemplated under Title VII." Appendix B at 10a. The court, therefore, decided that Mr. Olson's grievance was based on a theory of gender discrimination and that consequently, a 90 day statute of limitations period for filing judicial actions under 22 U.S.C. § 4140(b)(2) applied and dismissed Mr. Olson's case. Appendix B at 11a.

The Court did not address the fact that the lack of notice, as required in statute 42 U.S.C. § 2000e-16(c) for filing a civil action not later than 90 days after receiving a final decision kept Mr. Olson from knowing or discovering that his Complaint was actually one of sex discrimination covered under Title VII. Nor did it address the fact that Mr. Olson's claim, because it was a claim of sexual orientation discrimination, was not filed, accepted, investigated, adjudicated, or decided by the DOS or the FSGB as a sex discrimination complaint.

E. The United States Court of Appeals for the District of Columbia Circuit Affirmed the Lower Court's Decision.

Mr. Olson appealed the decision of the U.S. District Court for the District of Columbia. On February 25, 2003, the United States Court of Appeals for the District of Columbia Circuit, case no. 01-5441, granted Defendants' motion for summary affirmance and dismissed the case.

Although Mr. Olson's Complaint had not actually claimed sexual orientation discrimination under Title VII, the Court of Appeals for the DC Circuit assumed his was a Title VII case and, therefore, focused only on the issue that Mr. Olson filed his Complaint more than the 90 days after receiving the FSGB's final notice.

II. THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CORRECTLY ASSUMED THAT TITLE VII APPLIED TO SEXUAL ORIENTATION DISCRIMINATION.

The lower courts correctly assumed that Mr. Olson's case was based on sexual orientation discrimination in the workplace. The problem was, however, that Title VII has been unevenly applied and misapplied over the years, including to Mr. Olson himself, resulting in conflicting decisions across the United States and various Circuits. Mr. Olson, therefore, he had no way of knowing in 1999 that the prohibition against sex discrimination in Title VII also applied to sexual orientation discrimination.

CONCLUSION

It is now time now to settle the existing conflicts. It is time to acknowledge, as the lower courts did in Olson, that Title VII prohibits discrimination based upon sex, which includes sexual orientation.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED OCTOBER 15, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
99-2957 (GK)

KARL OLSON,

Plaintiff,

v.

COLIN POWELL, SECRETARY OF STATE,
et. al.,

Defendants.

October 15, 2001, Filed

ORDER

Plaintiff, Karl Olson, an employee with the Department of State, brings this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the Fifth Amendment, against the Secretary of State, Colin L. Powell, and against several members of the Foreign Service Grievance Board ("FSGB"). The matter is before the Court upon Defendants' Motion to Dismiss the Complaint [#19]. Upon consideration of the motion,

opposition, reply, sur-reply, and the entire record herein, for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Defendants' Motion to Dismiss [#19] is **granted;** it is further

ORDERED, that this case is **dismissed.**

October 15, 2001
DATE

/s/ Gladys Kessler
GLADYS KESSLER
UNITED STATES
DISTRICT COURT

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED OCTOBER 15, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 99-2957 (GK)

KARL OLSON

Plaintiff,

v.

COLIN L. POWELL, SECRETARY OF STATE,
et. al.,

Defendants.

MEMORANDUM OPINION

Plaintiff, Karl Olson, an employee with the Department of State, brings this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the Fifth Amendment, against the Secretary of State, Colin L. Powell, and against several employees with the Department of State. The matter is before the Court upon Defendants' Motion to Dismiss [#19]. Upon consideration of the motion, opposition, reply, sur-reply, and the entire record herein, the Court **grants** Defendants' Motion.

Appendix B

I. BACKGROUND

Plaintiff, Karl Olson, has been a tenured Foreign Service Officer with the Department of State ("DOS") since 1985. He brings this action against DOS and several of its employees who serve as members of the Foreign Service Grievance Board ("FSGB"). Plaintiff seeks judicial review of FSGB's decision pertaining to three grievances he filed to challenge various employment actions, namely a non-promotion and several unfavorable performance evaluations.

A. Grievance One

The first of Plaintiff's three grievances is based on events that occurred when Plaintiff served as Chief of the Non-Immigrant Visa Section at the United States Consulate in Rio de Janeiro, Brazil, between September 1993 and August 1996. While serving there, Plaintiff made a statement in his 1993-1994 Employee Evaluation Report ("EER") about enjoying the "beautiful Cariocas" of Rio de Janeiro.[1]

The Consular Promotion Board ("CPB"), which was evaluating Plaintiff for promotion, reviewed the EER containing Plaintiff's statement and concluded that he presented "an outmoded stereotype of women as objects to be ogled" that was "certain to offend most women." It criticized the remark as being "inappropriate and sexist

1. Plaintiff states that "Carioca" is a gender-neutral Portuguese word meaning inhabitant of Rio de Janeiro.

in today's workplace." Pl.'s Opp'n at 3. The CPB ranked Plaintiff below that of other candidates, and recommended that he attend EEO sensitivity training. Plaintiff did not receive a promotion.

In August of 1997, Plaintiff filed a grievance with the FSGB ("Grievance One"), contesting the CPB's decision to rank him below other candidates and require diversity training on the basis of his comment. Plaintiff argued that the CPB had unfairly stereotyped him and violated its own precepts against "stereotypes" and "group assumptions"[2] when it concluded that Plaintiff's remark about "beautiful Cariocas" was sexist. Plaintiff explained that the CPB thought his remark was sexist only because it incorrectly assumed that he was a heterosexual male when, in fact, he is gay.

On August 28, 1998 the FSGB issued an "Interim Decision," in which it concluded that the CPB had erred and violated its own precepts prohibiting stereotyping and group assumptions. The FSGB convened another CPB to re-evaluate Plaintiffts application for promotion. The CPB ranked Plaintiff last of eight candidates. On May 12, 1999, the FSGB issued its final decision, concluding that Plaintiff would not have been promoted, notwithstanding the CPB's error in stereotyping. Plaintiff appeals the FSGB's final decision ln this action.

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2. The precept provides that: "Boards will compare all members solely on merit with absolute fairness and justice . . . The performance rating process must be insulated from irrelevant or improper influences. Stereotypes, group assumptions, and sexist or ethnic comments are inadmissible . . ." *See* Def.'s Mot. to Dismiss, Ex. A. at 3.

B. Grievance Two

In November of 1998 and before the FSGB rendered its final decision on Plaintiff's first grievance, Plaintiff filed a second grievance with the FSGB ("Grievance Two") , claiming that his Employee Evaluation Reviews {"Reviews") for the periods from August 30, 1994, through April 30, 1995, and from August 30, 1995, through April 30, 1996, were "falsely prejudicial and inaccurate." Compl. at ¶ 31. Among other things, Plaintiff alleges that the Reviews were completed by supervisors with anti-gay bias. Plaintiff also alleges that the FSGB panel members reviewing Grievance Two are biased because some of them served on the FSGB panel that reviewed Grievance One.

On June 23, 2000 the FSGB issued a decision on a discovery matter relating to Plaintiff's second grievance. The Court is not aware of any other decision rendered by FSGB with respect to Plaintiff's second grievance, including any decision on the merits of Plaintiff's grievance.

C. Grievance Three

In November 1999, Plaintiff filed a third grievance ("Grievance Three"). In that grievance, Plaintiff alleged that DOS and his supervisors failed to conduct an Employment Evaluation Review as required for the period from April 16, 1996, through August 30, 1996. Plaintiff claimed that the failure to conduct a Review was, among

other things, discriminatory and motivated by anti-gay bias. *See* Compl. at ¶ 61; ¶¶ 33-35.

On March 16, 2000, the FSGB dismissed Plaintiff's third grievance on the grounds that the issues therein were raised in Plaintiff's second grievance and were therefore already being considered by the FSGB.

II. STANDARD OF REVIEW

The matter is before the Court on Defendant's Motion to Dismiss the Complaint. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1676 (1999).

III. ANALYSIS

A. All Claims Regarding Grievance One Are Untimely

Under the Foreign Service Act ("FSA") , 22 U.S.C. § 4140 *et seq.*, judicial review of any decision by the FSGB may be obtained by filing a district court action within either 90 or 180 days from the date of notice of final agency action, depending on the nature of the underlying grievance. Actions that must be filed within 90 days are those involving grievances alleging violations of rights that are protected under Title VII, namely the right to be "free from any discrimination based on race, color,

religion, sex, or national origin." 42 U.S.C. § 2000e-16. Actions involving grievances of any other nature may be filed within 180 days.[3]

Plaintiff's first grievance was that the CPB ranked him below that of other candidates because he made a comment about "beautiful Cariocas." He claims that the CPB unfairly stereotyped him by concluding that his comment was sexist. In particular, Plaintiff explains that the CPB assumed that he was a heterosexual male and concluded therefrom that his comment must have been sexual in nature and thus inappropriate and sexist. Plaintiff argues that, in fact, he is gay, and that CPB' s conclusions and assumptions violated its own precepts prohibiting "sexual stereotyping and group assumptions."[4]

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3. The FSA provides that: "Any aggrieved party may obtain judicial review of a final action of the Secretary or the Board on any grievance in the district courts of the United States . . . if the request for judicial review is filed not later than 180 days after the final action . . ." 22 U.S.C. § 4140(a).

The FSA further provides that "with respect to a grievance based on an alleged violation of a law, rule, regulation, or policy directive referred to in section 4141(a)(1)(H) of this title, judicial review . . . may be obtained . . . if such party commences a civil action, not later than 90 days after a party receives notice of the final action . . ." 22 U.S.C. § 4140(b)(2).

Section 4141 (a) (1) (H), referred to in the above quoted provision, refers to discrimination prohibited by Title VII: "any discrimination prohibited by - (i) section 2000e-16 of Title 42" or "(v) any rule, regulation, or policy directive prescribed under." 22 U.S.C. § 4131(a) (1)(H)(i), (v).

4. *See* note 2 *supra* for language of precept.

Appendix B

Defendant argues that Plaintiff's grievance is essentially one alleging gender discrimination under Title VII and that therefore, he had 90 days within which to file this action. Final agency action was rendered on May 12, 1999. Plaintiff filed this action on November 8, 1999, 176 days after final agency action on Plaintiff's grievance. Defendants argue that Plaintiff's claims are therefore untimely.

Plaintiff argues that his grievance does not allege gender discrimination, but rather, sexual-orientation discrimination, which is not protected under Title VII. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir.2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir.1999); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir.1989). Plaintiff therefore asserts that he had 180, not 90 days, within which to file this action.

For the reasons discussed below, the Court concludes that Plaintiff's grievance is based on a theory of gender discrimination,[5] not sexual orientation discrimination, and is therefore subject to a 90 day statute of limitations applicable to Title VII type claims.

First, when CPB ranked Plaintiff below other candidates based in part on his comment, it did not know Plaintiff's sexual orientation, and therefore could not

5. It should be noted that "sex" and "gender" are not distinct concepts for Title VII purposes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, (1989) (plurality opinion).

possibly have discriminated against him on the basis of his sexual orientation.

Second, Plaintiff's grievance was essentially a challenge to *gender* stereotyping by CPB. Plaintiff's argument is that CPB: (1) imputed stereotypically male personality traits to him, *i.e.*, assumed that he had chauvinistic attitudes about women because he is a man; and then (2) made an employment decision based on its stereotyping, *i.e.*, chose to rank him below other candidates for promotion.

Claims challenging gender stereotyping in employment decisions are exactly the sort of claims contemplated by Title VII. *Price Waterhouse supra*; *Nichols v. Azteca Restaurant Enterprises. Inc.*, 256 P.3d 864, 874 (9th Cir. 2001) ("*Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes.").

Therefore, an employer that makes employment decisions based on assumptions about typical or atypical, male or female behavior is engaging in sex discrimination in violation of Title VII. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Title VII forbids "[d]iscrimination because one fails to act in the way expected of a man or woman."); *Pivirotto v. Innovative Systems, Inc.* 191 F.3d 344, 355 (3rd Cir. 1999) (recognizing that employer's reliance on conformity or non-conformity to gender stereotypes violates Title VII) Plaintiff's grievance is similar to these stereotyping cases, as Plaintiff is alleging that CPB unfairly stereotyped him by assuming he was expressing stereotypical male attitudes about women.

Accordingly, in light of the foregoing, the Court concludes that Plaintiff's grievance is based on a theory of gender discrimination, not sexual orientation discrimination, and that consequently, a 90 day statute of limitations period for filing judicial actions applies. Given that Plaintiff filed this action 176 days after final agency action, his complaint with respect to his first grievance is untimely.

B. The Court Does Not Have Jurisdiction Over Grievances Two and Three.

The FSA provides for judicial review of only *final* actions of the FSGB. 22 U.S.C. 4140(a).

Plaintiff filed two subsequent grievances: one in November 1998 ("Grievance Two" or "Second Grievance") and the other in November 1999 ("Grievance Three" or "Third Grievance"). Grievance Two asserted, among other things, that two Employment Evaluation Reviews of Plaintiff completed between 1994-1996 were prejudicial and inaccurate. Specifically, Plaintiff alleged that the reviewing supervisors discriminated against him because he is gay, and consequently, gave him poor evaluations. The record does not disclose any decision yet rendered by the FSGB with respect to the merits of Plaintiff's second grievance.[6] In the absence of any "final action" by the FSGB on the second grievance, the Court may not

6. The Court is aware that on June 23, 2000, the FSGB issued a decision regarding a Motion to Compel filed by Plaintiff in connection with his second grievance. The FSGB decision, however, did not decide the merits of Plaintiff's second grievance.

exercise jurisdiction over any claim pertaining thereto and therefore dismisses these claims. 22 U.S.C. 4140(a).

Grievance Three alleged that an Employment Evaluation Review that should have been conducted during the 1994-1996 period did not occur - also because of discrimination based on sexual orientation, among other reasons. The FSGB dismissed Plaintiff's third grievance as duplicative in that the issues therein were already before the FSGB as part of Plaintiff's second grievance, the resolution of which is still pending. Thus, as the FSGB has not yet reached a final decision on those issues, the Court does not have jurisdiction over the subject matter of the third grievance.

Accordingly, all claims relating to Plaintiff's second and third grievances are **dismissed**.

IV. CONCLUSION

For the foregoing reasons, the Court **grants** Defendant's Motion to Dismiss. All claims with respect to Plaintiff's first grievance are **dismissed** as untimely. The Court does not have jurisdiction to decide claims regarding Plaintiff's second and third grievances, and therefore all claims pertaining thereto are **dismissed**. This case is **dismissed**. An Order will issue with this Opinion.

October 15, 2001
DATE

/s/
GLADYS KESSLER
UNITED STATES
DISTRICT COURT