No. 17-1618

In The
Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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U.S. District Court
Northern District of Georgia (Atlanta)
CIVIL DOCKET FOR CASE #: 1:16-cv-01460-ODE

Bostock v. Clayton County Board of Commissioners

10	*Filed & Entered:* 09/12/2016	Amended Complaint SECOND AMENDED COMPLAINT against Clayton County with Jury Demand, filed by Gerald Lynn Bostock.(klb) Please visit our website at http://www.gand.uscourts.gov/commonly-used-forms to obtain Pretrial Instructions which includes the Consent To Proceed Before U.S. Magistrate form.
13	*Filed & Entered:* 09/26/2016 *Terminated:* 07/21/2017	Motion to Dismiss for Failure to State a Claim MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Clayton County. (Attachments: # (1) Exhibit 1 - EEOC Charge of Discrimination, # (2) Exhibit 2 - EEOC Dismissal and Notice of Rights)(Heller, Martin) Exhibit 1 - EEOC Charge of Discrimination Exhibit 2 - EEOC Dismissal and Notice of Rights

14	*Filed & Entered:* 10/13/2016	Response in Opposition to Motion RESPONSE in Opposition re [13] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Gerald Lynn Bostock. (Attachments: # (1) Exhibit A, # (2) Exhibit B)(Mew, Thomas) Exhibit A Exhibit B
15	*Filed & Entered:* 10/27/2016	Reply Brief REPLY BRIEF re [13] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Clayton County. (Heller, Martin)
16	*Filed & Entered:* 11/03/2016 *Terminated:* 07/21/2017	Final Report and Recommendation FINAL REPORT AND RECOMMENDATION re [10] Amended Complaint, filed by Gerald Lynn Bostock. Signed by Magistrate Judge Walter E. Johnson on 11/3/16. (klb)
18	*Filed & Entered:* 11/17/2016	Objections to Report and Recommendation OBJECTIONS to [16] Report and Recommendation filed by Gerald Lynn Bostock. (Attachments: # (1) Exhibit)(Mew, Thomas) Exhibit

19	*Filed & Entered:*	Reply to Objection to Report and Recommendation
	12/01/2016	REPLY to Objection to Report and Recommendation re [18] Objections to Report and Recommendation filed by Clayton County. (Heller, Martin)
20	*Filed & Entered:*	Reply to Objection to Report and Recommendation
	12/15/2016	REPLY to Objection to Report and Recommendation re [18] Objections to Report and Recommendation filed by Gerald Lynn Bostock. (Mew, Thomas)
24	*Filed & Entered:*	Order on Motion to Dismiss for Failure to State a Claim
	07/21/2017	ORDER OVERRULING Plaintiff's [18] Objections and ADOPTING IN FULL the [16] Final Report and Recommendation. Defendant's [13] Motion to Dismiss for Failure to State a Claim is GRANTED and this case is hereby DISMISSED with prejudice. Costs are taxed to the Plaintiff. Signed by Judge Orinda D. Evans on 7/20/2017. (sap)

25	*Filed & Entered:* 07/21/2017	Clerk's Judgment CLERK'S JUDGMENT in favor of Defendant against Plaintiff for the costs of this action. (sap)--Please refer to http://www.ca11.uscourts.gov to obtain an appeals jurisdiction checklist--
26	*Filed & Entered:* 08/21/2017 *Terminated:* 07/26/2018	Notice of Appeal NOTICE OF APPEAL as to [25] Clerk's Judgment, [24] Order on Motion to Dismiss for Failure to State a Claim, Order on Final Report and Recommendation,, by Gerald Lynn Bostock. Filing fee $ 505, receipt number 113E-7338353. Transcript Order Form due on 9/5/2017 (Mew, Thomas)

General Docket
United States Court of Appeals
for the Eleventh Circuit

Court of Appeals Docket #: 17-13801
Gerald Bostock v. Clayton County, Georgia

GERALD LYNN BOSTOCK

Plaintiff - Appellant

versus

CLAYTON COUNTY, GEORGIA

Defendant - Appellee

11/13/2017	Appellant's brief filed by Gerald Lynn Bostock. (ECF: Brian Sutherland) [Entered: 11/13/2017 04:12 PM]
11/13/2017	MOTION for initial hearing en banc filed by Gerald Lynn Bostock. Opposition to Motion is Unknown. [8297379-1] (ECF: Brian Sutherland) [Entered: 11/13/2017 04:36 PM]
12/22/2017	Appellee's Brief filed by Appellee Clayton County, Georgia. (ECF: Jack Hancock) [Entered: 12/22/2017 10:46 AM]
5/3/18	ORDER: Motion for initial hearing en banc filed by Appellant Gerald Lynn Bostock is DENIED. [8297379-2] is DENIED. CRW [Entered: 05/03/2018 02:20 PM]

5/10/18	Opinion issued by court as to Appellant Gerald Lynn Bostock. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. (Opinion corrected on 5/10/2018. Typo on p. 2.)-- [Edited 05/10/2018 by JRP] [Entered: 05/10/2018 02:04 PM]
5/10/18	Judgment entered as to Appellant Gerald Lynn Bostock. [Entered: 05/10/2018 02:06 PM]
7/18/18	PUBLISHED ORDER: On it's [sic] own motion, the Court DENIES en banc rehearing. A member of this Court in active service having requested a poll on the suggestions of rehearing en banc, the majority of the judges in this Court in active service voted not to grant en banc rehearing.. [8513547-1] (Published Order Corrected on 7/19/2018. Judge Jill Pryor joined dissent)--[Edited 07/19/2018 by DLT] [Entered: 07/18/2018 03:11 PM]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	File No. 1:16-CV-1460
CLAYTON COUNTY,	)	**JURY TRIAL DEMANDED**
Defendant.	)	

SECOND AMENDED COMPLAINT

(Filed Sep. 12, 2016)

Plaintiff Gerald Lynn Bostock ("Plaintiff') files this Second Amended Complaint against Defendant Clayton County ("Defendant") for violations of Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq*. ("Title VII").

PARTIES

1.

At all times relevant to this action, Defendant employed Plaintiff.

2.

Plaintiff submits himself to the jurisdiction of this Court.

3.

Defendant is a political division of the state of Georgia and is subject to the jurisdiction and venue of this Court.

4.

Defendant may be served with process by delivering a copy of Summons and Complaint to Jeffrey E. Turner, Chairman, Clayton County Administration 112 Smith Street, Jonesboro, GA 30236 for service of process.

5.

Defendant is an "employer" as defined by Title VII.

ADMINSTRATIVE [sic]

6.

Mr. Bostock timely filed a charge for sex and sexual orientation discrimination with the Equal Employment Opportunity Commission.

7.

Mr. Bostock filed this lawsuit within 90 days of the receipt of his Notice of Right to Sue.

JURISDICTION AND VENUE

8.

Jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1331 (federal question).

9.

Venue is proper in this district and division pursuant to 28 U.S.C. § 1391(b)(1) because Defendant resides within the Northern District of Georgia.

10.

Venue is also proper in this district and division pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and omissions giving rise to this Complaint occurred within the Northern District of Georgia.

STATEMENT OF FACTS

11.

Plaintiff began working for the Defendant on or about January 13, 2003.

12.

Plaintiff is a gay male.

13.

Plaintiff was employed by Defendant as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County. Plaintiff was charged with the primary responsibility of Clayton County CASA (Court Appointed Special Advocate).

14.

During the over ten (10) years Plaintiff was employed by the Defendant, he received good performance evaluations and the program received accolades. Clayton County CASA was awarded the Established Program Award of Excellence by Georgia CASA in 2007. Plaintiff was recognized by National CASA for program expansion and served on the National CASA Standards and Policy committee in or around 2011-2012 .

15.

Beginning in January 2013, Plaintiff became involved with a gay recreational softball league called the Hotlanta Softball League.

16.

Plaintiff actively promoted the Clayton County CASA organization to the softball league as a source of volunteer opportunities for league members.

17.

In the months after Plaintiff joined the Hotlanta Softball League, Plaintiff's participation in the league and his sexual orientation and identity were, on information and belief, openly criticized by one or more persons who had significant influence on the decision-making of the Defendant.

18.

In or around April 2013, Defendant advised Plaintiff that it was conducting an internal audit on program funds Plaintiff managed.

19.

Plaintiff did not engage in any improper conduct with regard to program funds under his custody or control.

20.

Defendant initiated the audit as a pretext for discrimination against Plaintiff based on his sexual orientation and failure to conform to a gender stereotype.

21.

On information and belief, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where Plaintiff's supervisor was present, at least one individual made disparaging comments

about Plaintiff's sexual orientation and identity and participation in the league.

22.

On or about June 3, 2013, Defendant terminated Plaintiff's employment.

23.

Defendant stated that Plaintiff was terminated for Conduct Unbecoming of a Clayton County Employee. That purported reason, however, was a pretext for discrimination against Plaintiff based on his sex and/or sexual orientation.

COUNT I
Sex Discrimination in Violation of Title VII of The Civil Rights Act of 1964, as Amended

24.

Plaintiff incorporates by reference the preceding Paragraphs as if fully restated herein.

25.

Plaintiff is a gay male.

26.

Plaintiff is an "employee" as defined by Title VII, 42 U.S.C. § 2000e *et seq*.

27.

Defendant is an "employer" as defined by Title VII, 42 U.S.C. § 2000e *et seq*.

28.

Having worked in his position previously, Plaintiff was qualified for the position of Child Welfare Services Coordinator.

29.

Defendant discriminated against Plaintiff in the terms and conditions of Plaintiff's employment when it terminated Plaintiff's employment.

30.

As a direct and proximate result of the Defendant's actions, Plaintiff has suffered damages including emotional distress, inconvenience, loss of income and benefits, humiliation, and other indignities.

31.

Plaintiff is entitled to an award of back pay and benefits, compensatory damages, reinstatement or front pay, attorney's fees, and all other appropriate damages, remedies, and other relief available under Title VII and all federal statutes providing remedies for violations of Title VII.

32.

Defendant acted intentionally and maliciously with respect to Plaintiff, entitling Plaintiff to recover punitive damages against Defendant.

33.

Additionally, or in the alternative, Defendant undertook its unlawful conduct recklessly with respect to Plaintiff and his federally protected rights, entitling Plaintiff to recover punitive damages against Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands a TRIAL BY JURY and requests the following relief:

a. a declaratory judgment that Defendant violated Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq*.;

b. a permanent injunction, prohibiting Defendant from engaging in unlawful employment practices in violation of Title VII;

c. full back pay from the date of Plaintiff's termination, taking into account all raises to which Plaintiff would have been entitled but for his unlawful termination, and all fringe and pension benefits of employment, with prejudgment interest thereon;

d. reinstatement to Plaintiffs' former position with Defendant at the same pay grade, or in the alternative, front pay to compensate Plaintiff for lost future wages, benefits and pension;

e. compensatory damages in an amount to be determined by the enlightened conscience of the jury, for Plaintiff's emotional distress, suffering, inconvenience, mental anguish, loss of enjoyment of life and special damages;

f. punitive damages;

g. attorneys' fees and costs; and

h. all other and further relief as this Court deems just and proper.

Respectfully submitted,

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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

GERALD LYNN BOSTOCK,	)	
Plaintiff,	)	**CIVIL ACTION**
v.	)	**NO. 1:16-cv-01460-ODE-WEJ**
CLAYTON COUNTY,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

COMES NOW, Clayton County, the Defendant in the above-referenced matter, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss Plaintiff's Second Amended Complaint for failure to state a claim upon which relief may be granted.

In his Second Amended Complaint, Plaintiff alleges that he was terminated because of "gender stereotyping," and his sexual orientation, which he claims are both sex discrimination claims. Plaintiff's claims fail, however, because Title VII does not encompass discrimination on the basis of sexual orientation, and Plaintiff has not and cannot plead any facts to support a gender stereotyping claim. In addition, Plaintiff did not exhaust his administrative remedies with respect to his gender stereotyping claim, and even if he did, his gender stereotyping claim is time-barred. For these

reasons, Clayton County requests that its Motion be **GRANTED** and that Plaintiff's Second Amended Complaint be **DISMISSED**, with prejudice, in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initially filed this action *pro se* on May 5, 2016. [Doc. 2]. On or about August 1, 2016, this Court entered an Order recognizing that Plaintiff had not timely served his Complaint, and instructing Plaintiff to show cause as to why his Complaint should not be dismissed. Plaintiff never responded to the show cause order, but instead, the next day, Plaintiff (through counsel) filed his First Amended Complaint. [Doc. 4]. The Clayton County Board of Commissioners filed a Motion to Dismiss, arguing both that the Complaint failed to state a claim and that it was not a proper Defendant. [Doc. 7]. After consulting with Plaintiff's counsel, Defendant consented to the filing of Plaintiff's Second Amended Complaint, without prejudice to its right to move for its dismissal. [Doc. 8].

In the Second Amended Complaint, Plaintiff alleges that he is a gay male and that he worked for Clayton County as the Child Welfare Services Coordinator. Plaintiff claims that, beginning in January 2013, he began playing in a gay recreational softball league. [Doc. 10, ¶¶ 12-13, 15]. Plaintiff alleges that his participation in the league and his sexual orientation and "identity" were criticized by one or more (unnamed) persons, and that Clayton County subjected him to an internal audit of the funds he managed. [Doc. 10, ¶ 17].

Plaintiff claims that the audit was a pretext for discrimination against him based upon his sexual orientation and his failure to conform to a gender stereotype, and that his subsequent termination was actually due to his sex/sexual orientation, rather than due to the findings of the audit. [Doc. 10, ¶¶ 18-23].

Based solely upon these allegations, Plaintiff alleges that he was discriminated against due to his sex in violation of Title VII of the Civil Rights Act of 1964. [Doc. 10, Count I, ¶ 24-33].

II. ARGUMENT AND CITATION OF AUTHORITY

A. Motion To Dismiss Standard

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint is subject to dismissal if it fails to state a claim upon which relief may be granted. The tenet that a court must accept a complaint's allegations as true is inapplicable to legal conclusions and threadbare recitals of a cause of action's elements, supported by mere conclusory allegations. Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Id. To survive a motion to dismiss, a complaint must allege *facts*, and those facts must show "more than a sheer possibility that a defendant has acted unlawfully," but instead must state a claim to relief that is "plausible on its face." Id. at 678. If the complaint only pleads facts that are merely consistent with a defendant's liability, it "stops short of the line between

possibility and plausibility of entitlement to relief" and is subject to dismissal for failure to state a claim upon which relief can be granted. Id.; Holland v. Pilot Travel Centers, LLC, No. 5:09-CV-262 (CAR), 2010 WL 2732047, at *3 (M.D. Ga. July 8, 2010) (quoting Iqbal, 556 U.S. at 679).

B. Plaintiff Cannot Assert A Viable Claim For "Sex Discrimination" Based Upon His Sexual Orientation

Plaintiff alleges a Title VII sex discrimination claim based upon his claim that he was discriminated against and terminated because of his sexual orientation..

Plaintiff cannot state a viable claim for relief under established law because Title VII does not protect Plaintiff (or anyone else) from discrimination due to his sexual orientation. To this end, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") prohibits discrimination on the basis of an individual's "race, color, religion, sex, or national origin." Sexual orientation is not an enumerated protected class within the statute, and case law throughout the district courts within the Eleventh Circuit consistently holds that sexual orientation claims are not covered by Title VII. Evans v. Georgia Regional Hosp., No. CV415-103, 2015 WL 5316694, at *2 (S.D. Ga. Sept. 9, 2015) (granting motion to dismiss claim for sexual orientation discrimination); Davis v. Signius Invest. Corp./Answernet, No. 1:12-cv-04143-TWT-AJB,

2013 WL 1339758, at *5 (N.D. Ga. Feb. 26, 2013) (Baverman, J.) ("Title VII does not protect employees from discrimination based on sexual orientation."); Espinosa v. Burger King Corp., No. 11-62503-CIV, 2012 WL 4344323, at *5 (S.D. Fla. Sept. 21, 2012) ("[C]ourts in this circuit and across the country have consistently held that Title VII does not apply to discrimination claims based on sexual orientation."); Anderson v. Napolitano, No. 09-60744-CIV, 2010 WL 431898, at *4 (S.D. Fla. Feb. 8, 2010) ("The law is clear that Title VII does not prohibit discrimination based on sexual orientation."); Mowery v. Escambia Cnty. Utils. Auth., No. 3:04CV382-RSEMT, 2006 WL 327965, at *9 (N.D. Fla. Feb. 10, 2006) ("[C]ase law throughout the circuits consistently holds that Title VII provides no protection for discrimination based on sexual orientation."); Hudson v. Norfolk S. Ry. Co., 209 F. Supp.2d 1301, 1315 (N.D. Ga. 2001) ("[S]exual orientation is not a classification protected under Title VII.") (Carnes, J.).

This is consistent with case law from other circuit courts around the country. See e.g. Hively v. Ivy Tech Community College, 2016 WL 4039703, at *2, ___ F.3d ___ (7th Cir. July 28, 2016) ("our precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination. That holding is in line with all other circuit courts to have decided or opined about the matter"); Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012) ("[U]nder Title VII, sexual orientation is not a protected classification."); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) ("To the extent that [the Plaintiff] is

alleging discrimination based upon her Lesbianism, [the Plaintiff] cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class."); Hamner v. St. Vincent Hosp. & Health Care Center, Inc., 224 F.3d 701, 704 (7th Cir. 2000) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.").

Because Plaintiff's Second Amended Complaint alleges that he was discriminated against and terminated because of his sexual orientation, he cannot state a cognizable claim for relief. Accordingly, Clayton County respectfully requests that the Court dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

C. Plaintiff Has Failed To State A Claim For Gender Stereotyping

Plaintiff's gender stereotyping claim must be dismissed because the Second Amended Complaint is void of any factual support for this claim, aside from a single conclusory assertion that "Defendant initiated the audit as a pretext for discrimination against Plaintiff based upon his sexual orientation and failure to conform to a gender stereotype." [Doc. 10, ¶ 20]. This bare allegation is nothing more than a legal conclusion to be disregarded, and falls well short of alleging facts that plausibly support a sex discrimination gender stereotyping claim.

In reality, Plaintiff is attempting to avoid dismissal of his entire Second Amended Complaint by bootstrapping a "gender stereotyping" conclusory allegation to his sexual orientation claim. This simply is insufficient to state a claim and amounts to nothing more than alleging sexual orientation discrimination. See Vickers v. Fairfield Medical Center, 453 F.3d 757, 763-764 (6th Cir. 2006) (recognizing "faulty logic" in viewing a claim for sexual orientation as a claim for gender stereotyping, and finding that the plaintiff's "claim fails because Vickers has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work," because accepting such a claim "would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination").

Courts within this Circuit have ruled that a discrimination complaint should be dismissed when, as here, the plaintiff fails to allege sufficient facts supporting such claims. See Patel v. Georgia Dept. BHDD, 485 Fed. Appx. 982, 983 (11th Cir. 2012) (affirming dismissal of various discrimination and retaliation claims for failing to plead sufficient facts to support these claims); Evans v. Georgia Regional Hospital, 2015 WL 5316694, at *2-3 (S.D. Ga. Sept. 10, 2015) (allegations of gender non-conformity or gender stereotyping are subject to dismissal under Iqbal and 12(b)(6) when they are based solely upon an individuals' sexual orientation); Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010) (granting motion to dismiss gender stereotyping claim because the plaintiff did not

identify himself as effeminate and did not allege that he was discriminated or harassed because of the way he walked, talked, or acted; sexual orientation allegations alone simply cannot support a gender stereotyping claim).

Here, the Plaintiff's third version of his Complaint alleges for the first time that he was subjected to "gender stereotyping." However, the Second Amended Complaint does not contain a single fact that could support such a claim. Based upon Iqbal, this conclusory assertion is insufficient to state a claim, and without factual support of any kind, this claim is ripe for dismissal. Accordingly, Clayton County respectfully requests that this Court grant its Motion and dismiss Plaintiff's "gender stereotyping" claim.

D. Plaintiff Failed To Exhaust His Administrative Remedies With Respect To His Gender Stereotyping Claim

Although Plaintiff's third iteration of his Complaint attempts to plead a claim for "gender stereotyping" on account of his sex in violation of Title VII, this claim should be dismissed because Plaintiff never included any such claim in a charge of discrimination.

Before a potential claimant may sue for discrimination or retaliation under Title VII, he must first file a timely charge of discrimination. Duble v. FedEx Ground Package Sys., Inc., 572 F. App'x 889, 892-93 (11th Cir. 2014); 42 U.S.C. §§ 2000e-5(e)(1), 12117(a). The scope of a federal lawsuit is limited strictly to

those claims listed in the EEOC charge, with the only exception to this rule being that a plaintiff also can sue over those claims that reasonably can be expected to grow out of the charge of discrimination. Chanda v. Engelhard/ICC, 234 F.3d 1219, 1225 (11th Cir. 2000); Waldemar v. American Cancer Soc., 971 F. Supp. 547, 553 (N.D. Ga. 1996) (granting summary judgment for defendant on plaintiff's claim for discrimination based on unfavorable treatment because plaintiff did not raise claims of such discrimination in her EEOC charge).

Courts have noted that such a rule of law serves to enhance the administrative enforcement process by ensuring that the EEOC has the opportunity to investigate and attempt conciliation of all claims before litigation is brought. It also provides the employer advance notice of the claim and an opportunity to resolve the dispute. See Selman v. Kendall/Hunt Publishing Co., 20 FEP 1712, 1713 (N.D. Ga. 1979) (holding that core of Title VII is private settlement and elimination of unfair practices without litigation).

Federal courts routinely dismiss claims when they are outside the scope of a plaintiff's EEOC charge. See, e.g., Hillemann v. University of Cent. Fla., 167 Fed. Appx. 747, 749-750 (11th Cir. 2006); Williams v. Wal-Mart Associates, Inc., 2013 WL 979103, at *3 (N.D. Ala. Mar. 8, 2013); Swindle v. Hale, No. 2:09-CV-1458-SLB, 2012 WL 4725579, at *20 (N.D. Ala. Sept. 30, 2012), aff'd sub nom, Swindle v. Jefferson Cnty. Comm'n, 593 F. App'x 919 (11th Cir. 2014); Hernandez v. Mohawk Indus., Inc., 2009 WL 3790369, at *4 (M.D. Fla. 2009).

Here, Plaintiff's Charge of Discrimination, attached as Exhibit 1[1], states in its entirety:

> I was hired by the above named employer on January 13, 2003, as a Court Appointed Special Advocate Program Coordinator. Around October 2007, I was promoted to Child Welfare Services Coordinator. On June 3, 2013, I was notified by the Director of Juvenile Court Services and Chief of Staff of Juvenile Court Services that I was being discharged. The reason given for my discharge was "Violation of Clayton County Civil Service Rules." I believe that I have been discriminated against because of my sex (male/sexual orientation), in violation of Title VII of the Civil Rights Act of 1964, as amended.

Thus, Plaintiff's charge mentioned only discrimination due to his sexual orientation, and did not mention or include any facts that possibly could have led

---

[1] Documents referenced in the Complaint, explicitly relied upon by the Plaintiff, or otherwise incorporated into the Complaint can be attached to a Motion to Dismiss without converting the Motion into one for Summary Judgment. See Horsley v. Feldt, 2002 WL 2023463, at *5-6 (11th Cir. 2002) (adopting "incorporation by reference" doctrine for motions for judgment on the pleadings and noting that document attached to motion to dismiss may be considered by court without converting motion into one for summary judgment if document is central to plaintiff's claim and is undisputed); see also Harris v. Ivax Corp., 182 F.3d 799, 802, n.2 (11th Cir. 1999.) Here, Plaintiff repeatedly referenced his EEOC charge and his right-to-sue letters, which are attached as Exhibit 1 and Exhibit 2 and are incorporated into the Complaint and may be used as an exhibit for the purposes of this Motion to Dismiss.

to an investigation into a potential claim of gender stereotyping. As a result, Plaintiff failed to exhaust his administrative remedies as to gender stereotyping, because an EEOC charge that complains only of sexual orientation does not exhaust administrative remedies for other types of sex discrimination. Norris v. Hiakin Drivetrain Components, 46 Fed.Appx. 344, 346 (6th Cir. 2002) (claim for same-sex sexual harassment cannot be reasonably expected to grow out of EEOC charge asserting discrimination based on sexual orientation); Lankford v. BorgWarner Diversified Transmission Products, Inc., 2004 WL 540983, at *3 (S.D. Indiana Mar. 12, 2004) ("a claim of discrimination based on sex is not reasonably related to, nor may it be expected to grow out of, a charge of discrimination based on sexual orientation.") Because Plaintiff's EEOC charge claims that he was discriminated against on the basis of his sexual orientation, he has failed to exhaust his administrative remedies as to his gender stereotyping claim, and this Court should dismiss that claim.

E. Plaintiff's Gender Stereotyping Claim Is Time-Barred

Even assuming, *arguendo*, that Plaintiff properly pled a gender stereotyping claim and that such a claim was exhausted by his EEOC charge, this claim still should be dismissed because he did not bring it within 90 days after receiving his right-to-sue letter. In this regard, Plaintiff alleges that he received a right-to-sue letter (attached as Exhibit 2) and that he filed his original lawsuit within 90 days of his receipt of the letter.

[Doc. 10, ¶ 7]. The right-to-sue letter was issued on February 10, 2016. Plaintiff then filed his initial Complaint on May 5, 2016, and his First Amended Complaint on August 2, 2016. [Docs. 1, 4].

Both of Plaintiff's Complaints alleged only sexual orientation discrimination. Id. Now, for the first time, in his Second Amended Complaint filed on September 12, 2016, Plaintiff alleges a new and distinct claim – gender stereotyping. [Doc. 10]. This claim was not brought within 90 days of his receipt of his right-to-sue letter, as it was not filed until 215 days after his right-to-sue letter was issued.

Presumably, Plaintiff will claim that his gender stereotyping claim should "relate back" to the time he filed his original Complaint. However, any such contention would be meritless because neither the original Complaint nor the First Amended Complaint contained any facts that support, let alone gave Clayton County notice of, Plaintiff's gender stereotyping claim. Under Federal Rule of Civil Procedure 15(c), an amended pleading relates back to the date of the original pleading when it "asserts a claim or defense that arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading." Fed.R.Civ.P. 15(c)(1)(B); Brown v. Montgomery Surgical Center, 2013 WL 1163427, at *7 (M.D. Ala. Mar. 20, 2013). This means the original complaint must have given defendant notice of the claim asserted, and "[w]hen new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended

complaint is barred by limitations if it was untimely filed." Moore v. Baker, 989 F.2d 1129, 1131 (11th Cir. 1993).

In his present Second Amended Complaint, Plaintiff pleads a sexual orientation claim masquerading as a gender stereotyping claim as well. There are no allegations in any of the previous pleadings indicating that Plaintiff was discriminated against in any way because he failed to act as a traditional male. The allegations in the original Complaint and First Amended Complaint do not allege that Plaintiff walked, talked or acted in any way different than the typical male, let alone that he was discriminated against for such activities. Accord Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010) (granting motion to dismiss gender stereotyping claim because sexual orientation allegations alone cannot support a gender stereotyping claim).

As a result, because the original Complaint and the First Amended Complaint failed to plead any facts to support a gender stereotyping claim, Plaintiff's gender stereotyping claim cannot relate back to the original Complaint. Thus, even if the Second Amended Complaint contained sufficient facts to support a gender stereotyping claim (which it does not for the reasons discussed in Section C above), Plaintiff's gender stereotyping claim is time-barred and should be dismissed. See Brown, 2013 WL 1163427, at * 8 (denying relation back to failure-to-accommodate claim pled for first time in amended complaint when initial

complaint did not contain facts that put defendant no [sic] notice of the claim asserted).[2]

III. CONCLUSION

For the reasons stated herein, Clayton County respectfully requests that the Court **GRANT** the instant Motion to Dismiss and **DISMISS** Plaintiff's Second Amended Complaint, with prejudice, in its entirety.

This 23rd day of September, 2016.

/s/Martin B. Heller
Jack Hancock
Georgia Bar No. 322450
Martin B. Heller
Georgia Bar No. 360538
William H. Buechner
Georgia Bar No. 086392

Attorneys for Clayton County

[2] In his Second Amended Complaint, Plaintiff makes passing references to his "identity", which presumably is a reference to his gender identity. (Doc. 10, ¶¶ 17, 21). Plaintiff, however, does not allege that he was terminated because of his gender identity. (Id. at ¶ 20). Even if he did, the Second Amended Complaint does not include any supporting facts relating to Plaintiff's gender identity or relating to any purported claim of discrimination based on Plaintiff's gender identity. Moreover, to the extent that any such claim is encompassed by Title VII, Plaintiff failed to exhaust his administrative remedies with respect to any such claim, and any attempt by Plaintiff to assert such a claim in his Second Amended Complaint also is time-barred.

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[Certificate of Compliance Omitted]

EXHIBIT “1”

CHARGE OF DISCRIMINATION	Charge Presented To:	Agency(ies) Charge No(s).:
This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	☐ FEPA ☒ EEOC	410-2013-06136

_____ and EEOC
State or local Agency, if any

Name *(indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Gerald L. Bostock	[redacted]	[redacted]

Street Address	City, State and ZIP Code
[redacted]	

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. *(Include Area Code)*
CLAYTON COUNTY BOARD OF COMMISSIONERS - JUVENILE COURT	500 or More	(770) 477-3208

Street Address	City, State and ZIP Code
112 Smith Street, Jonesboro, GA 30236	

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*	DATE(S) DISCRIMINATION TOOK PLACE **Earliest**	**Latest**
☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER *(Specify)*	06-03-2013	06-03-2013 ☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I was hired by the above named employer on January 13, 2003, as a Court Appointed Special Advocate Program Coordinator. Around October 2007, I was promoted to Child Welfare Services Coordinator. On June 3, 2013, I was notified by the Director of Juvenile Court Services and Chief of Staff of Juvenile Court Services that I was being discharged.

The reason given for my discharge was "Violation of Clayton County Civil Services Rules."

I believe that I have been discriminated against because of my sex (male/sexual orientation), in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY – *When necessary for State and Local Agency Requirements*

I declare under penalty of perjury that the above is true and correct. Sep 05, 2013 *Date* [Illegible] *Charging Party Signature*	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(month, day, year)*

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. FORM NUMBER/TITLE/DATE. EEOC Form 5, Charge of Discrimination (5/01).

2. AUTHORITY. 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117.

3. PRINCIPAL PURPOSES. The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC antidiscrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. ROUTINE USES. This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

5. WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION. Charges must be reduced

to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII or the ADA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, and Section 503(a) of the ADA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

[SEAL] **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
Atlanta District Office

100 Alabama Street, SW, Suite 4R30
Atlanta, GA 30303
(404) 562-6800
TTY (404) 562-6801
FAX (404) 562-6909/6910

REQUEST FOR INFORMATION

The EEOC is authorized by Section 710 of Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act of 1990, as amended, Section 626(a) of the Age Discrimination in Employment Act of 1967, as amended, 29 CFR Sections 1620.30 & 31 of the Equal Pay Act of 1963, as amended and Title II of The Genetic Information Nondiscrimination Act of 2008, Section 29 CFR 1635.3(c) to issue a subpoena compelling the production of the information in the event of non-compliance by a Respondent. However, your cooperation in timely providing the requested information will facilitate the prompt resolution of this charge and will avoid delays created by compulsory subpoena activity.

Submit a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge. The position statement should also include, at least, the following information:

1. The correct name and address of the facility named in the charge, and a statement or document indicating how many employees are employed at the location.

2. Submit a copy of your facilities most recently submitted EEO-1 Report. If not required to submit an EEO-1 Report, please explain.

3. A true and accurate copy of all documents in the Charging Party's personnel file, to include all evaluations/appraisals/performance reviews, and all job action documents which indicate all increases in pay, promotions, reassignments, demotions and if no longer employed, submit copies of all termination documents.

4. Submit copies of and/or explain all written rules relating to employees' duties, conduct, and use of discipline for Charging Party's job classification during the relevant time period. Explain how an employee learns the contents of the rules. If the disciplinary system is progressive, explain its structure, penalties, and mode of operation.

5. Did the Charging Party complain to a supervisor or manager regarding the conduct described in the charge of discrimination? If your answer is yes, identify the person or persons with whom the complaint was registered and describe each action taken by your organization in response to that complaint. Provide a copy or any written document which reflects the complaint and the action taken as a result.

We believe the information sought is relevant to the investigation and is not unduly burdensome to produce.

If we do not receive the requested information by the date specified, we may proceed to subpoena the requested information.

EXHIBIT “2”

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Gerald L. Bostock [redacted]	From: Atlanta District Office 100 Alabama Street, S.W. Suite 4R30 Atlanta, GA 30303
☒ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*	

EEOC Charge No.	EEOC Representative	Telephone No.
410-2013-06136	Larry E. Satterwhite,Sr. Investigator	(404) 562-6855

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability as defined by the Americans With Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained

establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)*

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination In Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred**

more than 2 years (3 years) before you file suit may not be collectible.

On behalf of the Commission

Bernice Williams-Kimbrough — FEB 10 2016

Enclosure(s) — [illegible initials] — *(Date Mailed)*

Bernice Williams-Kimbrough,
District Director

cc:

Jack R. Hancock
Attorney
FREEMAN, MATHIS & GARY, LLP.
661 Forest Parkway
Suite E
Jonesboro, GA 30297

INFORMATION RELATED TO FILING SUIT UNDER THE LAWS ENFORCED BY THE EEOC

(This information relates to filing suit in Federal or State court under Federal law. If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.)

Private Suit Rights – **Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), or the Age Discrimination in Employment Act (ADEA):**

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you *receive* this Notice.** Therefore, you **should keep a record of this date.** Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was *mailed* to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the

appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS – Equal Pay Act (EPA):

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit before 7/1/10 – *not* 12/1/10 – in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan

to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

ATTORNEY REPRESENTATION – Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

ATTORNEY REFERRAL AND EEOC ASSISTANCE – All Statutes:

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at

least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, **please make your review request <u>within 6 months</u> of this Notice.** (Before filing suit, any request should be made within the next 90 days.)

IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK, Plaintiff, v. CLAYTON COUNTY, Defendant.	)))))))	CIVIL ACTION File No. 1:16-CV-01460-ODE-WEJ

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

(Filed Oct. 13, 2016)

Plaintiff Gerald Bostock hereby submits his response to the Motion to Dismiss filed by Defendant Clayton County.

I. INTRODUCTION

Mr. Bostock has pleaded claims of sexual orientation discrimination and gender stereotype discrimination. Defendant argues, however, that Mr. Bostock's Complaint should be dismissed because (1) sexual orientation discrimination is not a cognizable legal claim; (2) Mr. Bostock failed to state a claim for gender stereotyping; (3) Mr. Bostock failed to exhaust his administrative remedies with respect to the gender stereotyping claim; and (4) Mr. Bostock's gender

stereotyping claim is time-barred. As set forth in more detail below, none of these arguments has merit.

With respect to the sexual orientation discrimination claim, the better view is that such a claim is legally cognizable. As to the gender stereotyping claim, Mr. Bostock has alleged more than sufficient factual allegations concerning discriminatory treatment on the basis of gender non-conformity. With respect to the exhaustion claim, Mr. Bostock properly exhausted his remedies at the EEOC by filing a charge for sex discrimination, which covers all claims asserted in this lawsuit. Finally, Mr. Bostock's gender stereotype discrimination claim is timely because it relates back to the same conduct alleged in his original complaint and First Amended Complaint. Defendant's motion is without merit and should be denied.

II. FACTUAL AND PROCEDURAL HISTORY

The facts, as alleged in Mr. Bostock's Second Amended Complaint and which must be taken as true for purposes of the Motion to Dismiss are as follows. Mr. Bostock is a gay male. (Sec. Am. Compl. ¶ 12). Mr. Bostock began working for defendant on or about January 13, 2003. (*Id.* ¶ 11.) Mr. Bostock worked as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County and was charged with the primary responsibility of Clayton County CASA (Court Appointed Special Advocate). (*Id.* ¶ 13.) During the over 10 years Mr. Bostock worked for defendant, he received favorable performance evaluations and the

program received accolades. (*Id.* ¶ 14.) Clayton County CASA was awarded the established Program Award of Excellence by Georgia CASA in 2007. (*Id.*) Mr. Bostock received recognition from National CASA for his work and served on the National CASA Standards and Policy Committee in or about 2011 through 2012. (*Id.*)

Beginning in January 2013, Mr. Bostock became involved with a gay recreational softball league called the Hotlanta Softball League. (Sec. Am. Compl. ¶ 15.) Mr. Bostock actively promoted Clayton County CASA to the softball league as a source of volunteer opportunities for league members. (*Id.* ¶ 16.)

In the months after Mr. Bostock joined the softball league, his participation in the league and his sexual orientation and identity were openly criticized by one or more persons who had significant influence on the decision making of defendant. (*Id.* ¶ 17.) Shortly thereafter, in or around April 2013, defendant advised Mr. Bostock it was conducting an internal audit on the CASA program funds that Mr. Bostock managed. (*Id.* ¶ 18.) Mr. Bostock did not engage in any improper conduct with regard to program funds under his custody or control and alleges the Defendant initiated the audit as a pretext for discrimination based on his sexual orientation and failure to conform to gender stereotype. (*Id.* ¶¶ 19-20.) In fact, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where Mr. Bostock's supervisor was present, at least one individual made disparaging comments about Mr. Bostock's sexual orientation and identity and his participation in the softball league.

(*Id.* ¶ 21.) On or about June 3, 2013, Defendant terminated Mr. Bostock. (*Id.* ¶ 22.) The stated reason for Mr. Bostock's termination was conduct unbecoming of a county employee. (*Id.* ¶ 23.) That purported reason however, was a pretext for discrimination against Mr. Bostock based on his sex and/or sexual orientation. (*Id.*)

Mr. Bostock timely filed his charge of discrimination (copy attached as Ex. A) with the EEOC. As noted on the charge, Mr. Bostock checked the box for sex discrimination and stated, in part, "I believe that I have been discriminated against because of my sex (male/sexual orientation)." (Ex. A.)

On May 5, 2016, Mr. Bostock filed his initial Complaint, *pro se.* [Doc. No. 1.] After Mr. Bostock secured counsel, he filed his First Amended Complaint on August 2, 2016 and his Second Amended Complaint on September 12, 2016. (Doc. Nos. 4 and 10.]

III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

When deciding a motion to dismiss, courts must "accept[ ] the allegations in the complaint as true and construe[ ] them in the light most favorable to the plaintiff." *McCone v. Pitney Bowes, Inc.*, 582 Fed. Appx. 798, 799 (11th Cir.2014) (*quoting Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004)). To survive a motion to dismiss, a complaint's

"[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must also contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotation marks omitted). "A claim is facially plausible when the court can draw the reasonable inference that the defendant is liable for the misconduct alleged." *McCone*, 582 Fed. Appx. at 799-800 (emphasis added) (*quoting Iqbal*, 556 U.S. at 662) (internal quotation marks omitted). In this case, and as set forth below, Mr. Bostock's Second Amended Complaint clearly meets this standard.

B. Sexual Orientation Discrimination Claims are Cognizable Under Title VII

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In the Eleventh Circuit, the question of whether sexual orientation discrimination claims are cognizable under Title VII is "an open one."[1] *Isaacs v. Felder Servs., LLC*, 143 F. Supp.3d

[1] Additionally, there is no definitive authority in the U.S. Supreme Court or the Fifth and District of Columbia Circuits regarding Title VII coverage of sexual orientation discrimination claims. *See*, *e.g.*, *Espinosa v. Burger King Corp.*, No. 11-62503-CIV, 2012

1190, 1193 (M.D. Ala. 2016) (holding in part that claims of sexual orientation-based discrimination are cognizable under Title VII.) Although district courts in this circuit have reached differing conclusions on the issue, the better-reasoned view is that such claims are actionable. This view is most consistent with Supreme Court precedent, agency guidance, Eleventh Circuit precedent, and the purpose of Title VII.

First, Supreme Court precedent makes plain that Title VII' s prohibition against discrimination because of sex has become a robust source of protection for men and women workers alike without regard for hyper-technical distinctions. In *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) the Court stated: "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes" (emphasis added). *See also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) ("Proponents of the legislation stressed throughout the debates that Congress had always

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WL 4344323, at *5 (S.D. Fla. Sept. 21, 2012) ("[n]either the Supreme Court nor the Eleventh Circuit has specifically addressed this issue" of whether Title VII "appl[ies] to discrimination claims based on sexual orientation."); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 137 n.2 (S.D. Tex. 1993) (citing only cases from other circuits declaring Title VII inapplicable). Moreover, the Seventh Circuit recently vacated its opinion in *Hively v. Ivy Tech Comm. College*, 830 F.3d 698 (7th Cir. 2016) (cited by Defendant in its brief) and granted rehearing *en banc.* (Copy of order attached as Ex. B.)

intended to protect all individuals from sex discrimination in employment.")

In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a case addressing same-sex sexual harassment, the Court again reiterated this expansive interpretation of Title VII. The Court stated that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. . . ." *Id.* at 80. In rejecting the argument in *Oncale* that some mistreatment "because of . . . sex" might be outside Title VII's reach, the Supreme Court thus repudiated the notion that the scope of the statute is limited. In *Oncale*, the Court adopted perhaps the simplest test for whether discrimination had occurred: whether the conduct at issue met Title VII's "statutory requirements," i.e., whether the harassment occurred because of the employee's sex. *Id.* at 80.

The same test should apply to discrimination against gay and lesbian employees. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one's sex in relation to the sex of people to whom one is attracted. *See*, *e.g.*, *Isaacs*, 143 F. Supp. 3d at 1193-94. There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation.

Second, the Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcing Title VII, has held that sexual orientation discrimination is *necessarily* sex discrimination. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015) ("Indeed, we conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."). "Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* This is because "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex." *Id.*

As the EEOC correctly noted:

> When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination – whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.

2015 WL 4397641, at *4 (July 15, 2015). This interpretation is fully consistent with the Supreme Court's holding in *Oncale*.[2]

Baldwin is especially persuasive because the EEOC relied upon Eleventh Circuit precedent as part of its analysis. Specifically, the EEOC noted that "Title VII . . . prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, 'by definition,' discrimination because of the employee or applicant's sex." In support, the EEOC cited to the Eleventh Circuit's holding in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir.1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII]."). *See also Isaacs* 143 F. Supp.3d at 1193 ("Particularly compelling is [*Baldwin's*] reliance on Eleventh Circuit precedent.")

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[2] While the EEOC's interpretation of Title VII is not binding on this Court, it is entitled to respect to the extent that it is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The weight of deference afforded to agency interpretations under *Skidmore* depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 140. As noted above, *Baldwin* is particularly persuasive.

In *Isaacs*, the District Court for the Middle District of Alabama held that claims of sexual orientation-based discrimination are cognizable under Title VII.[3] The court first noted that the question of whether such claims were cognizable was an open one in the Eleventh Circuit. 143 F. Supp.3d at 1193. The plaintiff was a gay man who alleged that he suffered harassment based on his sexual orientation and also based on his failure to conform to gender stereotypes. The court endorsed the EEOC's view that claims of sexual orientation-based discrimination are cognizable under Title VII. 143 F. Supp.3d. at 1193.

This Court should follow *Isaac's* cogent analysis and careful attention to EEOC and Eleventh Circuit authority. In contrast, the district court cases cited by Defendant for its incorrect statement that "case law throughout the district courts within the Eleventh Circuit consistently holds that sexual orientation claims are not covered by Title VII" all *pre-date Baldwin* with the single exception of *Evans v. Ga. Reg'l Hosp.*, 2015 WL 5316694 (S.D. Ga. Sept. 10, 2015), which did not even address *Baldwin*.[4]

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[3] The court also held in part that summary judgment was appropriate under the particular facts of that case because the former employee failed to identify an appropriate comparator female employee. The case was obviously in a different posture under summary judgment than this case which is before this Court on a motion to dismiss.

[4] In one *post-Baldwin* decision not cited by Defendant, *Winstead v. Lafayette Cty. Bd. of Cty. Commissioners*, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601 (N.D. Fla. June 20, 2016), the court declined to follow *Baldwin* on the issue of

The only result that is consistent with both Supreme Court and EEOC precedent is that sexual orientation claims are covered under Title VII. The Court should deny Defendant's motion to dismiss Mr. Bostock's sexual orientation discrimination claim.

C. Mr. Bostock Has Stated a Claim For Gender Stereotype Discrimination

Mr. Bostock has set forth sufficient factual allegations to state a claim for gender stereotype discrimination. In the employment discrimination context, neither *Iqbal* nor *Twombly*, nor the Federal Rules of Civil Procedure, require a complaint to allege facts establishing each element of a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to survive a motion to dismiss. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding that a complaint need not contain "specific facts establishing a prima facie case of discrimination under the framework set forth by . . . McDonnell Douglas"); *see also McCone*, 582 Fed. Appx. at 801 n.4 (acknowledging that "*Twombly* effectively overruled *Swierkiewicz* when it rejected the old standard for dismissal" but that "this had no impact on *Swierkiewicz's* statement that a plaintiff is not required to plead a prima facie case of

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whether sexual orientation discrimination is discrimination "because of sex" under Title VII (although it held plaintiff's claim for gender stereotype discrimination was actionable). Given *Baldwin's* persuasive value, however, Mr. Bostock submits that *Isaacs* reached the correct result and that *Winstead* erred in declining to follow *Baldwin* on this specific point.

discrimination in order to survive dismissal"). Rather, as the Eleventh Circuit has recently reiterated, the purpose of Rule 8(a)(2)'s pleading requirements is to ensure that defendants receive fair notice of what the claim is and on what grounds it is made. *See Palm Beach Golf Center Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1260-1261 (11th Cir. 2015).

In this case, Mr. Bostock's Second Amended Complaint clearly meets this standard. The Second Amended Complaint details Mr. Bostock's position with Defendant, his participation in the softball league, and the ensuing criticism and discriminatory treatment suffered by Mr. Bostock. These allegations are more than sufficient to state a claim that is plausible on its face.

Defendant argues, however, that the Second Amended Complaint "is void of any factual support for [the gender stereotyping] claim, aside from a single conclusory allegation" regarding the audit. [Doc. No 13 at 6-7.] A simple reading of the Second Amended Complaint belies this argument.

Mr. Bostock's allegations, which must be taken as true, include: In the months after Mr. Bostock joined the softball league, his participation in the league and his sexual orientation and identity were openly criticized by one or more persons who had significant influence on the decision-making of Defendant (Sec. Am. Compl. ¶ 17). Similarly, Mr. Bostock alleged that during a meeting with the Friends of Clayton County CASA Advisory Board, at least one individual

made disparaging comments about Mr. Bostock's sexual orientation and identity. (*Id.* ¶ 21). Mr. Bostock has further alleged that the internal audit and the stated reason for his termination were simply a pretext for discrimination based on his sex and/or sexual orientation. (*Id.* ¶ 23). Thus, Mr. Bostock has sufficiently pleaded a claim for gender stereotype discrimination.

Defendant cites *Anderson v. Napolitano*, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010). But in that case, the court found that the plaintiff's complaint did not include instances of harassment based on gender stereotyping and consisted solely of instances of harassment based on sexual orientation. 2010 WL 431898 at *5. This is in contrast to Mr. Bostock, who has alleged that he was subject to comments and discrimination on both fronts. *See Prowel v. Wise Bus. Forms*, 579 F.3d 285, 292 (3rd. Cir. 2009) (finding that where evidence of harassment could plausibly be interpreted as being based on both sexual orientation and failure to conform to gender stereotypes, it was a question of fact for the jury).

Defendant also relies upon *Evans*, 2015 WL 5316694, at *2-3. But in *Evans*, the court appears to have misunderstood the distinction between gender stereotype discrimination and sexual orientation discrimination. In particular, the court noted that "to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation." 2015 WL 5316694, at *3. This is contrary to the Supreme Court's precedent that gender stereotype discrimination is a

cognizable claim. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Mr. Bostock has set forth sufficient factual allegations to state a claim for gender stereotype discrimination. The Court should deny Defendant's motion.

D. Mr. Bostock Properly Exhausted His Administrative Remedies With Respect To His Gender Stereotyping Claim

Defendant alleges that Mr. Bostock somehow failed to exhaust his administrative remedies with respect to his gender stereotyping claim. This argument is meritless.

As an initial matter, courts are "extremely reluctant to allow procedural technicalities to bar claims brought under [Title VII]." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970).[5] Thus, "'the scope of an EEOC complaint should not be strictly interpreted'" *Id.* at 465 (citation omitted).

In this case, Mr. Bostock's EEOC charge, which was filed *pro se,* "checked" the *only* box he could applicable to *both* sexual orientation and gender stereotyping discrimination: Sex. (Ex. A.) Moreover, Mr. Bostock

[5] As the Court is well aware, "the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit." *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

stated in the charge that he believed he had been discriminated against on the basis of his sex. (*Id.*) Thus, he clearly exhausted this claim at the EEOC level. *See Rhea v. Dollar Tree Stores, Inc.*, No. 04-2554MIV, 2004 WL 3313616, at *3 (W.D. Tenn. August 26, 2004) (holding in part that where plaintiff amended a complaint alleging sexual orientation discrimination to add gender stereotyping claims that "[t]he amendments do not fail on their face for failure to exhaust administrative remedies. Both plaintiffs alleged discrimination based on sex at the EEOC level by checking the appropriate box on the complaint form.") Defendant's arguments on this issue are without merit and its motion should be denied.

E. Mr. Bostock's Gender Stereotyping Claim is Timely

Mr. Bostock's gender stereotyping claim is timely because it relates back to the same conduct alleged in his Complaint and First Amended Complaint. Rule 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

In this case, Mr. Bostock's allegations concerning gender stereotype discrimination arise from the same conduct set forth in his original pleading. Specifically, the allegations relate to his sexual orientation and

identity being openly questioned and/or commented upon by individuals who had significant influence on the decision making of Defendant. Since the claim arises out of the same conduct as already set forth in the original complaint, it clearly relates back for purposes of the statute of limitations. *See Rhea*, 2004 WL 3313616 at *3 (holding in part that where plaintiff originally brought a sexual orientation discrimination claim and sought to amend to add claims of sexual stereotyping that "[t]o the extent a claim for sex-stereotyping arises out of the same conduct alleged in the original complaint, any amendment would relate back.").

IV. CONCLUSION

For the foregoing reasons, Mr. Bostock requests that the Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

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[Certificate Of Compliance Omitted]

CHARGE OF DISCRIMINATION	Charge Presented To:	Agency(ies) Charge No(s).:
This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	☐ FEPA ☒ EEOC	410-2013-06136

_____ and EEOC
State or local Agency, if any

Name *(indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Gerald L. Bostock		

Street Address	City, State and ZIP Code
[redacted]	

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. *(Include Area Code)*
CLAYTON COUNTY BOARD OF COMMISSIONERS - JUVENILE COURT	500 or More	(770) 477-3208

Street Address	City, State and ZIP Code
112 Smith Street, Jonesboro, GA 30236	

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*	DATE(S) DISCRIMINATION TOOK PLACE **Earliest**	**Latest**
☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER *(Specify)*	06-03-2013	06-03-2013 ☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I was hired by the above named employer on January 13, 2003, as a Court Appointed Special Advocate Program Coordinator. Around October 2007, I was promoted to Child Welfare Services Coordinator. On June 3, 2013, I was notified by the Director of Juvenile Court Services and Chief of Staff of Juvenile Court Services that I was being discharged.

The reason given for my discharge was "Violation of Clayton County Civil Services Rules."

I believe that I have been discriminated against because of my sex (male/sexual orientation), in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY – *When necessary for State and Local Agency Requirements*

I declare under penalty of perjury that the above is true and correct. Sep 05, 2013 *Date* [Illegible] *Charging Party Signature*	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(month, day, year)*

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 11, 2016

By the Court:

No. 15-1720

KIMBERLY HIVELY,
Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE, South Bend,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:14-cv-01791-RL-CAN

Rudy Lozano,
Judge.

ORDER

(Filed Oct. 11, 2016)

The Petition for Rehearing En Banc is **GRANTED**, and the panel's opinion and judgment are **VACATED**.

The court will announce the date for oral argument in a separate order.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

GERALD LYNN BOSTOCK,	)	
Plaintiff,	)	**CIVIL ACTION**
v.	)	**NO: 1:16-cv-01460-**
CLAYTON COUNTY,	)	**ODE-WEJ**
Defendant.	)	

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

(Filed Oct. 27, 2016)

I. INTRODUCTION

Grade school students watch Schoolhouse Rock to learn about our government. The classic song "Three Ring Government" taught students about the separation of powers, and that Congress in particular is tasked with writing and passing the laws. As the song states, "No one part can be more powerful than any other is. Each controls the other you see, and that's what we call checks and balances." In this case, however, Plaintiff asks this Court to ignore the separation of powers, disregard the founding tenants of our country, and to instead, judicially amend Title VII for some perceived public policy benefit. Although admittedly over-simplified, this analysis shows why Plaintiff's claims all fail and why this Court should dismiss Plaintiff's Second Amended Complaint.

Plaintiff's Second Amended Complaint seeks redress for sexual orientation discrimination. When confronted with the daunting fact that sexual orientation discrimination is not covered by Title VII, Plaintiff urges this Court to judicially modify Title VII to include protection for sexual orientation claims, arguing this is the "better view" of the statute. [Doc. 14, p. 2]. Of course, it is without dispute that Title VII was not designed or written to include protections for sexual orientation. Instead, Plaintiff asks this Court to adopt the EEOC's interpretation of the statute (which is contrary to nearly every single case that has ever interpreted Title VII) that discrimination due to an individual's sex includes sexual orientation discrimination. Frankly, this misreading of the statute creates a palpable friction with the countless court decisions issued both before and after the EEOC's politically motivated decision in Baldwin v. Foxx. Simply stated, if Congress wants Title VII to cover sexual orientation discrimination, then Title VII must be amended to include it. Accordingly, Plaintiff's sexual orientation claim must fail.

Furthermore, Plaintiff's gender stereotyping claim fails because he has not (and apparently cannot) identify a single characteristic that makes him different than the typical male, aside from his sexual orientation. Because sexual orientation alone cannot support a gender stereotyping claim, and because Plaintiff's Second Amended Complaint is devoid of any factual allegations to otherwise support a gender stereotyping claim (despite amending his pleadings

multiple times already), Plaintiff has failed to state a gender stereotyping claim.

Finally, contrary to Plaintiff's claims, he did not include a gender stereotyping claim in his EEOC charge, nor did he allege facts to support such a claim in his original Complaint. Therefore, his gender stereotyping claim is subject to dismissal because it was not administratively exhausted and is now time-barred.

For all of these reasons, Plaintiff's Second Amended Complaint should be dismissed in its entirety.

II. LEGAL ARGUMENT

A. Title VII Does Not Cover Sexual Orientation Discrimination

Plaintiff spends much of his brief asking this Court to adopt what he calls the "better view" that Title VII covers sexual orientation discrimination. The plain language of the statute, however, speaks for itself. Title VII protects individuals from discrimination due to race, color, religion, sex or national origin; not from discrimination due to their sexual orientation. 42 U.S.C. § 2000e-2(a)(1); Stevens v. State Dep't of Corr., 2015 WL 1245355, at *7 (N.D. Ala. Mar. 18, 2015) ("Noticeably absent from the statue [sic] is any protection against discrimination on account of sexual orientation.").

The legislative history of Title VII shows that sexual orientation was not intended to be protected by

Title VII. When Congress passed Title VII as part of the Civil Rights Act of 1964, its legislative discussions focused on protecting against discrimination due to race, religion and national origin. *Sex Discrimination*, 84 Harv. L. Rev. 1166, 1166 (1971). At the last minute, without prior hearing or debate, sex was added as a protected characteristic. Id., at 1167. Nothing in the legislative history or plain language of the statute suggests that Congress intended to protect against discrimination due to one's sexual orientation. In fact, since that time, Congress repeatedly has introduced ENDA, The Employment Non-Discrimination Act, explicitly designed to add sexual orientation to the protections under Title VII. This Act has never passed. Of course, ENDA would be superfluous if sexual orientation was already covered by Title VII.[1] Plaintiff argues that there is no precedent on this issue in this Circuit. However, in Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979), the Fifth Circuit recognized "discharge for homosexuality is not prohibited by Title VII."[2]

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[1] See Thomas v. Keystone Real Estate Group, LP, 2015 WL 1471273, at *2 (M.D. Pa. Mar. 31, 2015) (Title VII does not protect against sexual orientation discrimination and Congress repeatedly has rejected legislation to amend Title VII to include it); Johnson v. Shinseki, 2013 WL 1987352, at *2 (E.D. Mo. May 13, 2013) (same); Mowery v. Escambia County Util. Auth., 2006 WL 327965, at *9, (N.D. Fla. Feb. 10, 2006) (Congress "specifically and repeatedly" rejected ENDA).

[2] Fifth Circuit decisions issued prior to September 30, 1981 are binding on courts within the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981).

Even if Blum was not binding on this Court, nearly every single court that has considered the question has ruled that Title VII does not include protection for discrimination due to sexual orientation. In his reply brief, Plaintiff claims that this plain language reading of Title VII is "hyper-technical" [Doc. 14, p. 6], and that Clayton County's citations are primarily to cases issued prior to the EEOC's Baldwin v. Foxx decision [Doc. 14, pp. 10-11], wherein the EEOC (apparently intent on re-writing provisions of Title VII) espoused its view that Title VII covers sexual orientation discrimination. Although the EEOC has taken the radical position that Title VII should be interpreted to cover characteristics that are not included within its plain language, a multitude of courts within the Eleventh Circuit and elsewhere disagree with the EEOC's view and have refused to follow Baldwin. See, e.g., Dingle v. Bimbo Bakeries USA/Entenmann's, 624 F. App'x 57 (2d Cir. 2015) (noting that discrimination based on perceived sexual orientation was not cognizable under Title VII); Brandon v. Sage Corp., 808 F.3d 266, 270 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation."); Murray v. North Carolina Dept of Pub. Safety, 611 F. App'x 166, 166 (4th Cir. 2015) (affirming grant of motion to dismiss without need for oral argument, citing binding circuit precedent that "Title VII does not protect against sexual orientation discrimination"); Cargian v. Breitling USA, Inc., 2016 WL 5867445, at *4 (S.D.N.Y. Sept. 29, 2016) ("Despite significant changes in the broader legal landscape since the Second Circuit's decision in Simonton, the prevailing law in this and every other Circuit to

consider the question is that, in the Title VII context, courts must distinguish between actionable gender-stereotyping claims and non-actionable sexual orientation claims."); Thompson v. CHI Health Good Samaritan Hosp., 2016 WL 5394691, at *2 (D. Neb. Sept. 27, 2016) ("[N]either Nebraska law nor Title VII encompass discrimination based upon sexual orientation,"); Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 618 (S.D.N.Y. 2016) ("[D]iscrimination based on sexual orientation will not support a claim under Title VII"); Ashford v. Danberry at Inverness, 2016 WL 4615782, at *11 (N.D. Ala. Sept. 6, 2016) ("[A]ny assertion of discrimination based upon sexual orientation does not state a claim under Title VII."); Somers v. Express Scripts Holdings, 2016 WL 3541544, at *3 (S.D. Ind. June 29, 2016) ("Under binding precedent currently in effect, discrimination or harassment based on a person's sexual orientation alone is not actionable under Title VII. In other words, Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation." (citations omitted)); Magnusson v. Cty. of Suffolk, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) ("Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here."); Hinton v. Virginia Union Univ., ___ F. Supp. 3d ___, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016) ("More importantly, the reasons offered in decisions that have adopted the EEOC's position are matters

that lie within the purview of the legislature, not the judiciary. Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment. In sum, Title VII does not encompass sexual orientation discrimination claims, and cannot be supplanted by the merely-persuasive power of the EEOC's decision."), *motion to certify appeal denied*, 2016 WL 3922053 (E.D. Va. July 20, 2016); Burrows v. Coll. of Cent. Fla., 2015 WL 5257135, at *2 (MD. Fla. Sept. 9, 2015) (denying motion for reconsideration on grant of employer's motion for summary judgment even though plaintiff cited to EEOC's recent decision in Baldwin v. Foxx as intervening change in law). Given the plain language of the statute, the legislative history and the overwhelming authority cited above and in the County's opening brief, Plaintiff's sexual orientation claim fails.

Undeterred, Plaintiff cites the Supreme Court's decision in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) to support his argument that this Court should judicially modify Title VII. Oncale, however, provides no such support. In Oncale, the Supreme Court ruled that Title VII's protection against sexual harassment included protection against sexual harassment perpetrated by someone of the same sex, so long as the harassment was still "because of sex." Essentially, the Oncale decision held that sexual harassment is unlawful, regardless of the gender of the

individual who engages in such conduct. It is an unfathomable leap to claim Oncale states or even implies that sexual orientation is protected by Title VII. Plaintiff's argument otherwise misses the point – "because of sex" is very different than "because of sexual orientation." See King v. Super Serv., Inc., 68 Fed.Appx. 659, 664 (6th Cir. 2003) ("animosity directed towards the plaintiff because of his apparent sexual orientation is . . . different from discrimination on the basis of sex"); Bibby v. Phil. Coca-Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (noting difference between "because of sex" and sexual orientation, the latter of which "Congress has not yet seen fit" to protect); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (same).

Similarly, the material flaw in the Baldwin v. Foxx EEOC decision relied upon by Plaintiff is that it, too, believes that "because of sex" includes sexual orientation. Sex, however, simply does not reference ones sexual orientation.[3]

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[3] Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) does not support Plaintiff's proposed amendment to Title VII. Parr concluded that racial discrimination prohibits discriminating against someone who is in an interracial marriage. In that context, the discrimination is "because of race, albeit the race of that individual's spouse. That is a natural extension of the race discrimination analysis, and has no application or role in interpreting the difference between someone's sex and sexual orientation, a wholly different analysis. See Partners Healthcare Sys. v. Sullivan, 349 F.Supp.2d 29, 39 (D. Mass. 2007).

B. Plaintiff Has Failed To State A Claim For Gender Stereotyping

Plaintiff's Second Amended Complaint is completely devoid of any factual allegations to support a gender stereotyping claim, aside from Plaintiff's allegation that he is a homosexual. Of course, this fact alone cannot support a gender stereotyping claim, as this would have the effect of re-writing Title VII to include sexual orientation discrimination.

Plaintiff alleges that he has stated a claim for gender stereotyping because his Second Amended Complaint claimed that he participated in a softball league primarily for homosexuals, and received criticism and different treatment.[4] [Doc. 14, p. 12]. This demonstrates a fundamental misunderstanding of what a gender stereotyping claim is, and are mere conclusions, not facts.

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[4] Plaintiff argues that he does not need to plead facts to support every aspect of a *prima facie* case of gender stereotyping discrimination. Although a plaintiff is not required to plead facts establishing every element of a *prima facie* discrimination case, he still "must provide 'enough factual matter (taken as true) to suggest' intentional . . . discrimination." See, e.g., Castillo v. Allegro Resort Marketing, 603 Fed.Appx. 913, 917 (11th Cir. 2015). See also Henderson v. JP Morgan Chase Bank, NA., 436 Fed.Appx. 935, 937 (11th Cir. 2011) (complaint needed sufficient factual detail "to support reasonable inference that Chase engaged in racial discrimination against Henderson in relation to her loan"); Norwood v. Costco Wholesale Corp., 2014 WL 988863, at *5 (N.D. Ga. 2014) (notwithstanding Swierkiewicz, plaintiff must allege facts sufficient to support reasonable inference that employer discriminated against him on account of protected characteristic).

Specifically, the seminal Price Waterhouse decision found that a female employee could state a claim for sex discrimination based upon gender stereotyping when she alleged that she did not walk, talk or dress in the stereotypical feminine way, and instead exhibited more masculine characteristics. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Courts repeatedly have stated that such a gender stereotyping claim is not a piggyback for a sexual orientation claim under another name, but instead, that the individual must allege that they were discriminated against because they did not act like the typical male for a reason other than the mere fact that they are homosexual. See Simonton, 232 F.3d at 38 (noting that the gender stereotyping theory "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine"); Gilbert v. Country Music Ass'n, 432 Fed.Appx. 516, 520 (6th Cir. 2011) (dismissing claim for gender stereotyping due to lack of allegations to support claim, and noting "for all we know, Gilbert fits every male 'stereotype' save one – sexual orientation – and that does not suffice to obtain relief under Title VII"); Dawson v. Bumble & Bumble, 398 F.3d 211, 219 (2d Cir. 2005) (noting that courts "have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes"); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (holding that "theory of sex stereotyping under *Price Waterhouse* is

not broad enough to encompass" a theory based solely on sexual orientation and that this did not conform to traditional masculine roles). As noted in Clayton County's Motion to Dismiss, at least one court within this circuit has dismissed a gender stereotyping claim where the plaintiff failed to allege what traits or circumstances make him different than the stereotypical male (aside from their sexual preference). See Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010). Here, Plaintiff has not alleged any facts whatsoever to support a gender stereotyping claim. Plaintiff's attempt to claim that he was subjected to commentary based upon his sexual orientation and identity is simply nowhere near enough to state a gender stereotyping claim. First of all, his assertions are nothing more than legal conclusions and contain no factual detail. Furthermore, even if Plaintiff provided any factual detail, he has not alleged that he is in any way different than a typical male, aside from his sexual orientation. Under these facts, he has failed to allege anything near a gender stereotyping claim, and instead, is again asking this court to judicially modify Title VII. Respectfully, this Court should decline the invitation.

C. Plaintiff Failed To Allege Gender Stereotyping In His EEOC Charge

Even if Plaintiff's Complaint stated a claim for gender stereotyping, his claim still fails because he simply did not include any such claim in his EEOC charge. Plaintiffs only response to this argument is that he checked the box for "sex" discrimination, and

therefore, a gender stereotyping claim is within the scope of his EEOC charge.

This argument fails. In this regard, the "crucial element of a charge of discrimination is the factual statement contained therein." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462 (5th Cir. 1970). "The selection of the type of discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal conclusion to the facts alleged." Id.

The Eleventh Circuit has held that merely checking a particular box on an EEOC charge does not satisfy the exhaustion requirement where the plaintiff provides no supporting facts in connection with the claim at issue. Chanda v. Engelhard/ICC, 234 F.3d 1219, 1224 (11th Cir. 2000). See also Jerome v. Marriott Residence Inn Barcelo Crestline/AIG, 211 Fed.Appx. 844, 846-847 (11th Cir. 2006) (circling "wages" on EEOC questionnaire without providing any supporting facts insufficient to exhaust wage discrimination claim); Houston v. Army Fleet Services, LLC, 509 F.Supp.2d 1033, 1043 (M.D. Ala. 2007) ("Indeed, checking the correct box alone is not sufficient to satisfy the filing requirement when no factual particulars relating to the claim are disclosed to the EEOC").

Here, it is undisputed that Plaintiff checked the sex box on his EEOC charge, but did not include a single factual statement or allegation that indicated he was discriminated against due to gender stereotyping. For this reason, and because he alleged only that he

was subject to sexual orientation discrimination, any gender stereotyping claim is outside the scope of his charge and was never administratively exhausted. Norris v. Hiakin Drivetrain Components, 46 Fed.Appx. 344, 346 (6th Cir. 2002) (claim for same-sex sexual harassment cannot be reasonably expected to grow out of EEOC charge asserting discrimination based on sexual orientation); Lankford v. BorgWarner Diversified Transmission Products, Inc., 2004 WL 540983, at *3 (S.D. Indiana Mar. 12, 2004) ("a claim of discrimination based on sex is not reasonably related to, nor may it be expected to grow out of, a charge of discrimination based on sexual orientation.")

D. Plaintiff's Gender Stereotyping Claim Is Untimely

Plaintiff alleges only that his claim is timely because it arises out of the same conduct as set forth in his original pleading. However, Plaintiff has not (whether in the original Complaint, the Amended Complaint or the Second Amended Complaint) alleged any facts or circumstances that may support a gender stereotyping claim, and certainly did not do so in his original Complaint, which included allegations related solely to Plaintiff's sexual orientation. Accordingly, Plaintiff's attempts to add a gender stereotyping claim are untimely and otherwise fail as a matter of law.

III. CONCLUSION

For the reasons stated herein, Clayton County respectfully requests that the Court **DISMISS** Plaintiff's Second Amended Complaint, with prejudice.

[Certificate Of Compliance Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK, Plaintiff, v. CLAYTON COUNTY, Defendant.	)))))))	CIVIL ACTION File No: 1:16-CV-01460-ODE-WEJ

PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

(Filed Nov. 17, 2016)

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and LR 72.1.B, NDGa, Plaintiff Gerald Bostock files these Objections to the Magistrate Judge's Final Report and Recommendation [Doc. 16].

I. INTRODUCTION

The Magistrate Judge erroneously ignored established legal principles and Supreme Court precedent in recommending the dismissal of Mr. Bostock's claims of sexual orientation discrimination and gender stereotype discrimination. With respect to the sexual orientation discrimination claim, this type of discrimination is actionable under Title VII of the Civil Rights Act of 1964 ("Title VII). As to the gender stereotyping claim, Mr. Bostock has alleged sufficient factual allegations

concerning discriminatory treatment on the basis of gender non-conformity. Finally, as to the exhaustion issue, Mr. Bostock properly exhausted all available remedies at the EEOC by filing a charge for sex discrimination, which encompasses all the claims asserted in this lawsuit. As set forth in greater detail below, Mr. Bostock requests that the Court reject the Report and Recommendation and deny Defendant's Motion to Dismiss.

II. PROCEDURAL HISTORY

On May 5, 2016, Mr. Bostock filed his initial Complaint, *pro se.* [Doc. 1.] After Mr. Bostock secured counsel, he filed his First Amended Complaint on August 2, 2016 and his Second Amended Complaint on September 12, 2016. [Docs. 4, 10.]

On September 26, 2016, Defendant filed a Motion to Dismiss the Second Amended Complaint. [Doc. 13.] On November 3, 2016, the Magistrate Judge issued his Final Report and Recommendation, recommending that Plaintiff's complaint be dismissed with prejudice. [Doc. 16.] Mr. Bostock objects to the Magistrate Judge's erroneous legal determinations in their entirety, and seeks to proceed with discovery and preparation for trial of his claims.

III. OBJECTIONS TO SPECIFIC RULINGS

Mr. Bostock objects specifically to the erroneous rulings of the Magistrate Judge that:

(1) A sexual orientation claim may not be brought under Title VII;

(2) Plaintiff failed to state a gender stereotyping claim;

(3) Plaintiff failed to exhaust administrative remedies with regard to his gender stereotyping claim.

For the reasons set forth below, Mr. Bostock respectfully contends that the Magistrate Judge's rulings on these three issues were erroneous.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

Under Fed. R. Civ. P. 72 and 28 U.S.C. § 636, this Court reviews the recommended order of a Magistrate Judge to determine if it is either "clearly erroneous" or "contrary to law." Normally, factual determinations fall under the deferential "clearly erroneous" standard, while legal issues and dispositive matters fall under the "contrary to law" standard, which mandates *de novo* review. Mixed questions of fact and law are reviewed *de novo.* Wright, Miller & Marcus, Fed. Prac. & Proc. § 3070.2 (2008) (collecting and discussing numerous authorities).

B. The Magistrate Judge Erred in Determining that Sexual Orientation Discrimination Claims are not Cognizable Under Title VII

The Magistrate Judge determined that sexual orientation discrimination claims are not cognizable under Title VII. For the reasons set forth below, Mr. Bostock respectfully contends that the Magistrate Judge erred on this issue.

1. *The Fifth Circuit's Decision in Blum v. Gulf Oil Corp is not Dispositive*

The Magistrate Judge relied in part upon *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), for the proposition that sexual orientation claims are not cognizable under Title VII. Mr. Bostock does not dispute that the Fifth Circuit in *Blum* stated that "[d]ischarge for homosexuality is not prohibited by Title VII[,]" 597 F.2d at 938, but in *Blum*, the primary issue on appeal was whether the defendant articulated a legitimate non-discriminatory reason for the plaintiff's discharge. The Fifth Circuit held that it did. 596 F.2d at 937. After reaching this decision, which effectively resolved the appeal, the Fifth Circuit went on, however, to "comment briefly" on other issues raised on appeal. It was in this section of the opinion in which the Fifth Circuit made its statement regarding discharge for homosexuality.[1] In support of this proposition, the Fifth Circuit

[1] *See* Black's Law Dictionary (9th ed.2009) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case

did not recite any analysis and simply cited to its prior holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

Smith, however, did not specifically address the issue of whether sexual orientation claims are cognizable under Title VII. Rather, in *Smith* the court considered whether discrimination on the basis of gender stereotyping (the plaintiff was not hired because the defendant considered him "effeminate") was a viable claim under Title VII.[2] The Fifth Circuit held that it was not. 569 F.2d at 327. But *Smith* is no longer good law on this point since its holding "has clearly been abrogated by subsequent Supreme Court cases." *See Winstead v. Lafayette County Board of County Commissioners*, No. 1:16-CV00054-MW-GIU, 2016 WL 3440601, at *6, n.4 (N.D. Fla. June 20, 2016); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The *Winstead* court also noted that "[o]f course the EEOC has changed course" also on this issue. *Id.* In sum, "[e]very pillar supporting the reasoning of the *Smith* court has been knocked down." *Id.* Thus, "*Smith* is one of many examples of a parsimonious reading of Title VII failing to stand the test of time." *Id.* Because the entire basis on which *Blum* based its statement regarding sexual orientation discrimination has been

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and therefore not precedential (although it may be considered persuasive)").

[2] *Smith* noted in a footnote that "[t]he EEOC itself has ruled that adverse action against homosexuals is not cognizable under Title VII", 569 F.2d at 327 n.1, (which is no longer the case).

abrogated, Mr. Bostock respectfully contends that *Blum* is not controlling on this issue.

2. *The Eleventh Circuit's Decision in Fredette v. BVP Mgmt. Assocs did not Decide the Issue of Sexual Orientation Discrimination Claims Under Title VII*

The Magistrate Judge also stated that, even without *Blum*, "one could argue that the Eleventh Circuit is squarely in line with the weight of authority against application of Title VII to sexual orientation discrimination claims" [Doc. 16. n.4] and cited *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997). The Magistrate Judge "could argue" this, and essentially did in his Final Report and Recommendation, but this is not the law. *Fredette* deliberately left the issue of sexual orientation discrimination entirely open and is not indicative one way or the other of how the Eleventh Circuit would determine this issue.

Fredette held that "when a homosexual male supervisor solicits sexual favors from a male subordinate . . . the male subordinate can state a viable Title VII claim for gender discrimination." 112 F.3d at 1510. The Eleventh Circuit specifically emphasized the "narrowness" of its holding and stated that "[w]e do not hold that discrimination because of sexual orientation is actionable." *Id.* It thus did not hold that sexual orientation discrimination claims were not actionable as sex discrimination, it simply did not determine the issue one way or the other.

Although various district courts have interpreted *Fredette* differently, the interpretation that *Fredette* left the issue open is most consistent with the Eleventh Circuit's pronouncement regarding the "narrowness" of its holding. Compare *Winstead*, 2016 WL 3440601, at *5 ("this Court's interpretation—that *Fredette* left the issue open—is hardly unique"); *Mowery v. Escambia Cty. Utils. Auth.*, No. 3:04cv382, 2006 WL 327965, at *8 (N.D. Fla. Feb. 10, 2006) (characterizing *Fredette* as not "holding that discrimination because of sexual orientation is not actionable"); *Rodriguez v. Alpha Inst. of S. Fla., Inc.*, No. 10-80714–CIV, 2011 WL 5103950, at *5 (S.D. Fla. Oct. 27, 2011) (same), with *Stevens v. Ala. Dept of Corr.*, No. 1:12cv3782, 2015 WL 1245355, at *7 (N.D.Ala. Mar. 18, 2015) (suggesting that *Fredette* foreclosed claims of sexual orientation discrimination under Title VII); *Fitzpatrick v. Winn–Dixie Montgomery, Inc.*, 153 F.Supp.2d 1303, 1306 (M.D. Ala.2001) (citing *Fredette* for the proposition that "[s]exual orientation is not a protected class under Title VII.")

3. *Congress' Failure to Amend Title VII does not Provide a Basis to Find Sexual Orientation Discrimination Claims are not Cognizable*

The Magistrate Judge also relied on the fact that "supporters of an extension have fought unsuccessfully in Congress to amend Title VII since the mid-1970s." [Doc. 16, p. 10.] The Supreme Court, however, has warned against relying on Congressional inaction as an interpretative tool. "[S]ubsequent legislative

history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.'" *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted); accord *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.") (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *United States v. Price*, 361 U.S. 304, 310-311 (1960) ("nonaction by Congress affords the most dubious foundation for drawing positive inferences."). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Ben Guar. Corp.*, 496 U.S. at 650 (internal quotations omitted). Moreover, "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21; *see also id.* ("Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment.")

There is no need to amend Title VII to prohibit sexual orientation discrimination. Title VII already makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Supreme Court precedent makes plain that Title VII's prohibition against discrimination because of sex has become a robust source of protection for men and women workers alike without regard for hyper-technical distinctions. In *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) the Court stated: "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes" (emphasis added). *See also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) ("Proponents of the legislation stressed throughout the debates that Congress had always intended to protect all individuals from sex discrimination in employment.")

In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a case addressing same-sex sexual harassment, the Court again reiterated this expansive interpretation of Title VII. The Court stated that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. . . ." *Id.* at 80. In rejecting the argument in *Oncale* that some mistreatment "because of . . . sex" might be outside Title VII's reach, the Supreme Court thus repudiated the notion that the scope of the statute is limited. In *Oncale*, the Court adopted perhaps the simplest test for whether

discrimination had occurred: whether the conduct at issue met Title VII's "statutory requirements," i.e., whether the harassment occurred because of the employee's sex. *Id.* at 80.

The same test should apply to discrimination against gay and lesbian employees. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one's sex in relation to the sex of people to whom one is attracted. *See*, *e.g.*, *Isaacs*, 143 F. Supp. 3d at 1193-94. There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation and no need to amend the statute to cover this type of discrimination.

4. *The EEOC's Interpretation of Title VII is Entitled to Deference*

Mr. Bostock also respectfully submits that the Magistrate Judge failed to give proper deference to the position of the Equal Employment Opportunity Commission ("EEOC") in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015) that sexual orientation discrimination is necessarily sex discrimination. As the Magistrate Judge correctly noted, while the EEOC's interpretation of Title VII is not binding on this Court, it is entitled to respect to the extent that it is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The weight of deference afforded to agency interpretations under *Skidmore* depends upon "the thoroughness evident in its

consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 140. Here, the Magistrate Judge made "no judgment about the thoroughness evident in Foxx's consideration or the validity of its reasoning, but note[d] its inconsistency with the EEOC's earlier pronouncement." [Doc. 16 at 12.][3] Mr. Bostock respectfully contends that the Magistrate Judge erred in failing to consider the thoroughness and validity of *Baldwin*.

In *Baldwin*, the EEOC concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."). "Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* This is because " '[s]exual orientation' as a concept cannot be defined or understood without reference to sex." *Id.*

As the EEOC correctly noted:

> When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not

[3] The Magistrate Judge also stated that "Title VII is a creation of Congress and, if Congress is so inclined, it can amend the statute to provide a claim for sexual orientation discrimination. It is not the province of unelected jurists to effect such an amendment" [Doc. 16 at 13.1.] For the reasons stated in Part B.3., Mr. Bostock contends that no amendment of Title VII is necessary to provide for protection against sexual orientation discrimination.

> whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination – whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.

2015 WL 4397641, at *4 (July 15, 2015). "[S]exual orientation is inseparable from and inescapably linked to sex and, therefore . . . allegations of sexual orientation discrimination involve sex-based considerations." *Id.* at *5. This interpretation is fully consistent with the Supreme Court's holding in *Oncale.*

Baldwin is also especially persuasive because the EEOC relied upon Eleventh Circuit precedent as part of its analysis. Specifically, the EEOC noted that "Title VII . . . prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, 'by definition,' discrimination because of the employee or applicant's sex." *Id.* at *7. In support, the EEOC cited to the Eleventh Circuit's holding in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated

against because of his race [in violation of Title VII].”). The EEOC noted that an “employment action based on an employee’s relationship with a person of another race necessarily involves considerations of the employee’s race, and thus constitutes discrimination because of the employee’s race” and that “[t]his analysis is not limited to the context of race discrimination” since “Title VII ‘on its face treats each of the enumerated categories’ – race, color, religion, sex, and national origin – ‘exactly the same.” *Id. at *6-7* (citing *Price Waterhouse*, 490 U.S. at 243 n.9; *See also Isaacs* 143 F. Supp.3d at 1193 (“Particularly compelling is [*Baldwin’s*] reliance on Eleventh Circuit precedent.”)

In *Isaacs*, the District Court for the Middle District of Alabama held that claims of sexual orientation-based discrimination are cognizable under Title VII. The court endorsed the EEOC’s view that claims of sexual orientation-based discrimination are cognizable under Title VII. 143 F. Supp.3d. at 1193. The cogent analysis and careful attention to EEOC and Eleventh Circuit authority in *Isaac* is the only analysis that makes sense.[4] It is the only result that is consistent with both Supreme Court and EEOC precedent is that sexual orientation claims are covered under Title VII.

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[4] In *Winstead*, the court declined to follow *Baldwin* on the issue of whether sexual orientation discrimination is discrimination “because of sex” under Title VII (although it held plaintiff’s claim for gender stereotype discrimination was actionable). Given *Baldwin’s* persuasive value, however, Mr. Bostock submits that *Isaacs* reached the correct result and that *Winstead* erred in declining to follow *Baldwin* on this specific point.

C. The Magistrate Judge Erred in Determining that Mr. Bostock Has Not Stated a Claim For Gender Stereotype Discrimination

Mr. Bostock contends that the Magistrate Judge erred in dismissing his complaint for gender stereotype discrimination. The Magistrate Judge correctly acknowledged that Mr. Bostock was not required to allege facts establishing each element of a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to survive a motion to dismiss, *see Swierkiewicz v. Sorema NA.*, 534 U.S. 506, 508 (2002), but determined that the Second Amended Complaint "contains no allegations that plaintiff suffered discrimination based on his employer's belief that he failed to conform to masculine stereotypes." [Doc 16 at 16.]

The purpose of Rule 8(a)(2)'s pleading requirements is to ensure that defendants receive fair notice of what the claim is and on what grounds it is made. *See Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1260-1261 (11th Cir. 2015). In this case, Mr. Bostock's Second Amended Complaint meets this standard. Mr. Bostock's allegations, which must be taken as true, include: in the months after Mr. Bostock joined the softball league, his participation in the league and his sexual orientation and identity were openly criticized by one or more persons who had significant influence on the decision-making of Defendant. (Sec. Am. Compl. ¶ 17). Similarly, Mr. Bostock alleged that during a meeting with the Friends of Clayton County CASA Advisory Board, at least one individual made disparaging comments

about Mr. Bostock's sexual orientation and identity. (*Id.* ¶ 21). Mr. Bostock has further alleged that the internal audit and the stated reason for his termination were simply a pretext for discrimination based on his sex and/or sexual orientation. (*Id.* ¶ 23). Thus, Mr. Bostock has sufficiently pleaded a claim for gender stereotype discrimination.

D. The Magistrate Judge Erred in Determining that Mr. Bostock Failed to Exhaust His Administrative Remedies With Respect To His Gender Stereotyping Claim

The Magistrate Judge determined that Mr. Bostock failed to exhaust his administrative remedies with respect to his gender stereotyping claim and that "[o]ne would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge's allegation of sexual orientation discrimination." Mr. Bostock respectfully submits that the Magistrate Judge erred in this determination.

As an initial matter, courts are "extremely reluctant to allow procedural technicalities to bar claims brought under [Title VII]." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970). Thus, "'the scope of an EEOC complaint should not be strictly interpreted'" *Id.* at 465 (citation omitted).

In this case, Mr. Bostock's EEOC charge, which was filed *pro se*, "checked" the *only* box he could applicable to *both* sexual orientation and gender stereotyping discrimination: Sex. (Redacted copy attached as

Ex. A.) Moreover, Mr. Bostock stated in the charge that he believed he had been discriminated against on the basis of his sex. (*Id.*) Thus, he exhausted this claim at the EEOC level. *See Rhea v. Dollar Tree Stores, Inc.*, No. 04-2554MIV, 2004 WL 3313616, at *3 (W.D. Tenn. August 26, 2004) (holding in part that where plaintiff amended a complaint alleging sexual orientation discrimination to add gender stereotyping claims that that the administrative remedies for the amendment were properly exhausted by an EEOC charge that checked the box marked "sex").

The Magistrate Judge relied on two inapposite cases, *Norris v. Diakin Drivetrain Components*, 46 F. App'x 344, 346 (6th Cir. 2002) and *Lankford v. BorgWarner Diversified Transmission Prods., Inc.*, No. 1:02CV1876-SEB-VSS, 2004 WL 540983, at *3 (S.D. Ind. Mar. 12, 2004) in support of his erroneous determination that "[o]ne would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge's allegation of sexual orientation discrimination." [Doc. 16 at 20.] Neither of these cases dealt with gender stereotyping claims. *See Norris*, 46 Fed App'x 344 (holding that a charge alleging discrimination based on sexual orientation did not give district court subject matter jurisdiction over claim of same-sex sexual harassment); *Lankford*, 2004 WL 540983, at *3 (noting that the amended complaint asserted harassment and discrimination on the basis of sex while the EEOC charge described harassment and discrimination on the basis of sexual orientation). These cases therefore do not support the Magistrate Judge's

erroneous conclusion that sex discrimination in the form of gender stereotyping was not properly exhausted by Mr. Bostock's EEOC charge. Moreover, because the issue of gender stereotyping is analytically indistinct from the issue of sexual orientation discrimination, *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) ("claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims"), his allegations of gender stereotyping are necessarily "'like or related to, or grew out of' the allegations in the EEOC charge." *Green v. Elixir Indus., Inc.*, 407 F.3d 1163, 1168 (11th Cir. 2005). The simple fact is that there is no box denoting the "gender stereotyping" theory of sex discrimination on the EEOC's form charge. Mr. Bostock properly exhausted his administrative remedies for any and all theories of sex discrimination by checking the box marked "sex" for the type of discrimination of which he complained.

E. Mr. Bostock's Gender Stereotyping Claim is Timely

Based on his other recommendations, the Magistrate Judge did not address Defendant's alternative argument that Mr. Bostock's gender stereotyping claim is untimely. [Doc. 16 at p. 19, n.7.] Should the Court agree with Mr. Bostock's objections to the Report and Recommendation, Mr. Bostock contends that this claim

is timely because the claim relates back to the same conduct alleged in his Complaint and First Amended Complaint. Rule 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

In this case, Mr. Bostock's allegations concerning gender stereotype discrimination arise from the same conduct and occurrences set forth in his original pleading. Specifically, the allegations relate to his sexual orientation and identity being openly questioned and disparagingly commented upon by individuals who had significant influence on the decision making of Defendant, which led to the discriminatory termination of Mr. Bostock. Since the claim arises out of the same conduct as already set forth in the original complaint, it clearly relates back for purposes of the statute of limitations. *See Rhea*, 2004 WL 3313616 at *3 (holding in part that where plaintiff originally brought a sexual orientation discrimination claim and sought to amend to add claims of sexual stereotyping that "[t]o the extent a claim for sex-stereotyping arises out of the same conduct alleged in the original complaint, any amendment would relate back.").

IV. CONCLUSION

There may not be a definitive recent ruling by the United States Supreme Court that Title VII prohibits

sexual orientation discrimination, but the law is clear that it does. For all the reasons set forth above and in Mr. Bostock's Response in Opposition to Defendant's Motion to Dismiss [Doc. 14], Mr. Bostock requests that the Court reject the Magistrate Judge's Report and Recommendation and deny Defendant's Motion to Dismiss.

Respectfully submitted,

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[Certificate Of Compliance Omitted]

CHARGE OF DISCRIMINATION	Charge Presented To:	Agency(ies) Charge No(s).:
This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	☐ FEPA ☒ EEOC	410-2013-06136

_____ and EEOC
State or local Agency, if any

Name *(indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Gerald L. Bostock		

Street Address	City, State and ZIP Code
[redacted]	

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. *(Include Area Code)*
CLAYTON COUNTY BOARD OF COMMISSIONERS - JUVENILE COURT	500 or More	(770) 477-3208

Street Address	City, State and ZIP Code
112 Smith Street, Jonesboro, GA 30236	

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*	DATE(S) DISCRIMINATION TOOK PLACE
☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER *(Specify)*	**Earliest** 06-03-2013 **Latest** 06-03-2013 ☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I was hired by the above named employer on January 13, 2003, as a Court Appointed Special Advocate Program Coordinator. Around October 2007, I was promoted to Child Welfare Services Coordinator. On June 3, 2013, I was notified by the Director of Juvenile Court Services and Chief of Staff of Juvenile Court Services that I was being discharged.

The reason given for my discharge was "Violation of Clayton County Civil Services Rules."

I believe that I have been discriminated against because of my sex (male/sexual orientation), in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY – *When necessary for State and Local Agency Requirements*

I declare under penalty of perjury that the above is true and correct. Sep 05, 2013 *Date* [Illegible] *Charging Party Signature*	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(month, day, year)*

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

GERALD LYNN BOSTOCK,	)	
	)	
Plaintiff,	)	**CIVIL ACTION**
	)	**NO: 1:16-cv-01460-**
v.	)	**ODE-WEJ**
	)	
CLAYTON COUNTY,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Dec. 1, 2016)

I. INTRODUCTION

Plaintiff's Objections to Judge Johnson's Report and Recommendation (hereinafter, "R&R") granting Defendant's Motion to Dismiss [Doc. 18] ask this Court to ignore the separation of powers, disregard the founding tenants of our country, and to instead, judicially amend Title VII for some perceived public policy benefit. Specifically, Plaintiff argues that Title VII covers sexual orientation discrimination, and that his conclusory allegations (without any factual support) that he was subjected to discrimination due to his sexual orientation and his gender identity support a gender stereotyping claim. Because Title VII does not

cover sexual orientation discrimination and because Plaintiff has not sufficiently pled a gender stereotyping claim (nor was it included in his EEOC charge), Defendant respectfully requests that this Court overrule Plaintiff's objections and adopt the R&R in its entirety and dismiss Plaintiff's claims with prejudice.

II. LEGAL ARGUMENT

A. Title VII Does Not Cover Sexual Orientation Discrimination

1. *Blum v. Gulf Oil Corp.* Constitutes Binding Precedent

As Judge Johnson correctly concluded, Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), is binding precedent in the Eleventh Circuit and held that Title VII does not protect against discrimination due to sexual orientation. In his Objections, Plaintiff argues that Blum should be ignored because, in Plaintiff's view, its holding that Title VII does not protect sexual orientation discrimination is merely dicta. This argument is untenable..

In Blum, a former employee sued Gulf Oil Corp alleging that he was terminated due to (amongst other things) his sexual orientation. Gulf Oil presented evidence that he was terminated for making personal phone calls related to his side business rather than due to his sexual orientation. Blum, 597 F.2d at 936-37. After a bench trial, the trial court concluded that the plaintiff was terminated for legitimate, non-discriminatory reasons, mainly, his use of a phone for

personal reasons. Id. The plaintiff appealed to the Fifth Circuit, which affirmed the trial court's judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim. First, the Fifth Circuit found that the plaintiff could not establish pretext to support any of his claims, including his sexual orientation claim. Id. at 937-38. The Fifth Circuit also concluded that the district court properly rejected the plaintiff's sexual orientation claim because "discharge for homosexuality is not prohibited by Title VII or Section 1981." Id. at 938.

This statement obviously was not dicta, but rather was an alternative ground for the Fifth Circuit's decision to affirm the district court's judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim. In other words, the Fifth Circuit affirmed the judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim because (1) he failed to prove that the legitimate, nondiscriminatory reasons given for his termination were a pretext for sexual orientation discrimiantion; and (2) even if he did, discrimination on the basis of sexual orientation is not prohibited by Title VII. Moreover, the Court explicitly stated that the issue of whether Title VII prohibited discrimination on the basis of sexual orientation was an issue briefed by the parties on appeal. Id. at 938.

While Blum's conclusion that Title VII does not prohibit discharge because of sexual orientation may be a separate and distinct reason for its holding, it is a statement directly related to and an equally necessary basis for the decision to affirm the district court's

judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim.

The United States Supreme Court and the Eleventh Circuit repeatedly have held that an alternative ground for a decision is binding precedent, not dicta. See, e.g., Massachusetts v. United States, 333 U.S. 611, 623 (1948) (where a case has "been decided on either of two independent grounds" and "rested as much upon the one determination as the other," the "adjudication is effective for both"); Bravo v. United States, 532 F.3d 1154, 1162 (11th Cir.2008) (an "alternative holding counts because in this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings"); Johnson v. DeSoto Cnty. Bd. of Comm'rs, 72 F.3d 1556, 1562 (11th Cir.1996) ("[W]e are bound by alternative holdings"); McLellan v. Miss. Power & Light Co., 545 F.2d 919, 925 n. 21 (5th Cir.1977) (en banc) ("It has long been settled that all alternative rationales for a given result have precedential value.").

Accordingly, the R&R correctly concluded that Blum's holding that Title VII does not prohibit discrimination on the basis of sexual orientation is binding precedent in the Eleventh Circuit, and Plaintiff's sexual orientation claim should therefore be dismissed.

2. The R&R Correctly Followed The Overwhelming Weight Of Authority Holding That Title VII Does Not Include Sexual Orientation As A Protected Class

Even if Blum's conclusion that Title VII does not encompass sexual orientation was dicta as Plaintiff contends, Blum's conclusion nonetheless is consistent with the overwhelming majority of cases that have held (both before and after the EEOC's Baldwin v. Foxx decision) that sexual orientation is not a protected class under Title VII. See, e.g., Dingle v. Bimbo Bakeries USA/Entenmann's, 624 F. App'x 57 (2d Cir. 2015) (holding that discrimination based on perceived sexual orientation was not cognizable under Title VII); Brandon v. Sage Corp., 808 F.3d 266, 270 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation."); Murray v. North Carolina Dep't of Pub. Safety, 611 F. App'x 166, 166 (4th Cir. 2015) (affirming grant of motion to dismiss without need for oral argument, citing binding circuit precedent that "Title VII does not protect against sexual orientation discrimination"); Cargian v. Breitling USA, Inc., 2016 WL 5867445, at *4 (S.D.N.Y. Sept. 29, 2016) ("Despite significant changes in the broader legal landscape since the Second Circuit's decision in Simonton, the prevailing law in this and every other Circuit to consider the question is that, in the Title VII context, courts must distinguish between actionable gender-stereotyping claims and non-actionable sexual orientation claims."); Thompson v. CHI Health Good Samaritan Hosp., 2016 WL 5394691,

at *2 (D. Neb. Sept. 27, 2016) ("[N]either Nebraska law nor Title VII encompass discrimination based upon sexual orientation."); Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 618 (S.D.N.Y. 2016) ("[D]iscrimination based on sexual orientation will not support a claim under Title VII"); Ashford v. Danberry at Inverness, 2016 WL 4615782, at *11 (ND. Ala. Sept. 6, 2016) ("[A]ny assertion of discrimination based upon sexual orientation does not state a claim under Title VII."); Somers v. Express Scripts Holdings, 2016 WL 3541544, at *3 (S.D. Ind. June 29, 2016) ("Under binding precedent currently in effect, discrimination or harassment based on a person's sexual orientation alone is not actionable under Title VII. In other words, Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation." (citations omitted)); Magnusson v. Cty. of Suffolk, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) ("Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here."); Hinton v. Virginia Union Univ., ___ F. Supp. 3d ___, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016) ("More importantly, the reasons offered in decisions that have adopted the EEOC's position are matters that lie within the purview of the legislature, not the judiciary. Title VII is a creation of Congress and if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave

Title VII as presently written. It is not the province of unelected jurists to effect such an amendment. In sum, Title VII does not encompass sexual orientation discrimination claims, and cannot be supplanted by the merely-persuasive power of the EEOC's decision."), *motion to certify appeal denied*, 2016 WL 3922053 (E.D. Va. July 20, 2016); Burrows v. Coll. of Cent. Fla., 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) (denying motion for reconsideration on grant of employer's motion for summary judgment even though plaintiff cited to EEOC's recent decision in Baldwin v. Foxx as intervening change in law). See also Doc. 15, at pp. 5-8 (citing these cases).

Plaintiff's Objections fail to discuss or respond to these cases. Instead, Plaintiff ignores the overwhelming case law rejecting his position (only some of which is cited above), and instead focuses on the very few decisions he can find that incorrectly embrace the EEOC's radical attempt to amend Title VII by executive fiat, rather than apply the plain text of Title VII and leave it to the legislative branch (Congress) to amend Title VII to include sexual orientation as a protected class if it so desires.

Plaintiff goes on to argue that Fredette v. BVP Mgmt. Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) is inapposite to his argument that sexual orientation discrimination should be protected by Title VII. While certainly Fredette is not as clear as Blum, the court's statement that "[w]e do not hold that discrimination because of sexual orientation is actionable" strongly implies that the Eleventh Circuit does not construe

Title VII as prohibiting sexual orientation discrimination. As Plaintiff properly concedes – this reading is consistent with many district courts' interpretation of Fredette. See, e.g., Stevens v. Ala. Dep't of Corr., 2015 WL 1245355, at *7 (N.D. Ala. Mar. 18, 2015); Fitzpatrick v. Winn-Dixie Montgomery, Inc., 153 F.Supp.2d 1303, 1306 (M.D. Ala. 2001); Ashford v. Danberry at Iverness [sic], 2016 WL 4615782, at *11 (Sept. 6, 2016); Rodriguez v. Alpha Inst. of S. Florida, Inc., 2011 WL 5103950, at *5 (S.D. Fla. Oct. 27, 2011); Luckey v. Martin, 2012 WL 665694, at *7 (D.N.J. Feb. 29, 2012).[1]

3. The R&R Correctly Cited Congressional Attempts To Pass ENDA As Further Confirmation That Title VII Does Not Encompass Sexual Orientation

Plaintiff next argues that Congress's attempts to enact the Employment Non-Discrimination Act are not controlling as to whether Title VII protects against sexual orientation discrimination. In support of this contention, Plaintiff cites to various Supreme Court decisions cautioning against relying on congressional inaction as a basis for interpreting a statute. [Doc. 18, p. 8].

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[1] Plaintiff cites Winstead v. Lafayette County Board of Commisioners [sic], 2016 WL 3440601, at *6 (N.D. Fla. June 20, 2016) to support his interpretation of Blum and Fredette. Notably, however, Winstead reached the same conclusion that nearly every court that has reviewed this issue has reached: Title VII does not protect against sexual orientation discrimination.

However, the Second Circuit, while acknowledging such concerns, concluded that "Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation." Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000).[2] Indeed, numerous courts have cited Congress' refusal to enact ENDA as further confirmation that Title VII does not encompass sexual orientation. See, e.g., Thomas v. Keystone Real Estate Group, LP, 2015 WL 1471273, at *2 (M.D. Pa. Mar. 31, 2015) (Title VII does not protect against sexual orientation discrimination and Congress repeatedly has rejected legislation to amend Title VII to include it); Johnson v. Shinseki, 2013 WL 1987352, at *2 (E.D. Mo. May 13, 2013) (same); Mowery v. Escambia County Util. Auth., 2006 WL 327965, at *9, (N.D. Fla. Feb. 10, 2006) (Congress "specifically and repeatedly" rejected ENDA).

Moreover, Congress' refusal to enact ENDA is only part of the overwhelming evidence to support the conclusion that Title VII does not cover sexual orientation discrimination. Plaintiff completely ignores the legislative history cited by Judge Johnson that supports the finding that discrimination "because of sex" under Title VII was intended to mean discrimination due to gender. [Doc. 16, at pp. 6-7]. When viewed in this context, the legislative history, combined with the

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[2] Plaintiff has failed to present any evidence or argument that Congress' refusal to enact ENDA has been the result of unawareness, preoccupation or a belief that sexual orientation discrimination already is prohibited under Title VII.

repeated attempts by Congress to enact ENDA (unsuccessfully), and of course the plain language of the statute, conclusively demonstrate that Title VII simply does not protect against sexual orientation discrimination.

4. *Oncale* And *Foxx* Do Not Provide A Basis To Support The Plaintiff's Claims

Plaintiff falls back on reliance upon Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) to argue that Title VII already protects sexual orientation discrimination. Oncale, however, provides no such support. In Oncale, the Supreme Court ruled that Title VII's protection against sexual harassment included protection against sexual harassment perpetrated by someone of the same sex, so long as the harassment was still "because of sex." Essentially, the Oncale decision held that sexual harassment is unlawful, regardless of the gender of the individual who engages in such conduct. It is an unfathomable leap to claim Oncale states or even implies that sexual orientation discrimination is protected by Title VII. Plaintiff's argument otherwise misses the point – "because of sex" is very different than "because of sexual orientation." See King v. Super Serv., Inc., 68 Fed.Appx. 659, 664 (6th Cir. 2003) ("animosity directed towards the plaintiff because of his apparent sexual orientation is . . . different from discrimination on the basis of sex"); Bibby v. Phil. Coca-Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (noting difference between "because of

sex" and sexual orientation, the latter of which "Congress has not yet seen fit" to protect); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (same).

Similarly, the material flaw in the EEOC's Baldwin v. Foxx decision relied upon by Plaintiff is that it, too, believes that "because of sex" includes sexual orientation. Sex, however, simply does not reference ones [sic] sexual orientation.[3] Plaintiff's claim that Baldwin v. Foxx should be entitled to some deference (and apparently that all courts should reevaluate their previous interpretations of the statute because of a single radical decision by the EEOC that reverses its own previous interpretation ofTitle VII) simply is inconceivable given the EEOC's own previous contradictory interpretations, and the fact that its new position is contrary to controlling law in nearly every single Circuit in the country.[4]

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[3] Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) does not support Plaintiff's proposed amendment to Title VII. Parr concluded that racial discrimination prohibits discriminating against someone who is in an interracial marriage. In that context, the discrimination is "because of" race, albeit the race of that individual's spouse. That is a natural extension of the race discrimination analysis, and has no application or role in interpreting the difference between someone's sex and sexual orientation, a wholly different analysis. See Partners Healthcare Sys. v. Sullivan, 349 F.Supp.2d 29, 39 (D. Mass. 2007).

[4] Judge Johnson correctly noted that the EEOC's position is not entitled to any deference, as it attempts to change something that is within the purview of the legislative branch, and "if Congress is so inclined, it can amend the statute to provide a claim for sexual orientation discrimination." [Doc. 16, p. 13]. Moreover, Plaintiff ironically argues that Baldwin v. Foxx is entitled to

Thus, distilled to its essence, Plaintiff is asking this Court to ignore Blum and all of the circuit and district courts that have ruled that Title VII does not protect against sexual orientation discrimination. Because this is contrary to the binding precedent in this Circuit, the reasoning of nearly every single court to ever consider this issue, the legislative history of Title VII, and the plain language of the statute, Defendant respectfully submits that this Court should decline Plaintiff's invitation to amend Title VII. Instead, the Court should follow the overwhelming case law holding that Title VII does not cover sexual orientation, and that it is up to Congress to amend Title VII to add sexual orientation as a protected class if it so desires.

Accordingly, the Court should adopt the R&R and dismiss Plaintiff's sexual orientation claim with prejudice.

B. Plaintiff Has Failed To State A Claim For Gender Stereotyping

Plaintiff's objection attempts to bootstrap his gender stereotyping claim to his sexual orientation claim without any factual support.[5] Sexual orientation alone,

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deference because of its supposed reliance on Eleventh Circuit precedent. [Doc. 18, p. 12]. Yet, significant portions of Plaintiff's Objections are devoted to a futile attempt to explain away Eleventh Circuit precedent holding, or at the very least strongly suggesting or implying, that Title VII does not encompass sexual orientation.

[5] Plaintiff's bootstrapping attempt is made abundantly clear when he argues later in his brief that "the issue of gender

however, cannot support a gender stereotyping claim, as this would have the effect of re-writing Title VII to include sexual orientation discrimination.

Plaintiff claims that his allegations in the Second Amended Complaint that his sexual orientation and identity were criticized by one or more individuals, and that someone made disparaging comments about his sexual orientation and identity, is sufficient to state a gender stereotyping claim. This argument fails. As Judge Johnson noted, a gender stereotyping claim is based upon allegations that "he suffered discrimination based on his employer's belief that he failed 'to conform to masculine stereotypes.'" (Doc. 16, p. 14)(citing EEOC v. Family Dollar Stores, Inc., 2008 WL 4098723, at * 14 (N.D. Ga. Aug. 28, 2008)).

Courts repeatedly have stated that such a gender stereotyping claim cannot masquerade as a sexual orientation claim under another name, but instead, that the plaintiff must allege that he was discriminated against because he did not act like the typical male for a reason other than the mere fact that he is homosexual, such as his appearance or mannerisms on the job. See Simonton, 232 F.3d at 38 (noting that the gender stereotyping theory "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine");

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stereotyping is analytically indistinct from the issue of sexual orientation discrimination," citing a California case. [Doc. 18, p. 17]. Of course, this is not the law in the Eleventh Circuit.

Gilbert v. Country Music Ass'n, 432 Fed.Appx. 516, 520 (6th Cir. 2011) (dismissing claim for gender stereotyping due to lack of allegations to support claim, such as non-stereotypical appearance or mannerisms, and stating "for all we know, Gilbert fits every male 'stereotype' save one – sexual orientation – and that does not suffice to obtain relief under Title VII"); Dawson v. Bumble & Bumble, 398 F.3d 211, 219 (2d Cir. 2005) (noting that courts "have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes"); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (holding that "theory of sex stereotyping under *Price Waterhouse* is not broad enough to encompass" a theory based solely on sexual orientation and that this did not conform to traditional masculine roles).

At least one court within this circuit has dismissed a gender stereotyping claim where the plaintiff failed to allege what traits or circumstances made him different than the stereotypical male (aside from his sexual preference). See Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010). Here, as Judge Johnson correctly found, "the Second Amended Complaint contains no allegations that plaintiff suffered discrimination based on his employer's belief that he failed to conform to masculine stereotypes." [Doc. 16, p. 16]. Accordingly, because Plaintiff has not and cannot plead any facts that support that he fails to meet or conform to masculine stereotypes, his claim fails. Accordingly,

Defendant respectfully requests that this Court dismiss Plaintiff's claim with prejudice.

C. The R&R Correctly Concluded That Plaintiff Failed To Allege Gender Stereotyping In His EEOC Charge

Plaintiff's final objection argues that Judge Johnson erred in concluding that Plaintiff's EEOC charge did not include a claim for gender stereotyping, and thus, Plaintiff failed to exhaust his administrative remedies with respect to this claim. Plaintiff's argument is based entirely upon the fact that he "checked the box" for sex discrimination in his EEOC charge. This argument conveniently ignores, however, that the narrative (not the box he checked) in Plaintiff's EEOC charge controls whether he exhausted his administrative remedies, and his gender stereotyping claim fails because he simply did not include any gender stereotyping allegations or factual support in the narrative of his EEOC charge.

In this regard, the "crucial element of a charge of discrimination is the factual statement contained therein." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462 (5th Cir. 1970). "The selection of the type of discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal conclusion to the facts alleged." Id. The Eleventh Circuit has held that merely checking a particular box on an EEOC charge does not satisfy the exhaustion requirement where the plaintiff provides no

supporting facts in connection with the claim at issue. Chanda v. Engelhard/ICC, 234 F.3d 1219, 1224 (11th Cir. 2000). See also Jerome v. Marriott Residence Inn Barcelo Crestline/AIG, 211 Fed.Appx. 844, 846-847 (11th Cir. 2006) (circling "wages" on EEOC questionnaire without providing any supporting facts insufficient to exhaust wage discrimination claim); Houston v. Army Fleet Services, LLC, 509 F.Supp.2d 1033, 1043 (M.D. Ala. 2007) ("Indeed, checking the correct box alone is not sufficient to satisfy the filing requirement when no factual particulars relating to the claim are disclosed to the EEOC").

Here, it is undisputed that Plaintiff did not include a single factual statement or allegation that indicated he was discriminated against due to gender stereotyping in his charge of discrimination. As a result, Judge Johnson reached the proper conclusion that "[o]ne would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge's allegation of sexual orientation discrimination." [Doc. 16, p. 20].

Contrary to Plaintiff's assertions, the two decisions cited by Defendant and by Judge Johnson support this conclusion, and stand for the proposition that a charge alleging "sexual orientation" discrimination and nothing else simply does not exhaust a claim for some other type of sex discrimination, such as gender stereotyping. Norris v. Hiakin Drivetrain Components, 46 Fed.Appx. 344, 346 (6th Cir. 2002) (claim for same-sex sexual harassment cannot be reasonably expected to grow out of EEOC charge asserting discrimination

based on sexual orientation); Lankford v. BorgWarner Diversified Transmission Products, Inc., 2004 WL 540983, at *3 (S.D. Indiana Mar. 12, 2004) ("a claim of discrimination based on sex is not reasonably related to, nor may it be expected to grow out of, a charge of discrimination based on sexual orientation.")

Because Plaintiff does not dispute that his EEOC charge does not mention or describe any gender stereotyping allegation, and because merely "checking the box" for sex discrimination does not mean that Plaintiff has exhausted a claim of gender stereotyping, Defendant respectfully requests that this Court overrule Plaintiff's Objections and dismiss Plaintiff's gender stereotyping claim with prejudice.

D. Plaintiff's Gender Stereotyping Claim Is Untimely

Although Magistrate Judge Johnson did not address this argument because he already properly concluded that Plaintiff's Second Amended Complaint should be dismissed, for the reasons identified in Defendant's Motion to Dismiss and reply brief in support thereof, Plaintiff's attempt to add a gender stereotyping claim is untimely and otherwise fails as a matter of law. [Doc. 13, pp. 12-14 and Doc. 15, p.14].

III. CONCLUSION

For the reasons stated herein, Clayton County respectfully requests that the Court overrule Plaintiff's

objections and **DISMISS** Plaintiff's Second Amended Complaint with prejudice.

This 1st day of December, 2016.

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[Certificate Of Compliance Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK, Plaintiff, v. CLAYTON COUNTY, Defendant.	)	CIVIL ACTION File No: 1:16-CV-01460-ODE-WEJ

PLAINTIFF'S REPLY IN SUPPORT OF OBJECTIONS TO THE MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

(Filed Dec. 15, 2016)

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and LR 72.1.B, NDGa, Plaintiff Gerald Bostock files this Reply in Support of Objections to the Magistrate Judge's Final Report and Recommendation.

I. INTRODUCTION

In his opening brief in support of his Objections, Mr. Bostock established that the Magistrate Judge erred in recommending dismissal of Mr. Bostock's claims of sexual orientation discrimination and gender stereotype discrimination. Defendant raises a number of meritless arguments in opposition. As set forth in greater detail below, and in his initial brief and his opposition to Defendant's Motion to Dismiss, Mr. Bostock

requests that the Court reject the Report and Recommendation and deny Defendant's Motion to Dismiss.

II. ARGUMENT AND CITATION OF AUTHORITY

A. *Blum v. Gulf Oil Corp.* is Not Controlling Authority

In his initial brief in support of his objections, Mr. Bostock established that the "comment" in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) that sexual orientation claims are not cognizable under Title VII in [sic] not controlling on this issue. Defendant attempts to characterize this dicta in *Blum* as an alternative holding. This is not the case.

In the first place, nowhere in the opinion does it state that the footnote "comment" that "discharge for homosexuality is not prohibited by Title VII" is in any way an alternative holding. The court simply stated that it would "comment briefly" on other issues raised in the appeal. 596 F.2d at 938. The language in the footnote, moreover, could not resolve the case in full, because the plaintiff also had claims for other forms of discrimination. The primary issue on appeal, and the basis for the court's decision, was whether the defendant articulated a legitimate nondiscriminatory reason for the plaintiff's discharge. *Id.* at 937. The court determined that it did which resolved the appeal. *Id.*

Moreover, as set forth in detail in Plaintiff's initial brief, in *Blum*, the Fifth Circuit did not recite any analysis for its comment regarding sexual orientation

discrimination and simply cited to its prior holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978), a case which *did not even address* the issue of whether sexual orientation claims are cognizable under Title VII and whose holding "has clearly been abrogated by subsequent Supreme Court cases." *Winstead v. Lafayette County Board of County Commissioners*, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *6, n.4 (N.D. Fla. June 20, 2016); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Thus, the entire basis on which *Blum* based its dicta regarding sexual orientation claims has been abrogated. *Blum* is not controlling on this issue.

B. *Fredette V. BVP Mgmt. Assocs.* did not Address the Issue of Sexual Orientation Discrimination Either Way

Defendant also argues that *Fredette v. BVP Management Associates*, 112 F.3d 1503 (11th Cir. 1997), "strongly implies that the Eleventh Circuit does not construe Title VII as prohibiting sexual orientation discrimination." (Doc. 19 at 8.) In fact, as set forth in detail in Plaintiff's initial brief, the only conclusion that can reasonably be drawn from *Fredette* is that the Eleventh Circuit deliberately left open the issue of sexual orientation discrimination. The Eleventh Circuit specifically emphasized the "narrowness" of its holding and merely stated it was not holding that sexual orientation discrimination was actionable. Thus, it did not hold that sexual orientation discrimination claims were actionable or not actionable. It deliberately and

carefully left the issue open. While courts have reached differing conclusions on this point (*see* Pl.'s Initial Br. at 7 (Doc. 18)), the better reasoned cases have properly read *Fredette* as leaving the issue open. *Winstead*, 2016 WL 3440601, at *5 ("this Court's interpretation—that *Fredette* left the issue open—is hardly unique"); *Mowery v. Escambia Cty. Utils. Auth.*, No. 3:04cv382, 2006 WL 327965, at *8 (N.D. Fla. Feb. 10, 2006) (characterizing *Fredette* as not "holding that discrimination because of sexual orientation is not actionable"); *Rodriguez v. Alpha Inst. of S. Fla., Inc.*, No. 10–80714–CIV. 2011 WL 5103950, at *5 (S.D. Fla. Oct. 27, 2011) (same).

C. Congress' Failure to Amend Title VII Does not Provide a Basis to Find Sexual Orientation Discrimination Claims are not Cognizable

Defendant maintains that Congress failure to amend Title VII to specifically include a claim for sexual orientation discrimination somehow means that there is no such claim. As set forth in detail in Mr. Bostock's initial brief in support of his Objections, courts have continually cautioned against relying on Congressional inactivity as any type of interpretive tool. (Doc.18 at 7-8.) Indeed, Congressional inactivity could just as easily establish that amendment of Title VII is unnecessary because sexual orientation discrimination already is covered by the prohibition against discrimination "because of sex" (which it is).

Moreover, subsequent legislative inaction or speculation concerning Congressional intent has no bearing on the plain language of Title VII. "[I]t is what Congress *says*, not what Congress *means* to say, that becomes the law of the land." *Bernstein v. Bankert*, 733 F.3d 190, 211 (7th Cir. 2013). The Supreme Court in *Oncale* specifically rejected the notion that sex discrimination is limited by some type of unwritten exceptions to Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. . . .") *Oncale* makes clear that with limited exceptions not relevant here, an employer violates Title VII when an employee suffers discrimination that would not have occurred had the employee been of the other sex.

That is what Mr. Bostock alleges here: that Defendant took adverse employment actions against him because he is a man who is attracted to men that it would not have taken had he been a man who is attracted to women. In other words, but for Mr. Bostock's sex, Defendant would not have taken the action it did. Contrary to Defendant's assertion, there is no need to "amend" Title VII or "redefine" the term "sex" under Title VII for sexual orientation claims to be

cognizable.[1] The plain language of the statute is more than sufficient.

D. The EEOC's Position on This Issue is Persuasive as are the Court Decisions That Have Reached the Same Conclusion

Defendant has offered no compelling reason to depart from the EEOC's cogent guidance on this issue in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015) or the cases that have held that sexual orientation discrimination is actionable. *Isaacs v. Felder Servs., LLC*, 143 F. Supp.3d 1190 (M.D. Ala. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp.3d 1151(C.D. Cal. 2015). Mr. Bostock's initial brief in support of his Objections discussed this issue in detail and he will not belabor the point here. The bottom line is that these authorities are most consistent with both the plain language of Title VII and Supreme Court precedent.

Defendant cites cases that have held that sexual orientation discrimination is not actionable under Title VII. Certainly, courts have reached different conclusions on this issue. But the fact that other circuits may have resolved the issue differently (or that district courts did so) does not compel the same result in this

[1] Defendant argues that Mr. Bostock is attempting to amend Title VII through "executive fiat," but this is not so. By contending that the plain language of Title VII does not protect Mr. Bostock, *Defendant* is essentially arguing for a *judicially-created* exception to Title VII.

case, where the issue remains open in the Eleventh Circuit.

Defendant also attempts to distinguish *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986) addressing racial discrimination against someone in an interracial marriage from discrimination based on sexual orientation. Although Defendant argues that this is "a wholly different analysis" it is, in fact, the same analysis. In both instances it is the employee's race or sex (relative to the race or sex of the person with whom the employee is in a relationship or to whom the employee is attracted) that is causing the differential treatment. Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (justifying reliance on statements of legislative intent regarding the treatment of race in the workplace as authoritative regarding the appropriate treatment of sex). Thus, the EEOC properly cited *Parr* in support of its position that sexual orientation claims are actionable under Title VII. Its careful attention to Eleventh Circuit precedent provides compelling reason to defer to the EEOC's guidance on this issue.

The only result that is consistent with both Supreme Court and EEOC precedent is that sexual orientation claims are covered under Title VII. The Magistrate Judge erred on this issue.

E. Mr. Bostock Has Stated a Timely Claim for Gender Stereotype Discrimination

Mr. Bostock's opening brief established that he timely and adequately pleaded his gender stereotype claim and that he properly exhausted his administrative remedies before bringing this claim. Mr. Bostock relies on his initial brief and his opposition brief to Defendant's Motion to Dismiss for these points and addresses here only the points in Defendant's response brief that merit further discussion.

With respect to the exhaustion issue, Defendant argues that it is "undisputed" that Mr. Bostock did not include in his EEOC charge any factual allegation or statement that he was discriminated against due to gender stereotyping. (Doc. 19 at 17.) In the first place, "'the scope of an EEOC complaint should not be strictly interpreted'" *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970). In his charge, Mr. Bostock, who was *pro se* at the time, recited the circumstances of his employment and termination and then stated "I believe that I have been discriminated against because of my sex (male/sexual orientation)." (Doc. 18, Ex. A.) Nothing further is required. It is well-established that gender stereotyping discrimination is a form of sex discrimination. *Price Waterhouse*, 490 U.S. 228.

Moreover, the issue of gender stereotyping is analytically close to the issue of sexual orientation discrimination so that Mr. Bostock's allegations of gender stereotyping in his Second Amended Complaint are

"'like or related to, or grew out of' the allegations in the EEOC charge." *Green v. Elixir Indus., Inc.*, 407 F.3d 1163, 1168 (11th Cir. 2005). *See also Videckis*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (concluding that this distinction between sexual orientation discrimination claims and gender stereotype claims is "illusory and artificial" and that "sexual orientation discrimination is not a category distinct from sex or gender discrimination.")[2] Thus, Mr. Bostock properly raised and exhausted his gender stereotype discrimination claim.

III. CONCLUSION

For the foregoing reasons, and for the reasons raised in his initial brief in support of his Objections and his opposition to Defendant's Motion to Dismiss, Mr. Bostock requests that the Court reject the Magistrate Judge's Report and Recommendation and deny Defendant's Motion to Dismiss.

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[2] Defendant argues that this citation somehow shows "bootstrapping" on Mr. Bostock's part. (Doc. 19 at 13, n.5.) What is [sic] really shows is that the two claims are so analytically overlapping that there is no rational basis for prohibiting one form of sex discrimination (gender stereotype) while permitting another (sexual orientation) based on an illusory distinction. Both claims are forms of actionable sex discrimination.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK, Plaintiff, v. CLAYTON COUNTY, Defendant.	)	CIVIL ACTION File No. 1:16-CV-01460-ODE-WEJ

PLAINTIFF'S NOTICE OF APPEAL

(Filed Aug. 21, 2017)

Notice is hereby given that Plaintiff, Gerald Bostock, appeals to the United States Court of Appeals for the Eleventh Circuit from this Court's Order granting Defendant's Motion to Dismiss [Doc 24], and the Clerk's Judgment [Doc 25], both entered on July 21, 2017.

LET THIS NOTICE BE SERVED ON THE DEFENDANT.

Respectfully submitted,

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No. 17-13801-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GERALD BOSTOCK,

Plaintiff-Appellant,

v.

CLAYTON COUNTY, GEORGIA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA CASE NO. 1:16-CV-01460

BRIEF OF APPELLEE

(Filed Dec. 22, 2017)

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[C1 of 1] **CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for Appellee shows that the following trial judge(s), attorneys, persons, associations of persons, firms, partnerships, and corporations have an interest in the outcome of this appeal:

1. Bostock, Gerald (Plaintiff-Appellant)
2. Buckley Beal, LLP (Attorneys for Plaintiff-Appellant)
3. Buechner, Jr., William H. (Attorney for Defendant-Appellee)
4. Clayton County, Georgia (Defendant-Appellee)
5. Evans, Orinda D. (Senior United States District Judge for the Northern District of Georgia)
6. Freeman Mathis & Gary, LLP (Attorneys for Defendant-Appellee)
7. Green, T. Brian (Attorney for Plaintiff-Appellant)
8. Hancock, Jack R. (Attorney for Defendant-Appellee)
9. Indian Harbor Insurance Company (Insurer for Defendant-Appellee)
10. Johnson, Walter E. (United States Magistrate Judge for the Northern District of Georgia)
11. Mew, Thomas (Attorney for Plaintiff-Appellant)

12. Sutherland, Brian (Attorney for Plaintiff-Appellant)

[i] **STATEMENT REGARDING ORAL ARGUMENT**

Defendant-Appellee respectfully submits that oral argument is not necessary to address the issues raised in this appeal.

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[1] **JURISDICTIONAL STATEMENT**

I. District Court Jurisdiction

The United States District Court for the Northern District of Georgia had subject matter jurisdiction over

this case pursuant to 28 U.S.C. § 1331, as Plaintiff-Appellant brought claims pursuant to Title WI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq.

II. Court of Appeals Jurisdiction

The Eleventh Circuit Court of Appeals has jurisdiction to review the district court's dismissal of the Second Amended Complaint pursuant to 28 U.S.C.§ 1291.

[2] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly followed and applied binding Eleventh Circuit precedent in Evans v. Ga. Reg'l Hosp., 850 F.3d, 1248 (11th Cir.), cert. denied, 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017) and held that Plaintiff's claim that he was terminated because of his sexual orientation fails to state a claim for relief under Title VII?

[3] STATEMENT OF THE CASE

I. Course of Proceedings

Plaintiff filed this action *pro se* on May 5, 2016 asserting claims against the Clayton County Board of Commissioner ("the Board"). (Doc. 1). Plaintiff retained counsel and filed his First Amended Complaint on August 2, 2016. (Doc. 2). In response to the Board's Motion to Dismiss and with the consent of the Board and Clayton County ("the County"), Plaintiff filed his Second

Amended Complaint ("SAC") on September 12, 2016, which dropped the Board as a Defendant and named the County as the Defendant. (Doc. 7-10). In his SAC, Plaintiff asserted that he was terminated in violation of Title VII because of his sexual orientation and because he did not conform with gender stereotypes. (Doc. 10).

The County filed a Motion to Dismiss the SAC, arguing that Plaintiff's claim that he was terminated because he is gay should be dismissed because Title VII does not prohibit discrimination on the basis of sexual orientation. (Doc. 10, at pp. 4-6). The County also argued that Plaintiff's claim that he was terminated because he did not conform with gender stereotypes should be dismissed because (among other reasons) the SAC did not sufficiently allege a gender stereotyping claim. (Id. at pp. 6-8).

After briefing by the parties, the magistrate judge issued a Report and Recommendation on November 3, 2016 recommending dismissal of the SAC. (Doc. [4] 16). With respect to Plaintiff's claim that he was terminated because of his sexual orientation, the R&R concluded that Title VII does not encompass claims of discrimination on the basis of sexual orientation. (Id. at pp. 8-9). The R&R determined that Plaintiff's contention to the contrary was precluded by Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (per curiam), which held that Title VII does not prohibit discrimination on the basis of sexual orientation. (Id. at pp. 8-9). The R&R recognized that the EEOC changed its position in 2015 and interpreted Title VII as encompassing

sexual orientation, but the R&R declined to defer to the EEOC's position in light of the binding precedent set forth in Blum. (Id. at pp. 11-13). The R&R also recommended dismissal of Plaintiff's gender stereotyping claim. (Id. at pp. 14-18).

Plaintiff filed Objections to the R&R on November 17, 2016, asserting that Title VII encompasses discrimination on the basis of sexual orientation and that the SAC adequately pled a gender stereotyping claim. (Doc. 18). After briefing by the parties, the district court issued an Order on February 2, 2017 deferring consideration of the R&R. (Doc. 21). The 2/2/17 Order noted that the Eleventh Circuit had recently heard oral argument in the Evans v. Ga. Reg'l Hosp. case and was considering whether Blum was binding precedent. (Id. at pp. 4-5). The 2/2/17 Order decided to defer a ruling on the R&R until after the Eleventh Circuit issued its decision in Evans. (Id. at p. 5).

[5] On March 10, 2017, the Eleventh Circuit issued its decision in Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017), which holds that Blum remained binding precedent and that Title VII therefore does not prohibit discrimination on the basis of sexual orientation. Relying on Evans, the district court entered an Order on July 21, 2017 adopting the R&R and dismissing Plaintiff's Title VII claim that he was terminated because of his sexual orientation. (Doc. 24, at p. 5). The district court also adopted the R&R and dismissed

Plaintiff's gender stereotyping claim. (Id. at p. 6). This appeal followed.[1]

II. Statement of the Facts

In the SAC, Plaintiff alleges that he is a gay male and that he worked for Clayton County as the Child Welfare Services Coordinator. (Doc. 10, ¶¶ 11-13). Plaintiff claims that, beginning in January 2013, he began playing in a gay recreational softball league. (Id. at ¶ 15). Plaintiff alleges that his participation in the league and his sexual orientation and "identity" were criticized by one or more (unnamed) persons, and that the County subjected him to an internal audit of the funds he managed. (Id. at ¶¶ 17-18). Plaintiff claims that the audit was a pretext for discrimination against him based upon his sexual orientation and his failure to conform to a gender stereotype, and that his subsequent termination was actually due [6] to his sexual orientation and gender non-conformity, rather than due to the findings of the audit. (Id. at ¶¶ 18-23). Based solely upon these allegations, Plaintiff alleges that he was discriminated against due to his "sex" in violation of Title VII of the Civil Rights Act of 1964. (Id. at ¶¶ 24-33).

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[1] Plaintiff does not appeal the district court's dismissal of his gender stereotyping claim.

III. Standard of Review

This Court reviews de novo a district court's dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. Warner v. City of Marathon, 2017 U.S. App. LEXIS 24790, at *7, 2017 WL 6209600 (11th Cir. Dec. 8, 2017); Hunt v. Aimco Properties, L.P., 814 F.3d 1213, 1221 (11th Cir. 2016); Leib v. Hillsborough Cty. Pub. Transp. Comm'n, 558 F.3d 1301, 1305 (11th Cir. 2009).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, accepted as true, states a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is plausible on its face if there is a "reasonable inference that the defendant is liable for the misconduct alleged." Id. Although a court is required to accept the allegations in a complaint as true, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted).

[7] SUMMARY OF THE ARGUMENT

The district court correctly followed the Eleventh Circuit's binding precedent in Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255-57 (11th Cir. 2017), cert. denied, 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017) and dismissed Plaintiff's claim that he was terminated because of his sexual orientation in violation of Title VII. In Evans, the Eleventh Circuit held that Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), which held that

Title VII does not prohibit termination because of sexual orientation, remains good law and is binding Circuit precedent.

In this appeal, Plaintiff improperly urges this Court to "overrule" Evans because it was "wrongly decided." (Brief of Appellant, pp. 2, 7, 20). However, under the prior panel rule, the Court must follow a prior panel decision unless it has been clearly and directly overruled or abrogated by an intervening or subsequent decision by the Supreme Court or the Eleventh Circuit sitting en banc. Plaintiff has not identified any such decision, but rather contends that Evans incorrectly construed or applied prior Supreme Court and Eleventh Circuit decisions.

Regardless, Plaintiff's contention that Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) directly conflicts with Evans and Blum is meritless and was properly rejected by Evans. Under the prior panel rule, Plaintiff cannot re-litigate Evans' holding that Price Waterhouse is not clearly on point or contrary to Blum, and that Price Waterhouse did not squarely address whether discrimination on the basis of [8] sexual orientation is prohibited under Title VII, Evans' conclusion also was correct because Price Waterhouse simply held that an employer may not make employment decisions based on stereotypes concerning how a female should appear, dress and behave in the workplace. Moreover, the fact that most circuit courts have decided after Price Waterhouse that Title VII does not encompass discrimination on the basis of sexual orientation demonstrates, at a bare minimum, that

Price Waterhouse did not clearly and directly overrule or abrogate Blum or hold that Title VII prohibits discrimination on the basis of sexual orientation. The fact that the Supreme Court recently denied the plaintiff's petition for a writ of certiorari in Evans suggests that the Supreme Court also does not discern any conflict between Price Waterhouse and Evans.

Contrary to Plaintiff's assertions, Evans does not clearly and directly conflict with Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). Glenn is not directly on point and does not squarely address whether sexual orientation discrimination is prohibited by Title VII. Instead, Glenn addressed the separate and distinct issue of whether discrimination against a transgendered individual because of her gender non-conformity is actionable sex discrimination. Indeed, Evans applied Glenn by reversing the dismissal of the plaintiff's gender non-conformity claim. Even if Glenn held that sexual orientation discrimination is prohibited by Title VII (which it did not), then Glenn – not Evans – would need to be disregarded under the prior [9] panel rule because any such holding in Glenn would be contrary to this Court's prior decision in Blum. In any event, the Eleventh Circuit evidently concluded that Evans does not conflict with Glenn because it denied the plaintiff's petition for rehearing en bans in Evans. (Evans v. Ga. Reg'l Hosp., Appeal No. 15-15234-BB) (11th Cir.) (Order of July 6, 2017).

Based on the foregoing, Plaintiff's contention that Title VII already prohibits discrimination on the basis of sexual orientation is circular and contrary to Evans

and Blum. Moreover, the EEOC's position that Title VII prohibits discrimination on the basis of sexual orientation is not binding on this Court and is contrary to Evans and Blum.

Finally, Plaintiff's reliance on Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), which held that same-sex sexual harassment is actionable under Title VII, is inapposite. Evans concluded that Oncale is not clearly on point or contrary to Blum, and did not squarely address whether sexual orientation discrimination is prohibited by Title VII. Plaintiff may not re-litigate the correctness of Evans' holding on this point in this appeal. In any event, other circuits have had little difficulty distinguishing between same-sex sexual harassment that is actionable under Title VII pursuant to Oncale, and harassment based on sexual orientation, which is not actionable under Title VII. The fact that the Supreme Court recently [10] denied the plaintiff's petition for a writ of certiorari in Evans suggests that the Supreme Court also does not discern any conflict between Oncale and Evans.

ARGUMENT AND CITATION OF AUTHORITY

I. Under Binding Eleventh Circuit Precedent, The District Court Correctly Held That Plaintiff Cannot Assert A Viable Claim For Sex Discrimination Based On His Sexual Orientation

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII")

prohibits discrimination on the basis of an individual's "race, color, religion, sex, or national origin." Sexual orientation is not an enumerated protected class within the statute. Undeterred, Plaintiff alleges a Title VII sex discrimination claim based upon his claim that he was terminated because of his sexual orientation. However, as the district court correctly held, Plaintiff's claim is foreclosed by binding Eleventh Circuit precedent.

A. This Court Held In *Blum v. Gulf Oil Corp.* That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation

In Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979),[2] a former employee sued Gulf Oil Corp alleging that he was terminated due to (among other things) his sexual orientation. Gulf Oil presented evidence that the plaintiff was terminated for making personal phone calls related to his side business rather than due to his sexual orientation. Id. at 936-37. After a bench trial, the trial court concluded that the [11] plaintiff was terminated for legitimate, non-discriminatory reasons, mainly, his use of a phone for personal reasons. Id.

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[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued on or before September 30, 1981.

The plaintiff appealed to the former Fifth Circuit, which affirmed the trial court's judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim. First, the former Fifth Circuit found that the plaintiff could not establish pretext to support any of his claims, including his sexual orientation claim. Id. at 937-38. The former Fifth Circuit also concluded that the district court properly rejected the plaintiff's sexual orientation claim because "discharge for homosexuality is not prohibited by Title VII or Section 1981." Id. at 938.

B. This Court Recently Reaffirmed That *Blum* Remains Binding Precedent And That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation In *Evans v. Ga. Reg'l Hosp.*

In Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255-57 (11th Cir. 2017), cert. denied, 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017), this Court recently reaffirmed that Blum remains binding precedent and that Title VII does not prohibit discrimination on the basis of sexual orientation.

In Evans, the plaintiff was employed with the hospital as a security officer. The plaintiff asserted that she was subjected to a hostile work environment and terminated because of her sexual orientation and because of her gender non-conformity. Evans, 850 F.3d at 1250-52. The plaintiff asserted that these claims were actionable under Title VII as discrimination because of her sex. Id. at 1252. [12] The district court dismissed

the plaintiff's sexual orientation claim on the ground that Title VII was not intended to cover discrimination against homosexuals. Id. at 1252-53. The district court also dismissed the plaintiff's gender non-conformity claim on the ground that it was "just another way to claim discrimination based on sexual orientation." Id.

On appeal, the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's sexual orientation claim. The Eleventh Circuit stated as follows:

> Evans next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent forecloses such as action. Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII. . . .") "Under our prior precedent rule, we are bound to follow a binding precedent in this Circuit unless and until it is overruled by this court en Banc, or by the Supreme Court." Offshore of the Palm Beaches, Inc. v. Lynch, 741 F.3d 1251, 1256 (11th Cir. 2014) (internal quotations omitted).

Evans, 850 F.3d at 1255.

The Eleventh Circuit in Evans then rejected various arguments as to why the Court should not follow Blum. First, the Eleventh Circuit rejected the plaintiff's argument that the above statement in Blum was mere dicta, concluding that it was a holding that directly addressed an issue raised on appeal. Id. The Eleventh Circuit also held that, at the very least, the

statement in Blum that discharge for homosexuality is not prohibited by Title VII was an alternative ground for its [13] decision affirming the judgment of the district court, and that, as such, it was binding precedent. Id. at 1255-56.

In addition, the Eleventh Circuit in Evans rejected the plaintiff's contention that Blum was overruled or abrogated by the Supreme Court's subsequent decisions in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) and Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998). In this regard, the Eleventh Circuit in Evans stated as follows:

> The fact that claims for gender non-conformity and same-sex discrimination can be brought pursuant to Title VII does not permit us to depart from Blum. See Randall v. Scott, 610 F.3d 701, 707 (11th Cir. 2010) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point.") (citation omitted); N.L.R.B. v. Datapoint Corp., 642 F.2d 123, 129 (5th Cir. 1981) ("Without a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court . . . "). Price Waterhouse and Oncale are neither clearly on point nor contrary to Blum. These Supreme Court decisions do not squarely address whether sexual orientation discrimination is prohibited by Title VII.

Evans, 850 F.3d at 1256.

The Eleventh Circuit, however, reversed the district court's dismissal of the plaintiff's gender non-conformity claim. Id. at 1254. The Eleventh Circuit explained that "[d]iscrimination based on failure to conform to a gender stereotype is sex-based discrimination." Id. (citing Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)). [14] The Eleventh Circuit in Evans reiterated Glenn's holding that discrimination against a transgender individual because of gender non-conformity constitutes a viable sex discrimination claim under Title VII. Id. at 1254-55.[3]

C. Both The Eleventh Circuit And The United States Supreme Court Have Declined Further Review Of *Evans*

The Eleventh Circuit denied the plaintiff's petition for panel rehearing and for rehearing en banc in Evans on July 6, 2017. (Evans v. Ga. Reg'l Hosp., Appeal No. 15-15234-BB) (11th Cir.) (Order of July 6, 2017). The plaintiff then filed a petition for certiorari with the United States Supreme Court, which the Supreme Court recently denied on December 11, 2017.

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[3] Circuit Judge William Pryor issued a concurring opinion agreeing in full with the majority opinion but emphasizing that claims of discrimination based on sexual orientation are distinct from claims of discrimination based on gender stereotypes. Evans, 850 F.3d at 1258-1261 (Pryor, J., concurring). Circuit Judge Rosenbaum wrote a separate opinion concurring in the reversal and remand of the plaintiff's gender non-conformity claim, but dissenting from the Court's holding that Title VII does not prohibit discrimination on the basis of sexual orientation. Id. at 1261-1273 (Rosenbaum, J., concurring in part and dissenting in part).

Evans v. Ga. Reg'l Hosp., 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017).

Based on the foregoing, Evans and Blum preclude Plaintiff from asserting that he was terminated because of his sexual orientation in violation of Title VII. Accordingly, the district court's dismissal of Plaintiff's Title VII sexual orientation claim should be summarily affirmed.

[15] **II. The Court Should Reject Plaintiff's Invitation To Disregard And Overrule *Evans***

Plaintiff urges the Court to disregard and "overrule" Evans because it was "wrongly decided." (Brief of Appellant, pp. 2, 7, 20). Under the prior panel rule, however, this Court

> may disregard the holding of a prior opinion only where that "holding is overruled by the Court sitting en banc or by the Supreme Court." Smith v. GTE Corp., 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). To constitute an "overruling" for the purposes of this prior panel precedent rule, the Supreme Court decision "must be clearly on point." Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1292 (11th Cir. 2003); see also Main Drug., Inc. v. AETNA U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007) ("Of course, we will not follow prior panel precedent that has been overruled by a Supreme Court decision, but without a clearly contrary opinion of the Supreme Court or of this court

> sitting en banc, we cannot overrule a decision of a prior panel of this court.") (quotation marks and citations omitted); United States v. Chubbuck, 252 F.3d 1300, 1305 n.7 (11th Cir. 2001) ("[T]he prior precedent rule would not apply if intervening on-point case law from either this Court en banc, the United States Supreme Court, or the Florida Supreme Court existed."). In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that this intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel. See In re Provenzano, 215 F.3d 1233, 1235 (11th Cir. 2000) ("We would, of course, not only be authorized but also required to depart from [our prior decision] if an intervening Supreme Court decision actually overruled or conflicted with it."); Chambers v. Thompson, 150 F.3d 1324, 1326 (11th Cir. 1998) ("We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to [16] the point of abrogation by a subsequent en banc or Supreme Court decision.").

United States v. Kaley, 579 F.3d 1246, 1255-56 (11th Cir. 2009) (emphasis added).

Thus, a Supreme Court or Eleventh Circuit en banc decision cannot be relied upon to disregard a prior panel decision unless it is an intervening decision issued subsequent to the prior panel decision at issue. Kaley, 579 F.3d at 1255-56 (citing cases); United States

v. Chafin, 808 F.3d 1263, 1274 (11th Cir. 2015) ("For a Supreme Court decision to 'overrule' a prior panel precedent, the intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel") (citation and punctuation omitted) (emphasis added), cert denied, 136 S. Ct. 1391 (2016); Randall, 610 F.3d at 707 ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point.") (citation and punctuation omitted) (emphasis added).

In this case, as discussed below, Plaintiff has failed to cite any intervening or subsequent Supreme Court or Eleventh Circuit en banc decision that is clearly and directly on point and which overrules or abrogates Evans. Moreover, the preexisting cases relied on by Plaintiff do not clearly and directly conflict with Evans or address whether Title VII encompasses claims of discrimination on the basis of sexual orientation.

[17] **A. Plaintiff Has Failed To Identify Any Intervening Or Subsequent Supreme Court Or En Banc Eleventh Circuit Decision That Is Clearly And Directly On Point And That Overrules Or Abrogates *Evans***

Plaintiff has not identified any intervening or subsequent Supreme Court or en banc Eleventh Circuit decision that is clearly and directly on point and that

has overruled or abrogated Evans. Instead, Plaintiff improperly attempts to re-litigate Evans and argue that Evans incorrectly construed or distinguished pre-existing Supreme Court (Price Waterhouse) and Eleventh Circuit (Glenn) precedent. Plaintiff, however, cannot do so under the clearly established prior panel rule. See, e.g., Wood v. Comm'r of Soc. Sec., 861 F.3d 1197 (11th Cir. 2017) ("To the extent Mr. Culbertson points to other circuits to argue [the prior panel decision] was wrongly decided, this does not empower us to ignore it"); Chubbuck, 252 F.3d at 1305 n.7 ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong"); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1076 (11th Cir.) ("[T]he prior panel precedent rule is not dependent on a subsequent panel's appraisal of the initial decision's correctness. Nor is the application of the rule dependent on . . . wisdom of the judges involved in the prior decision"), cert. denied, 531 U.S. 957 (2000).

The district court's dismissal of Plaintiff's sexual orientation claim therefore should be summarily affirmed.

[18] B. *Evans* Does Not Clearly And Directly Conflict With The Supreme Court Or Eleventh Circuit Decisions Cited By Plaintiff

Leaving aside Plaintiff's failure to cite any intervening or subsequent Supreme Court or en banc Eleventh Circuit decision clearly or directly on point that

overrules or abrogates Evans, Plaintiff has not cited any Supreme Court or en banc Eleventh Circuit decision that is clearly and directly on point and which directly conflicts with Evans.

1. *Price Waterhouse* Is Not Clearly And Directly On Point And Does Not Overrule Or Abrogate *Evans*

Plaintiff asserts that the Court should disregard and overrule Evans because it conflicts with Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Plaintiff's contentions are meritless and were properly rejected by Evans.

In Price Waterhouse, a female senior manager was not invited to become a partner with an accounting firm. The plaintiff introduced evidence that various male partners made stereotypical comments about her when considering her candidacy. These comments included that the plaintiff was "macho," that she "overcompensated for being a woman," that she should take "a course at charm school," that certain partners objected to her swearing only "because it's a lady using foul language" and similar comments. Id. at 235. The partner who informed the plaintiff of the decision to place her candidacy on hold told her that, if she wanted to improve her chances for partnership in the future, she should "walk more femininely, talk more [19] femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." Id. at 235.

A plurality of four justices, joined by two concurring justices, held that such evidence that an employer took adverse action against an employee for failure to conform to a stereotype associated with the employee's protected class was sufficient to establish a violation under Title VII. Price Waterhouse, 490 U.S. at 251; Id. at 258-261 (White, J., concurring); Id. at 302 (O'Connor, J., concurring). For example, "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." Id. at 251.

Contrary to Plaintiff's assertions (and the assertions of the dissenting judge in Evans), Price Waterhouse's holding that an employer violates Title VII by making employment decisions because of gender stereotypes such as how a female should dress or wear her hair, what personality traits (such as "aggressiveness") a female should have, or how a female should talk, is not clearly and directly on point nor contrary to Evans' holding that Title VII does not prohibit discrimination on the basis of sexual orientation. See Evans, 850 F.3d at 1256 (concluding that Price Waterhouse is 'neither clearly on point nor contrary to Blum" and that Price [20] Waterhouse "do[es] not squarely address whether sexual orientation discrimination is prohibited by Title VII").

Simply put, Price Waterhouse does not clearly and directly address whether sexual orientation discrimination is prohibited by Title VII, but rather merely addresses gender stereotypes relating to how one

appears or behaves in the workplace. This conclusion is underscored by the fact that most circuit courts have held – notwithstanding Price Waterhouse – that Title VII does not encompass discrimination on the basis of sexual orientation. See, e.g., Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (citing and discussing Price Waterhouse, but holding that "Title VII does not proscribe harassment simply because of sexual orientation"); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) ("Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII") (citing cases);[4] Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290-292 (3d Cir. 2009) (discussing Price Waterhouse and distinguishing between harassment claims based on sexual orientation for which plaintiff may not recover, and harassment claims based on gender stereotyping (high voice and walking effeminately) for which plaintiff may recover); Bibby v. Phila. Coca Cola Bottling [21] Co., 260 F.3d 257, 261, 263-65 (3d Cir. 2001) (citing and discussing Price Waterhouse, but holding that "Title VII does not prohibit discrimination based on sexual orientation"), cert. denied, 534 U.S. 1155 (2002); Hopkins v. Baltimore Gas & Elect. Co., 77 F.3d 745, 751-52 (4th Cir. 1996) (discussing Price Waterhouse, but concluding that "Title VII does not prohibit conduct based on the employee's sexual orientation" as

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[4] In Zarda v. Altitude Express, Inc., 2017 U.S. App. LEXIS 13127 (2d Cir. May 25, 2017), the Second Circuit agreed to consider this issue en banc. That case is still pending.

opposed to "the fact that the employee is a man or a woman"), cert. denied, 519 U.S. 818 (1996); Brandon v. Sage Corp., 808 F.3d 266, 270 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation' "); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763-66 (6th Cir. 2006) (rejecting argument that Price Waterhouse supports conclusion that Title VII encompasses sexual orientation), cert. denied, 551 U.S. 1104 (2007); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063-64 (9th Cir. 2002) (en banc) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual orientation"), cert. denied, 538 U.S. 922 (2003); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (discussing Price Waterhouse, but holding that "Title VII's protections do not extend to harassment due to a person's sexuality"); but see Hively v. Ivy Tech. Cmty Coll. of Indiana, 853 F.3d 339, 340-41 (7th Cir. 2017) (en banc) (holding that discrimination on basis of sexual orientation is a form of sex discrimination under Title VII).

[22] In a similar vein, Plaintiff contends that Evans incorrectly held that Blum remains good law because Price Waterhouse abrogated the case cited by Blum in support of its holding that discharge for homosexuality is not prohibited by Title VII. (Brief of Appellant, pp. 11-13). More specifically, Plaintiff points out that Blum cited to Smith v. Liberty Ins. Co., 569 F.2d 325 (5th Cir. 1978), which held that discrimination based on "effeminate" behavior was not prohibited by Title VII and stated in a footnote that the EEOC

had ruled that adverse action against homosexuals is not cognizable under Title VII. Id. at 327 & n.1. (Id. at p. 12). Plaintiff points out that Smith's holding regarding gender stereotyping has been abrogated by Price Waterhouse and that the EEOC now takes the position that Title VII encompasses sexual orientation. (Id. at pp. 12-13).

However, as previously discussed, Evans held that Blum is binding precedent in this Circuit, that Price Waterhouse is not clearly on point or contrary to Blum, and that Price Waterhouse did not squarely address whether sexual orientation discrimination is prohibited by Title VII. Evans, 850 F.3d at 1256. Plaintiff may not re-litigate in this appeal the correctness of Evans' holding that Blum is binding Circuit precedent.

In any event, Smith also rejected the plaintiff's claim that Title VII prohibits an employer from rejecting a job applicant based on his or her sexual preference. Smith, 569 F.2d at 326-27 & n. 1. In doing so, Smith noted that the EEOC had taken [23] the position that Title VII does not prohibit adverse action against homosexuals. Id at 327 n. 1. Thus, contrary to Plaintiff's contentions, Price Waterhouse did not impact Smith's holding that Title VII does not prohibit an employer from making an employment decision based on the employee's or applicant's sexual orientation.

Nevertheless, even if Price Waterhouse somehow weakened or undermined the analysis employed in Blum as Plaintiff contends, it did not clearly and directly overrule or abrogate Blum's holding that Title

VII does not prohibit discrimination on the basis of sexual orientation. In this regard, the Eleventh Circuit has held that a prior panel decision may not be disregarded simply because an intervening Supreme Court decision has merely weakened the prior panel decision. See, e.g., United States v. Washington, 2017 U.S. App. LEXIS 16723, at *5, 2017 WL 3822039 (11th Cir. Aug. 31, 2017) ("To conclude that we are not bound by a prior holding in light of a Supreme Court case, we must find that case is clearly on point and that it actually abrogate[s] or directly conflict[s] with, as opposed to merely weaken[s], the holding of the prior panel.") (punctuation and citation omitted); Chafin, 808 F.3d at 1274 ("For a Supreme Court decision to overrule a prior panel precedent, the intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.") (punctuation and citations omitted); Kaley, 579 F.3d at 1255 (same) (citation omitted); Chubbuck, 252 F.3d at 1305 n.7 ("We are not at liberty to disregard [24] binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court") (quoting Fla. League of Professional Lobbyists v. Meggs, 87 F.3d 457, 462 (11th Cir. 1998)).

In any event, the Supreme Court evidently concluded that Evans does not conflict with Price Waterhouse because it very recently denied the plaintiff's petition for a writ of certiorari in Evans. Evans v. Ga. Reg'l Hosp., 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017). Based on the foregoing, Price Waterhouse does not

provide any basis for the Court to disregard Evans. The district court's dismissal of Plaintiff's sexual orientation claim therefore should be affirmed.

2. *Evans* Is Wholly Consistent With *Glenn v. Brumby* and In Fact Applied *Glenn*

Plaintiff also contends that Evans conflicts with Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (Brief of Appellant, pp. 13-15). However, Glenn is not directly on point and does not squarely address whether sexual orientation discrimination is prohibited by Title VII. Indeed, Glenn does not cite, much less discuss, Blum. Instead, Glenn addressed the separate and distinct issue of whether discrimination against a transgendered individual because of her gender non-conformity is actionable sex discrimination under the Equal Protection Clause, and held that it does. Id. at 1317-1320. As Evans correctly observed, a gender non-conformity claim "constitutes a separate, distinct avenue for relief under Title VII." Evans, 850 F.3d at 1254-55. Thus, Evans does not conflict with Glenn, but rather properly [25] applied it by reversing the dismissal of the plaintiff's gender non-conformity claim. Id.[5]

To the extent that Plaintiff contends that Glenn somehow held that sexual orientation discrimination is prohibited by Title VII, then Glenn – not Evans – would need to be disregarded under the prior panel

[5] The County notes that Circuit Judge William Pryor was on the panel in both Glenn and Evans.

rule because any such holding in Glenn would be contrary to this Court's prior decision in Blum. In any event, the Eleventh Circuit evidently concluded that Evans does not conflict with Glenn because it denied the plaintiff's petition for rehearing en banc in Evans. (Evans v. Ga. Reg'l Hosp., Appeal No. 15-15234-BB) (11th Cir.) (Order of July 6, 2017). According [sic], Glenn does not provide any support for Plaintiff's contention that the Court should disregard and overrule Evans.

III. Plaintiff's Contention That Title VII Already Protects Employees Against Discrimination On The Basis Of Sexual Orientation Ignores *Evans* And *Blum* And Is Circular

Finally, Plaintiff summarily declares that Evans "was wrongly decided because Title VII *already* prohibits discrimination on the basis of sexual orientation – because it is discrimination on the basis of sex. . . ."). (Brief of Appellant, p. 19) (emphasis in original). Of course, this contention is comically circular. Evans and Blum held that Title VII does not prohibit discrimination on the basis of sexual [26] orientation, and Plaintiff has failed to demonstrate that the Court may overrule or disregard this binding Circuit precedent.

Plaintiff contends that Title VII already prohibits discrimination on the basis of sexual orientation because the EEOC changed course in 2015 and has now taken the position that Title VII encompasses sexual orientation. (Brief of Appellant, pp. 17-18). However, EEOC interpretations of Title VII are not binding on

this Court and are entitled to deference "only to the extent that [they have] the power to persuade." EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1031 (11th Cir. 2016) (quoting Christiansen v. Harris Cty., 529 U.S. 576, 587 (2000). See also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Therefore, the Court may not disregard Evans and Blum based on the EEOC's new nonbinding and unpersuasive interpretation.

Plaintiff next contends that Title VII already prohibits discrimination on the basis of sexual orientation because the Supreme Court held in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) that same-sex sexual harassment is actionable under Title VII. (Brief of Appellant, p. 16). However, Oncale simply extended the Supreme Court's previous rejection of any conclusive presumption that an employer will not discriminate against members of the same protected class. Id. at 78-79. The Court in Oncale also emphasized that a claim for same-sex [27] harassment did not require a showing that the harassing conduct was motivated by sexual desire. Id. at 80.

Therefore, contrary to Plaintiff's assertions, Oncale does not squarely address whether Title VII protects against discrimination on the basis of sexual orientation. Indeed, Evans concluded that Oncale did not squarely address whether sexual orientation discrimination is prohibited by Title VII. Evans, 850 F.3d at 1256. For the reasons previously discussed, Plaintiff may not re-litigate the correctness of Evans' holding on this point in this appeal.

In any event, other circuits have had little difficulty distinguishing between same-sex sexual harassment that is actionable under Title VII pursuant to Oncale, and harassment based on sexual orientation, which is not actionable under Title VII. See, e.g., Higgins, 194 F.3d 252, 258-260 (citing and discussing Oncale, but holding that "Title VII does not proscribe harassment simply because of sexual orientation"); Bibby, 260 F.3d at 261, 263-65 (citing and discussing Oncale, but holding that plaintiff's harassment claim was not actionable because "[h]is claim was, pure and simple, that he was discriminated against because of his sexual orientation"); Vickers, 453 F.3d at 762-66 (citing and discussing Oncale, but holding that plaintiff's harassment claim was not actionable because alleged harassment was based on his sexual orientation, not his sex); Medina, 413 F.3d at 1134-35 (citing and discussing Oncale, but holding that plaintiff could not assert hostile work [28] environment claim based on her heterosexuality). Accordingly, Oncale does not even remotely support Plaintiff's contention that Title VII already prohibits discrimination on the basis of sexual orientation.

Finally, Plaintiff argues that Congress's failed attempts to enact the Employment Non-Discrimination Act to prohibit employment discrimination on the basis of sexual orientation are not controlling as to whether Title VII protects against sexual orientation discrimination. In support of this contention, Plaintiff cites to various Supreme Court decisions cautioning against relying on congressional inaction as a basis for

interpreting a statute. (Brief of Appellant, pp. 18-19). This contention is irrelevant because the majority opinion in Evans did not mention, much less rely on, the fact that Congress repeatedly has failed to enact ENDA. However, as Judge Pryor cogently stated in his concurring opinion, this "illustrates that Congress is the appropriate branch in which to raise the arguments raised" by Plaintiff in this appeal. Evans, 850 F.3d at 1261 (Pryor, J., concurring).

Based on the foregoing, Title VII does not prohibit discrimination on the basis of sexual orientation, and the district court's dismissal of Plaintiff's sexual orientation claim therefor should be affirmed.

CONCLUSION

For all the reasons set forth herein, the Court is bound under the prior panel rule to follow Evans and Blum and hold that Title VII does not encompass claims of [29] discrimination on the basis of sexual orientation. Accordingly, the district court's dismissal of Plaintiff's sexual orientation claim should be affirmed.

Respectfully Submitted

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[30] [Certificate Of Compliance Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13801

D.C. Docket No. 1:16-cv-01460-ODE

GERALD LYNN BOSTOCK,

Plaintiff - Appellant,

versus

CLAYTON COUNTY BOARD
OF COMMISSIONERS,

Defendant,

CLAYTON COUNTY,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed Jul. 18, 2018)

Before ED CARNES, Chief Judge, TJOFLAT, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, and BRANCH, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on whether this case should be

reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting a rehearing en banc, it is ORDERED that this case will not be reheard en banc.

ROSENBAUM, Circuit Judge, joined by JILL PRYOR, Circuit Judge, dissenting from the denial of rehearing en banc:

The issue this case raises—whether Title VII protects gay and lesbian individuals from discrimination because their sexual preferences do not conform to their employers' views of whom individuals of their respective genders should love—is indisputably en-banc-worthy. Indeed, within the last fifteen months, two of our sister Circuits have found the issue of such extraordinary importance that they have each addressed it en banc. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).[1]

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[1] And that's really saying something: in the past five years, the Second Circuit appears to have decided only two cases en banc—including *Zarda*—of the more than 24,000 appeals it terminated during that same period. *See* Westlaw search in CTA2 database: "adv:DA(aft 2008) & PR,PA,JU(en/2 banc)" (last visited July 10, 2018); Administrative Office of the United States Courts, Federal Court Management Statistics of the Courts of Appeals, http://www.uscourts.gov/sites/default/files/fcms_na_appprofile1231.2017.pdf; http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary1231.2016.pdf; http://www.uscourts.gov/sites/default/files/data_tables/fcsm_appeals_summary_pages_december_2015.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/appeals-fcms-summary-pages-december-2014.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/appeals-fcms-summary-pages-december-2013.pdf. In fact,

No wonder. In 2011, about 8 million Americans identified as lesbian, gay, or bisexual.[2] *See* Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, The Williams Inst., 1, 3, 6 (Apr. 2011), https://williamsinstitute.lawucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf (last visited July 10, 2018). Of those who so identify, roughly 25% report experiencing workplace discrimination because their sexual preferences do not match

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Chief Judge Katzmann has characterized the Second Circuit as having a "longstanding tradition of general deference to panel adjudication." *Ricci v. DeStafano*, 530 F.3d 88, 89 (2d Cir. 2008) (Katzmann, J., concurring in the denial of rehearing en banc); *see also id.* ("Throughout our history we have proceeded to a full hearing en banc only in rare and exceptional circumstances."). Similarly, in the past five years, the Seventh Circuit appears to have decided only sixteen cases en banc, including *Hiveley*, of the more than 15,000 appeals that Circuit has terminated during that time. *See* Westlaw search in CTA7 database: "adv:PR,PA,JU(en/2 banc) & DA(after 2012)% (den!/1 "en banc")" (last visited July 10, 2018); Federal Court Management Statistics of the Courts of Appeals, United States Courts, *supra.* Yet both Circuits found the question at issue here to be of such significance to warrant adding the respective cases to their very exclusive lists of en banc cases.

[2] Most statistics since that time include the number of individuals who identify as transgender. We have already held that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded in part by* The Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e–2(m)), requires the conclusion that Title VII precludes discrimination against transgender individuals because they fail to conform to their employers' stereotypes of how a member of the individual's birth-assigned gender should act or feel. *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

their employers' expectations.[3] That's a whole lot of people potentially affected by this issue.[4]

Yet rather than address this objectively en-banc-worthy issue, we instead cling to a 39-year-old precedent, *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), that was decided ten years before *Price*

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[3] *See*, *e.g.*, *2017 Workplace Equality Fact Sheet*, Out & Equal Workplace Advocates, http://outandequal.org/2017-workplace-equality-fact-sheet/ (last visited July 10, 2018) ("One in four LGBT employees report experiencing employment discrimination in the last five years."); *LGBT People in Georgia*, The Williams Inst., https://williamsinstitute.law.ucla.edu/wp-content/uploads/Georgia-fact-sheet.pdf (last visited July 10, 2018) (finding 25% of LGBT Georgians reported workplace discrimination). I have been unable to find current statistics providing the percentage of only lesbian, gay, and bisexual individuals (without the inclusion of transgender individuals) who report discrimination in the workplace. Nevertheless, according to Professor Gary Gates's report for the Williams Institute, *see supra* at 1, "[a]n estimated 3.5% of adults in the United States identify as lesbian, gay, or bisexual and an estimated 0.3% of adults are transgender."

[4] Studies show that this discrimination takes a myriad of forms: LGBT individuals are not interviewed and hired at the same rate as their heterosexual peers, and they face pay and promotional disparities. *See* Brad Spears, Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, The Williams Inst., 14 (July 2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf (last visited July 10, 2018). Studies also show that employment discrimination against LGBT individuals correlates with effects beyond the employment sphere. For example, LGBT employees who experienced employment discrimination reported higher levels of psychological distress and health-related problems. *See* Craig R. Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 J. of Counseling Psych. 218, 224-28 (1999).

Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Supreme Court precedent that governs the issue and requires us to reach the opposite conclusion of *Blum*. Worse still, *Blum*'s "analysis" of the issue is as conclusory as it gets, consisting of a single sentence that, as relevant to Title VII, states in its entirety, "Discharge for homosexuality is not prohibited by Title VII." *Blum*, 597 F.2d at 938.[5] And if that's not bad enough, to support this proposition, *Blum* relies solely on *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978)—a case that itself has been necessarily abrogated not only by *Price Waterhouse* but also by our own precedent in the form of *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).[6] I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people.[7]

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[5] For comparison's sake, this issue spawned 163 pages of analysis from the Second Circuit in *Zarda* and 69 pages of analysis from the Seventh Circuit in *Hively*.

[6] *Smith* concluded that Title VII does not prohibit discrimination against male employees who present as "effeminate." *Smith v. Liberty Mut. Ins.*, 569 F.2d 325, 328 (5th Cir. 1978). In *Price Waterhouse*, however, the Supreme Court concluded that Title VII did protect from discrimination a woman who acted "macho," 490 U.S. at 235—the same genre of problem that arose in *Smith*. And in *Glenn*, we found that *Price Waterhouse* requires the understanding that Title VII protects "[a]ll persons . . . from discrimination on the basis of gender stereotype," *Id.* at 1318.

[7] The pernicious effects of this discrimination are not just limited to those on people, they also drag down the economy by, among other things, reducing worker productivity and increasing turnover. *See* M.V. Lee Badgett, *The Economic Case for Supporting LGBT Rights*, The Atlantic, Nov. 29, 2014, https://www.

I have previously explained why *Price Waterhouse* abrogates *Blum* and requires the conclusion that Title VII prohibits discrimination against gay and lesbian individuals because their sexual preferences do not conform to their employers' views of whom individuals of their respective genders should love. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1261-73 (11th Cir.) (Rosenbaum, J., dissenting), *cert. denied*, 138 S. Ct. 557 (2017). Both the Second and Seventh Circuits have likewise concluded that their respective *pre-Price Waterhouse* precedents reaching the same conclusion as *Blum* cannot stand. *See Zarda*, 883 F.3d at 113 (observing that attempts to distinguish *Price Waterhouse* amount to "semantic sleight[s] of hand . . . not a defense . . . a distraction"); *Hively*, 853 F.3d at 350-51 ("It would require considerable calisthenics to remove 'sex' from 'sexual orientation' . . . The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."). I continue to firmly believe that Title VII prohibits discrimination against

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theatlantic.com/business/archive/2014/11/the-economic-case-for-supporting-lgbt-rights/383131/ (last visited July 10, 2018) (comparing the impact of employment discrimination against LGBT individuals on countries' gross domestic products); M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, The Williams Inst. (May 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf (last visited July 10, 2018).

gay and lesbian individuals because they fail to conform to their employers' views when it comes to whom they should love.

But I dissent today for an even more basic reason: regardless of whatever a majority of this Court's views may turn out to be on the substantive issue that *Bostock* raises, we have an obligation to, *as a Court*, at least subject the issue to the "crucial" "crucible of adversarial testing,"[8] and after that trial "yield[s] insights or reveal[s] pitfalls we cannot muster guided only by our own lights,"[9] to give a reasoned and

[8] I am, of course, aware that petitions for certiorari in *Bostock* and *Zarda* are currently pending before the Supreme Court. But as of the date we as a Circuit voted against granting en banc rehearing in this case and I distributed this dissent to my colleagues—July 10, 2018—nearly three months remain before the Supreme Court is even again in session. And who knows whether the Court will grant either petition? *See* Supreme Court, The Justice's Caseload, https://www.supremecourt.gov/about/justicecaseload.aspx (last visited July 10, 2018) (stating that the Supreme Court usually grants review in only 80 cases of the 8,000 certiorari petitions filed each year). We have been unhindered by similar impediments in the past. *See*, *e.g.*, *In re Anthony Johnson*, 815 F.3d 733 (11th Cir. 2016) (vacating panel order and ordering en banc rehearing where panel had held in abeyance petitioner's application to file second or successive § 2255 motion pending the Supreme Court's impending determination in *Welch v. United States*, 136 S. Ct. 790 (2016), of whether the new rule announced by the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), was retroactively applicable). Even if the Supreme Court grants one or both of these petitions eventually, we could simply hold our en banc proceedings in *Bostock* in abeyance pending the Supreme Court's resolution of the issue.

[9] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1232 (Gorsuch, J., concurring in part and concurring in the judgment) (citation and internal quotation marks omitted).

principled explanation for our position on this issue—something we have *never* done.[10]

Particularly considering the amount of the public affected by this issue, the legitimacy of the law demands we explain ourselves. *See* Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. Chi. L. Rev. 779, 798 (1989) ("Reason . . . defines the federal judicial system. Nothing in the Constitution requires the written justification of judicial decisions, but a judiciary accountable to reason cannot resort to arbitrary acts. It requires candor from judges in addressing the strongest arguments against their own views."); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 472 (1981) (Stevens, J., dissenting) ("[Common law judges'] explanations of why they decided cases as they did provided guideposts for future decisions. . . . Many of us believe that those statements of reasons provided a better guarantee of justice than . . . a code written in sufficient detail to be fit for Napoleon."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19-20 (1959) ("The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it."); 1 Blackstone, Commentaries 71 (1803) (observing that written court decisions have long been "held in the highest regard" because the

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[10] In *Evans*, 850 F.3d 1248, the panel majority declined to address (or even consider) the substantive Title VII issue and instead dispensed with the case by relying solely on *Blum* and the prior-precedent rule. And *Bostock* simply invoked *Evans* and *Blum*. *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App'x 964, 964-65 (11th Cir. 2018).

public can examine and understand "the reasons the court gave for [its] judgment.").

Despite never offering a reasoned explanation tested by the adversarial process, a majority of this Court apparently believes that *Blunt* somehow prophesized the correct *post-Price Waterhouse* legal conclusion in its one-sentence "analysis" that relies solely on authority itself abrogated by *Price Waterhouse*. If the majority truly believes that, it should grant en banc rehearing and perform the "considerable calisthenics" to explain why gender nonconformity claims are cognizable except for when a person fails to conform to the "ultimate" gender stereotype by being attracted to the "wrong" gender. *Hively*, 853 F.3d at 346, 350. And if it doesn't or if it believes—as I and others do—that these "calisthenics" are simply "impossible," *Hively*, 853 F.3d at 350-51, it should not sit idly by and leave victims of discrimination remediless by allowing *Blum* to continue to stand.