[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13801
Non-Argument Calendar

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

(May 10, 2018)

Before TJOFLAT, WILSON, and NEWSOM, Circuit Judges.

PER CURIAM:

Gerald Lynn Bostock appeals the district court's dismissal of his employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§§ 2000e-2(a)(1), against Clayton County, Georgia, for failure to state a claim. On appeal, Bostock argues that the County discriminated against him based on sexual orientation and gender stereotyping. After a careful review of the record and the parties' briefs, we affirm.

"We review de novo the district court's grant of a motion to dismiss under [Fed. R. Civ. P.] 12(b)(6) for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam). Issues not briefed on appeal are deemed abandoned. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam).

Title VII prohibits employers from discriminating against employees on the basis of their sex. 42 U.S.C. §2000e-2(a). This circuit has previously held that "[d]ischarge for homosexuality is *not* prohibited by Title VII." *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)[1] (per curiam) (emphasis added). And we recently confirmed that *Blum* remains binding precedent in this circuit. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017). In *Evans*, we specifically rejected the argument that Supreme Court precedent in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989),

[1] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (holding that all decisions of the "old Fifth" Circuit handed down prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit).

supported a cause of action for sexual orientation discrimination under Title VII.

As an initial matter, Bostock has abandoned any challenge to the district court's dismissal of his gender stereotyping claim under *Glenn*[2] because he does not specifically appeal the dismissal of this claim. *See Timson*, 518 F.3d at 874. Moreover, the district court did not err in dismissing Bostock's complaint for sexual orientation discrimination under Title VII because our holding in *Evans* forecloses Bostock's claim. And under our prior panel precedent rule, we cannot overrule a prior panel's holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit en banc decision is issued. *United States v. Kaley*, 579 F.3d 1246, 1255–56 (11th Cir. 2009); *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc).

AFFIRMED.

[2] In analyzing an equal protection claim, rather than a Title VII claim, we held that discrimination based on gender nonconformity was sex discrimination. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13801-BB

GERALD LYNN BOSTOCK,

Plaintiff-Appellant,

versus

CLAYTON COUNTY, GEORGIA,

Defendant-Appellee.

On Petition for Hearing En Banc from the
United States District Court for the
Northern District of Georgia

(Filed May 3, 2018)

BEFORE: TJOFLAT, WILSON and NEWSOM, Circuit Judges.

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

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

GERALD LYNN BOSTOCK, Plaintiff, v. CLAYTON COUNTY, Defendant.	CIVIL ACTION FILE NO. 1:16-CV-001460-ODE-WEJ

FINAL REPORT AND RECOMMENDATION

(Filed Nov. 3, 2016)

Plaintiff, Gerald Lynn Bostock, brought this action against his former employer, Clayton County, Georgia (the "County"), for alleged violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. (*See* Second Am. Compl. [10], Count I.) The County filed a Motion to Dismiss the Second Amended Complaint [13] pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting that it fails to state a claim upon which relief may be granted. As discussed below, the undersigned agrees and **RECOMMENDS** that defendant's Motion be **GRANTED**.

I. GOVERNING STANDARD

When considering a motion to dismiss, a federal court is to accept as true "all facts set forth in the plaintiff's complaint." *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000) (citation omitted).

Further, the court must draw all reasonable inferences in the light most favorable to the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (internal citations omitted); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). However, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* The Supreme Court has dispensed with the rule that a complaint may only be dismissed under Rule 12(b)(6) when "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Twombly*, 550 U.S. at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The Supreme Court has replaced that rule with the "plausibility standard," which requires that factual allegations "raise a right to relief above the speculative level." *Id.* at 555. The plausibility standard "does not [however,] impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence [supporting the claim]." *Id.* at 556.

II. PLAINTIFF'S ALLEGATIONS

Mr. Bostock is a gay male. (Sec. Am. Compl. ¶ 12). He began working for defendant on or about January 13, 2003. (*Id.* ¶ 11.) The County employed plaintiff as the Child Welfare Services Coordinator assigned to the

Juvenile Court of Clayton County; he was charged with primary responsibility for the Clayton County Court Appointed Special Advocate ("CASA"). (*Id.* ¶ 13.) During the over ten years that Mr. Bostock worked for the County, he received good performance evaluations and the program he managed received accolades. (*Id.* ¶ 14.) For example, in 2007 Georgia CASA awarded Clayton County CASA its Established Program Award of Excellence. (*Id.*) National CASA also recognized Mr. Bostock for program expansion, and he served on its Standards and Policy Committee in or about 2011-12. (*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 softball league members as a source for volunteer opportunities. (*Id.* ¶ 16.) In the months after plaintiff joined the Hotlanta Softball League, he alleges "on information and belief" that his participation in the league and his sexual orientation and identity were openly criticized by one or more persons who had significant influence on defendant's decision making. (*Id.* ¶ 17.)

In or around April 2013, defendant advised Mr. Bostock that it was conducting an internal audit on CASA program funds he managed. (Sec. Am. Compl. ¶ 18.) Mr. Bostock contends that he did not engage in any improper conduct with regard to program funds under his custody or control, and alleges that defendant initiated the audit as a pretext for discrimination

based on his sexual orientation and failure to conform to a gender stereotype. (*Id.* ¶¶ 19-20.) Plaintiff further alleges "on information and belief" that in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where his supervisor was present, at least one individual made disparaging comments about Mr. Bostock's sexual orientation and identity and participation in the softball league. (*Id.* ¶ 21.)

On or about June 3, 2013, defendant terminated Mr. Bostock's employment. (Sec. Am. Compl. ¶ 22.) The stated reason for termination was conduct unbecoming of a County employee. (*Id.* ¶ 23.) Plaintiff alleges that this purported reason was a pretext for discrimination against him based on his sex and/or sexual orientation. (*Id.*)

Mr. Bostock filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on September 5, 2013. (*See* Ex. A to Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss [14-1] ("Pl.'s Resp. Br.").) As reflected on the Charge, Mr. Bostock checked the box for sex discrimination and stated in part as follows: "I believe that I have been discriminated against because of my sex (male/sexual orientation)." (*Id.*)

On May 5, 2016, Mr. Bostock filed his initial Complaint [1] *pro se*. This pleading alleged only discrimination on the basis of sexual orientation. After Mr. Bostock secured counsel, he filed his First Amended Complaint [4] on August 2, 2016. This pleading also

alleged only discrimination on the basis of sexual orientation. Plaintiff filed his Second Amended Complaint [10] on September 12, 2016, which has been summarized above.

III. ANALYSIS

Defendant argues that the Second Amended Complaint should be dismissed because Title VII does not encompass claims of sexual orientation discrimination. Defendant also contends that, while gender stereotyping claims are cognizable under Title VII, because the Second Amended Complaint is devoid of any factual support for such a claim, this claim fails as well. Finally, defendant asserts that, even if plaintiff had properly pled a gender stereotyping claim, it should be dismissed for failure to exhaust administrative remedies. (*See* Def.'s Mem. [13] 4-12.) The Court incorporates plaintiff's arguments in response (*see* Pl.'s Resp. Br. [14] 5-15) as necessary, *infra*.

A. A Sexual Orientation Discrimination Claim May Not Be Brought Under Title VII

Title VII prohibits discrimination against any individual because of such individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As the Fifth Circuit explained a few years after Title VII's enactment:

> [T]here is little legislative history to guide our interpretation. The amendment adding the

> word 'sex' to 'race, color, religion and national origin' was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate. In attempting to read Congress' intent in these circumstances, however, it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women.

Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971).[1]

Four years after *Diaz* in *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc), the Fifth Circuit again noted the meager legislative history related to the addition of "sex" to Title VII and stated as follows:

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

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[1] The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions handed down before the close of business on September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

> We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly lies.

Id. at 1090-91.

Also in 1975, the EEOC issued a decision which noted the absence of a definition of the word "sex" in Title VII and the "scant" evidence of what Congress intended in the statute's legislative history, but which stated that "the congressional debates relative to the prohibition against employment discrimination based on sex which preceded the enactment of Title VII focused almost exclusively on disparaties [sic] in employment opportunities between males and females." EEOC Dec. No. 76-75 (Dec. 4, 1975), 1975 WL 342769, at *2. The EEOC then cited, *inter alia*, the Fifth Circuit's *Willingham* decision as support for the statement "that when Congress used the word 'sex' in Title VII it was referring to a person's gender." *Id.* The EEOC then concluded as follows::

> Charging Party alleges unlawful employment discrimination based on his homosexuality, a condition which relates to a person's sexual proclivities or practices, not his or her gender; these two concepts are in no way synonymous. There being no support in either the language or the legislative history of the statute for the proposition that in enacting Title VII Congress intended to include a person's sexual *practices* within the meaning of the term sex, and since the evidence in this case, viewed as

> a whole, indicates that Respondent Employer failed to rehire Charging Party at least in part because of his sexual practices, not his gender, the Commission must conclude that it lacks jurisdiction over the subject matter alleged by Charging Party as the basis for Respondent Employer's failure to rehire him.

Id.[2]

Four years later in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (per curiam), in a case brought by an employee who claimed that he was terminated because of his sexual preference, the Fifth Circuit stated, "Discharge for homosexuality is not prohibited by Title VII." *Id.* at 938; *see also Davis v. Signius Inv. Corp./Answernet*, No. 1:12-CV-04143-TWT, 2013 WL 1339758, at *5 (N.D. Ga. Feb. 26, 2013) ("Title VII does not protect employees from discrimination based on sexual orientation."), *R. & R. adopted*, No. 1:12-CV-4143-TWT, 2013 WL 1339751 (N.D. Ga. Mar. 29, 2013).

Every Circuit Court of Appeal which has considered the issue agrees with *Blum* that Title VII does not extend to sexual orientation discrimination. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764-65 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194

[2] As discussed *infra*, the EEOC changed its position in 2015.

F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979).[3]

Plaintiff asserts that the "question of whether sexual orientation discrimination claims are cognizable under Title VII is 'an open one'" in the Eleventh Circuit. (*See* Pl.'s Resp. Br. 6, quoting *Issacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015).) Plaintiff accurately quotes *Issacs*. However, the former Fifth Circuit decision in *Blum* is binding authority in the Eleventh Circuit. *See Bonner*, 661 F.2d at 1209 (adopting as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981). Given the *Blum* precedent, the statement that plaintiff quotes from the district court's order in *Issacs* is clearly wrong. The question is not open in the Eleventh Circuit.[4]

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[3] *DeSantis* was abrogated on other grounds by *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001). However, that portion of *DeSantis* holding that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality[,]" remains undisturbed. *See DeSantis*, 608 F.2d at 329-30 (footnotes omitted).

[4] 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. *See Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997) ("We do not hold that discrimination because of sexual orientation is actionable.").

In apparent response to the fact that the Circuit Courts have uniformly held that Title VII's prohibition against sex discrimination does not extend to sexual orientation discrimination, supporters of an extension have fought unsuccessfully in Congress to amend Title VII since the mid-1970s. *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 & n.11 (7th Cir. 1984) (citing HR. 166, 94th Cong., 1st Sess. (1975), which sought to add the phrase "affectional or sexual preference" to Title VII). 1994 saw introduction of The Employment Non-Discrimination Act ("ENDA"), which would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity. (*See* ENDA of 1994, H.R. 4636, 103d Cong. (1994).) The ENDA has been before Congress during almost every session since 1994, but it has failed to pass. (*See* https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda) (last visited Nov. 3, 2016.) The most recent proposal to amend Title VII to prohibit discrimination on the basis of, *inter alia*, sexual orientation and gender identity, is the Equality Act of 2015. *See* Equality Act of 2015, S. 1858, 114th Cong. (2015). It too has failed to pass.

As defendant points out, such proposed amendments would be "superfluous if sexual orientation was already covered by Title VII." (Def.'s Reply Br. [15] 4.) "Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, 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).

Although the judicial branch has rejected calls to interpret Title VII broadly to encompass sexual orientation discrimination claims and the legislative branch has not amended Title VII to include such claims, the executive branch recently reversed the position it first took in 1975. In *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015), the EEOC held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII. *Id.* at *5. Plaintiff asks this Court to follow the EEOC's *Baldwin* decision. (Pl.'s Resp. Br. 9.) He argues that the EEOC's interpretation of Title VII, although not binding, is entitled to respect to the extent that it is persuasive. (*Id.* at 9 n.2, citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

EEOC interpretations of Title VII are entitled to *Skidmore* "deference to the extent [that they have] the power to persuade." *Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 n.47 (2d Cir. 2016) (internal quotation marks and citation omitted). As held in *Skidmore*, "[t]he weight of such a judgment in a particular case will depend 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, if lacking power to control." *Skidmore*, 323 U.S. at 140.

The Court makes no judgment about the thoroughness evident in *Foxx*'s consideration or the validity of its reasoning, but notes its inconsistency with the EEOC's earlier pronouncement (discussed *supra* in the text preceding note 1). Several federal district courts have considered whether to defer to the EEOC's interpretation. *See, e.g.*, *Hinton v. Va. Union Univ.*, No. 3:15CV569, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016); *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598 (S.D.N.Y. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Isaacs*, 143 F. Supp. 3d at 1190; *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344 (E.D.N.Y. 2015); *Burrows v. Coll. of Cent. Fla.*, No. 5:14-CV-197-OC-30PRL, 2015 WL 5257135 (M.D. Fla. Sept. 9, 2015).

These district courts have split on whether to defer to the EEOC's decision or follow precedent in their own Circuits. For example, *Hinton* and *Christiansen* ruled that the EEOC's decision could not displace contrary holdings of their regional Circuit Courts of Appeal, while *Burrows* ruled that the EEOC's decision could not displace contrary holdings of other district courts in its Circuit.[5] *See Hinton*, 2016 WL 2621967, at *5; *Christiansen*, 167 F. Supp. 3d at 620-21; *Burrows*, 2015 WL 5257135, at *2. *Isaacs* and *Videckis* deferred to the EEOC's position without addressing binding precedent in their regional Circuits. *See Isaacs*, 143

[5] *Burrows* surprisingly failed to cite controlling precedent in *Blum*.

F. Supp. 3d at 1193;[6] *Videckis*, 150 F. Supp. 3d at 1159-60. Finally, *Roberts* recognized binding Second Circuit precedent but chose to disregard it in deferring to the EEOC's decision. *Roberts*, 115 F. Supp. 3d at 362.

The undersigned agrees with *Hinton* that the reasons offered in those decisions which deferred to the EEOC's position are matters that lie within the purview of the legislative branch, not the judicial branch. 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. *Hinton*, 2016 WL 2621967, at *5.

This Court thus will not defer to the EEOC's decision but will follow the former Fifth Circuit decision in *Blum*, which is binding precedent binding in the Eleventh Circuit. Therefore, the undersigned **RECOMMENDS** that plaintiff's sexual orientation discrimination claim be **DISMISSED WITH PREJUDICE**.

B. Plaintiff Has Failed to State a Gender Stereotyping Claim

"Title VII bar[s] not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by

[6] As discussed in the text preceding note 3, *Issacs* erroneously concluded that the issue of whether a plaintiff could state a claim for sexual orientation discrimination in the Eleventh Circuit was an open one.

gender." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989)); *see also Anderson v. Napolitano*, No. 09-60744-CIV, 2010 WL 431898, at *4 (S.D. Fla. Feb. 8, 2010) ("[A] plaintiff can state a Title VII claim for sex or gender stereotyping – a type of sex discrimination based on a person's failure to comply with gender stereotypes.").

To state such a claim, a plaintiff must allege that he suffered discrimination based on his employer's belief that he failed "to conform to masculine stereotypes." *E.E.O.C. v. Family Dollar Stores, Inc.*, No. 1:06-CV-2569-TWT, 2008 WL 4098723, at *14 (N.D. Ga. Aug. 28, 2008) (adopting R. & R.); *see also Higgins*, 194 F.3d at 261 n.4 (noting that a man can support a Title VII claim "on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity").

"The gender stereotype associated with being a man is masculinity." *Mowery v. Escambia Cty. Utilities Auth.*, No. 3:04CV382-RS-EMT, 2006 WL 327965, at *7 (N.D. Fla. Feb. 10, 2006). Therefore, in order to state a sex-stereotyping claim, a plaintiff is required to "show discrimination based on gender non-conforming 'behavior observed at work or affecting his job performance,' such as his 'appearance or mannerisms on the job.'" *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516, 519 (6th Cir. 2011) (quoting *Vickers*, 453 F.3d at 763); *see also E.E.O.C. v. McPherson Cos.*, 914 F. Supp. 2d 1234, 1244 (N.D. Ala. 2012) ("In the few cases in which actionable harassment based on a male's

nonconformity to gender stereotype has been found, the undisputed evidence unequivocally established that the male 'harassers' perceived the employee to show feminine characteristics.").

The County contends that any gender stereotyping claim must be dismissed because the Second Amended Complaint is devoid of any factual support for such a claim, aside from its single conclusory assertion that "Defendant initiated the audit as a pretext for discrimination against Plaintiff based on his sexual orientation and failure to conform to a gender stereotype." (Sec. Am. Compl. ¶ 20.) Plaintiff responds that Rule 8 of the Federal Rules of Civil Procedure does not require that he plead a prima facie case of discrimination in order to survive a motion to dismiss, and that all he must do is provide fair notice of his claim. (Pl.'s Resp. Br. 12.) Mr. Bostock asserts that the Second Amended Complaint meets that standard because it details his position with the County, his participation in the softball league, and the ensuring criticism and discriminatory treatment he allegedly received because of his sexual orientation and identity. (*Id.* at 12-13.)

A complaint in an employment discrimination case need not contain specific facts establishing a prima facie case under the evidentiary framework for such cases to survive a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002). Nevertheless, complaints alleging discrimination still must meet the plausibility standard of *Twombly* and *Iqbal*. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1300 (11th

Cir. 2010) (noting that to state a hostile work environment claim post-*Iqbal*, recitals of the cause of action do not suffice and that employee "was required to allege" five prima facie elements, including that he was harassed because of his race).

As discussed *supra*, in order to state a gender stereotyping claim, Mr. Bostock was required to allege facts showing that he was discriminated against based on gender non-conforming behavior observed at work or affecting his job performance, such as his appearance or mannerisms on the job. *See Gilbert*, 432 F. App'x at 519. However, 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. *See Family Dollar Stores*, 2008 WL 4098723, at *14. Like the plaintiff in *Mowery*, Mr. Bostock "does not allege, nor can an inference be properly drawn, that [he] was perceived by [his supervisor] and his co-workers as being feminine rather than masculine." *Mowery*, 2006 WL 327965, at *7. Therefore, the undersigned reports that plaintiff has failed to allege a plausible gender stereotyping claim under *Iqbal* and *Twombly*.

The Court agrees with defendant that plaintiff is attempting to avoid dismissal of this case by bootstrapping a conclusory gender stereotyping allegation to his sexual orientation discrimination claim. The court in *Bostick v. CBOCS, Inc.*, No. 8:13-CV-1319-T-30TGW, 2014 WL 3809169 (M.D. Fla. Aug. 1, 2014), explained why that cannot be allowed:

> In sum, the record is clear that Bostick is not bringing a case based on having been harassed and retaliated against because others perceived him to be homosexual and therefore not adequately masculine. Instead, he alleges he is a gay man who was discriminated and retaliated against based on sexual stereotyping. Bostick's response seems to imply that all gay men fail to comply with male stereotypes simply because they are gay. However, that would mean that every case of sexual orientation discrimination [would] translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII.

Id. at *6 (internal quotations and citations omitted; bracket in original).

The question arises whether plaintiff could amend the Complaint yet again to add facts alleging that Clayton County took adverse action against him because his supervisor or co-workers perceived him to be feminine. "Although plaintiff is represented by counsel and defendant's motion to dismiss has been pending . . . , [ ]he has not filed a motion or otherwise requested an opportunity to amend h[is] complaint." *Wells v. W. Ga. Tech. Coll.*, No. 1:11-CV-3422-JEC, 2012 WL 3150819, at *4 (N.D. Ga. Aug. 2, 2012). Instead of amending his claims to address the problems identified in defendant's Motion to Dismiss, plaintiff filed a Response Brief. In other words, plaintiff stands by the Second Amended Complaint as drafted. Therefore, the

undersigned will not *sua sponte* recommend that plaintiff be granted leave to amend to salvage a gender stereotyping claim that is deficient under *Twombly* and *Iqbal*. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc) ("A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.").

Accordingly, the undersigned **RECOMMENDS** that plaintiff's gender stereotyping claim be **DISMISSED WITH PREJUDICE**, because the Second Amended Complaint contains no factual allegations supportive of such any such claim. *See Vickers*, 453 F.3d at 764 (holding that the plaintiff's claim failed "because [he] has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work").

C. Plaintiff Failed to Exhaust Administrative Remedies With Regard To Any Gender Stereotyping Claim[7]

A potential claimant who intends to sue for discrimination must first file an administrative charge

[7] Given the other recommendations, the Court does not address defendant's alternative argument that plaintiff's gender stereotyping claim, which first appeared in the Second Amended Complaint, is time barred because he failed to file that pleading within 90 days of receipt of his notice of right to sue, and that claim does not relate back to the filing of the initial Complaint. (Def.'s Mem. [13] 12-14.)

with the EEOC. *See Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1239 (11th Cir. 2004). "The filing of a charge of discrimination with the EEOC initiates 'an integrated, multi-step enforcement procedure' that enables the EEOC to detect and remedy various discriminatory employment practices." *Id.* at 1238 (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984)). This multi-step process includes "(1) prompt notice from the EEOC to the employer that a charge has been filed; and (2) investigation of the charge by the EEOC." *Id.* at 1239. The purpose of requiring litigants to first exhaust these administrative remedies is that the EEOC should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts. *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004) (per curiam). As a result, a plaintiff's judicial complaint is limited by the allegations of his charge of discrimination or by "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.* at 1280 (internal quotation marks and citation omitted); *see also Green v. Elixir Indus., Inc.*, 407 F.3d 1163, 1168 (11th Cir. 2005) ("The proper inquiry, as these cases make clear, is whether the complaint is 'like or related to, or grew out of' the allegations in the EEOC charge."). Although courts allow claims in litigation that "amplify, clarify, or more clearly focus" allegations in the EEOC charge, *Gregory*, 355 F.3d at 1279-80, claims of discrimination not alleged in a charge are not permitted. *Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989).

Mr. Bostock's EEOC charge alleges only sexual orientation discrimination, not gender stereotyping. One would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge's allegation of sexual orientation discrimination. *See Norris v. Diakin Drivetrain Components*, 46 F. App'x 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 Prods., Inc.*, No. 1:02CV1876-SEB-VSS, 2004 WL 540983, at *3 (S.D. Ind. 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."). As a result, plaintiff failed to exhaust administrative remedies as to any alleged gender stereotyping claim. Accordingly, even if the Second Amended Complaint states a gender stereotyping claim, it should be dismissed for lack of exhaustion.

IV. CONCLUSION

For the reasons explained above, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss [13] be **GRANTED**, and that the Second Amended Complaint be **DISMISSED WITH PREJUDICE**.

SO RECOMMENDED, this 3rd day of November, 2016.

/s/ Walter E. Johnson
WALTER E. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

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

GERALD LYNN BOSTOCK, Plaintiff v. CLAYTON COUNTY, Defendant	CIVIL ACTION NO. 1:16-CV-1460-ODE

ORDER

(Filed Jul. 21, 2017)

This employment discrimination case is before the Court on United States Magistrate Judge Walter E. Johnson's Final Report and Recommendation [Doc. 16]. Plaintiff Gerald Lynn Bostock ("Plaintiff") has filed objections [Doc. 18], to which Defendant Clayton County ("Clayton County") has responded in opposition [Doc. 19] and Plaintiff has replied [Doc. 20]. For the reasons stated below, the R&R is adopted in full and Clayton County's underlying motion to dismiss [Doc. 13] thereby granted.

I. Background[1]

On September 12, 2016, Plaintiff filed his Second Amended Complaint, the operative document before

[1] Plaintiff has objected only to Judge Johnson's conclusions of law and not his findings of fact. Therefore, the following facts are taken from the R&R, unless otherwise noted.

the Court,[2] in which he alleges violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq*. [Doc. 10]. Plaintiff, a gay male, began working for Clayton County on or about January 13, 2003. Clayton County employed Plaintiff as the Child Welfare Services Coordinator assigned to its Juvenile Court; he had primary responsibility for the Clayton County Court Appointed Special Advocate ("CASA"). During his ten-year career with Clayton County, Plaintiff received good performance evaluations and the program he managed received accolades. For example, in 2007, Georgia CASA awarded Clayton County CASA its Established Program Award of Excellence. National CASA also recognized Plaintiff for his program expansion efforts, and he served on its Standards and Policy Committee in or about 2011-2012.

Beginning in January 2013, Plaintiff became involved with a gay recreational softball league, the Hotlanta Softball League. Plaintiff actively promoted Clayton County CASA to league members as a good volunteer opportunity. In the subsequent months, Plaintiff alleges that his participation in the league and his sexual orientation and identity were openly criticized by one or more persons with significant influence on Clayton County's decision-making. For example, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board at which Plaintiff's supervisor was present, Plaintiff alleges

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[2] *See Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1219-20 (11th Cir. 2007).

that at least one individual made disparaging comments about his sexual orientation and identity and participation in the league.

In or around April 2013, Clayton County advised Plaintiff that it would be conducting an internal audit on the CASA program funds that he managed. Plaintiff contends that he engaged in no improper conduct as to funds under his custody or control and that this audit was a pretext for discrimination. On or about June 3, 2013, Clayton County terminated Plaintiff, allegedly for conduct unbecoming one of its employees. Plaintiff alleges that this reason was pretext for discrimination based on his sexual orientation.

On September 5, 2013, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In that document, Plaintiff checked the box for sex discrimination and stated: "I believe I have been discriminated against because of my sex (male/sexual orientation)" [Doc. 14-1].

On May 5, 2016, Plaintiff *pro se* filed his initial Complaint in which he alleged only discrimination based on sexual orientation [Doc. 1]. After securing counsel, Plaintiff filed his First Amended Complaint on August 2, 2016 [Doc. 4]. Plaintiff's Second Amended Complaint was the first to explicitly add allegations of discrimination for failure to conform to a gender stereotype [Doc. 10]. On September 26, 2016, Clayton County filed a motion to dismiss for failure to state a claim [Doc. 13], to which Plaintiff responded in

opposition on October 13, 2016 [Doc. 14] and Defendant replied on October 27, 2016 [Doc. 15].

On November 3, 2016, Judge Johnson issued his R&R recommending dismissal with prejudice on three grounds: (1) Title VII does not encompass claims of sexual orientation discrimination, (2) the Second Amended Complaint contains no factual allegations supporting a gender stereotyping claim, and (3) the gender stereotyping claim was not referenced in Plaintiff's EEOC charge and thus he failed to exhaust his administrative remedies [Doc. 16]. On November 17, 2016, Plaintiff filed objections to each of these conclusions of law [Doc. 18], on December 1, 2016, Clayton County responded in opposition [Doc. 19], and on December 15, 2016, Plaintiff replied [Doc. 20]. On February 2, 2017, the Court deferred ruling on this case pending a decision from the United States Court of Appeals for the Eleventh Circuit in the related case of *Evans v. Ga. Regional Hospital*. The Eleventh Circuit has now issued its decision, and this Court may now rule with the benefit of that precedent.

II. Legal Standard

In reviewing an R&R, the Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Absent objection, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* Because Plaintiff

objects to each of Judge Johnson's conclusions of law, the Court will review *de novo* Clayton County's motion to dismiss.

To survive a Rule 12(b) (6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level," and "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678. Particularly-important is the requirement that a complaint contain enough factual allegations to provide "'fair notice' of the nature of the claim" and the

"'grounds' on which the claim rests." *Twombly*, 550 U.S. at 555 n.3.

A. Sexual Orientation Discrimination

In his Second Amended Complaint, Plaintiff alleges discrimination in violation of Title VII based on his sex, sexual orientation, and failure to conform to gender stereotypes [Doc. 10]. Clayton County objected because "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" [Doc. 13 at 14]. Judge Johnson agreed on the basis of precedent that the Eleventh Circuit has recently affirmed. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) ("[Plaintiff] 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 foreclosed such an action.") (citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII. . . .")). As a matter of law, the Eleventh Circuit has thus foreclosed the possibility of a Title VII action alleging discrimination on the basis of sexual orientation as a form of sex discrimination protected by that Act. Plaintiff's objection on this point is overruled.

B. Gender Stereotyping

In his Second Amended Complaint, Plaintiff also explicitly alleges for the first time that he was fired for "failure to conform to a gender stereotype" [Doc. 10 ¶ 20]. Other than sexual orientation, however, there is not a single mention of or fact supporting gender stereotype discrimination in this case.[3] The Court agrees with Judge Johnson that Plaintiff has failed to state any facts to facially support this claim standing alone. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555-56. Plaintiff's objection on this point is also overruled.

Because the Court finds that Plaintiff has failed to meet the pleading standard for a gender stereotype discrimination claim, it need not address the parties' dispute as to exhaustion of administrative remedies and timeliness.

III. Conclusion

For the reasons stated above, Plaintiff's Objections [Doc. 18] are OVERRULED and Judge Johnson's R&R [Doc. 16] is ADOPTED IN FULL. Clayton County's Motion to Dismiss [Doc. 13] is GRANTED. Plaintiff's case is hereby DISMISSED WITH PREJUDICE. Costs taxed to Plaintiff.

---

[3] Examples of proper pleading on this issue include refusing to promote a woman perceived as "aggressive," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), or declining to hire a qualified applicant because he was "effeminate," *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

SO ORDERED, this 20 day of July, 2017.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK, Plaintiff, vs. CLAYTON COUNTY Defendant.	CIVIL ACTION FILE NO. 1:16-CV-1460-ODE

JUDGMENT

(Filed Jul. 21, 2017)

This action having come before the court, Honorable Orinda D. Evans, United States District Judge, for consideration of the Defendant's Motion to Dismiss and the Court having GRANTED said motion, it is

Ordered and Adjudged that the Plaintiff take nothing; that the Defendant recover its costs of this action, and the action be, and the same hereby, is **DISMISSED with prejudice**.

Dated at Atlanta, Georgia, this 21st day of July, 2017.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Stephanie Pittman
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
July 21, 2017
James N. Hatten
Clerk of Court

By: s/ Stephanie Pittman
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 17-13801-BB

GERALD BOSTOCK,

Appellant,

v.

CLAYTON COUNTY, GEORGIA

Appellee.

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

INITIAL BRIEF OF APPELLANT GERALD BOSTOCK

(Filed Nov. 13, 2017)

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[C1] *Bostock v. Clayton County*
Docket No.: 17-13801-BB

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record verifies that those persons or entities listed below have or may have an interest in the outcome of this case:

Bostock, Gerald – Appellant/Plaintiff

Buckley Beal, LLP – counsel for Appellant

Buechner, William – counsel for Appellee

Clayton County, Georgia – Appellee/Defendant

Evans, Orinda D. – Senior Judge, United States District Court

Freeman Mathis & Gary, LLP – counsel for Appellee

Green, Brian – counsel for Plaintiff in underlying case

Hancock, Jack – counsel for Appellee

Heller, Martin B. – former counsel for Appellee

Indian Harbor Insurance Company (Insurer for Appellee)

Johnson, Walter E. (United States Magistrate Judge for the Northern District of Georgia)

Mew, Thomas – counsel for Appellant

Sutherland, Brian J. – counsel for Appellant

[i] **STATEMENT REGARDING ORAL ARGUMENT**

Counsel for Plaintiff-Appellant Gerald Bostock requests oral argument in this case. Counsel believes that oral argument would assist the Court in addressing the conflicts between this Court's decision in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) and its decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) and the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal of a final decision of the United States District Court for the Northern District of Georgia.

[1] **STATEMENT OF THE ISSUES**

1. Whether the District Court erred in dismissing Appellant's Complaint for sexual orientation

discrimination under the authority of *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), because *Evans* was wrongly decided on this point and conflicts with the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and this Court's decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

[2] **STATEMENT OF THE CASE**

This case presents the opportunity for this Court to correct its erroneous recent decision in *Evans v. Ga. Reg. Hosp.*, 850 F.3d 1248 (11th Cir. 2017), and clarify that discrimination based on an employee's sexual orientation is indeed discrimination based on that employee's sex and therefore violates Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). Plaintiff-Appellant Gerald Bostock alleges that his former employer, Defendant-Appellee Clayton County, violated Title VII by firing him because he is a gay male. He alleges sexual orientation discrimination and gender stereotype discrimination.[1] Because this Court incorrectly decided in *Evans* that the prohibition of sex discrimination in Title VII does not include discrimination based on sexual orientation, this Court must act to overrule *Evans* and reverse the decision of the

[1] Mr. Bostock does not appeal the dismissal of his gender stereotype discrimination claim but, as set forth in the Argument section, the distinction between sexual orientation discrimination and gender stereotype discrimination is a distinction without a difference since, in either case, the employer has discriminated because of the employee's sex.

District Court dismissing Mr. Bostock's claim under Title VII.

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Mr. Bostock filed this lawsuit *pro se* on May 5, 2016, alleging that Clayton County violated his rights under Title VII when it terminated his employment in [3] November 2012. (Doc. 1, ¶¶ 1, 12-14.) Specifically, he alleges that Clayton County discriminated against him on the basis of his sexual orientation. (*Id.* at ¶¶ 13-14.) 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.) The Second Amended Complaint alleges that Clayton County discriminated against Mr. Bostock on the basis of his sexual orientation and also alleges gender stereotype discrimination. (Doc. 10 ¶¶ 17, 20-21, 23, 24-31.)

On September 26, 2016, Clayton County 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 Mr. Bostock's complaint be dismissed with prejudice. (Doc. 16.) Mr. Bostock filed objections to the Report and Recommendation, to which Clayton County responded and Mr. Bostock replied. (Docs. 18, 19, 20.)

The District Court deferred ruling on the objections pending the outcome of this Court's decision in

Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017). (*See* Doc. 21.) On March 10, 2017, this Court issued its decision in *Evans*, in which a majority of the panel decided that Title VII's prohibition of sex discrimination does not include discrimination based on sexual orientation. 850 F.3d at 1255-57. This Court denied a petition for rehearing and rehearing en banc [4] On July 6, 2017. (Order dated July 6, 2017, per curiam). The next day, on July 7, 2017, the District Court adopted the Report and Recommendation and granted Clayton County's Motion to Dismiss. (Doc. 24.)

II. STATEMENT OF FACTS[2]

Mr. Bostock is a gay male. (Doc. 10, ¶ 12). Mr. Bostock began working for Clayton County on or about January 13, 2003 (*id.* ¶ 11), and worked as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County (*id.* ¶ 13). His primary responsibility was the Court Appointed Special Advocate ("CASA") program for Clayton County. (*Id.* ¶ 13.) During the over ten years Mr. Bostock worked for Clayton County, he received favorable performance evaluations and helped earned accolades for the Clayton County

[2] These are the facts as alleged in Mr. Bostock's Second Amended Complaint. Many of these facts are denied by Clayton County, but this Court reviews an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) *de novo*. *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017). In assessing the sufficiency of a claim, the Court accepts all well-pleaded allegations as true and draws all reasonable inferences in the plaintiff's favor. *Montgomery Cty. Comm'n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1254 (11th Cir. 2015).

CASA program. (*Id.* ¶ 14.) Clayton County CASA was even awarded the established Program Award of Excellence by Georgia CASA in 2007. (*Id.*) Mr. Bostock also 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.*)

[5] Beginning in January 2013, Mr. Bostock became involved with a gay recreational softball league called the Hotlanta Softball League. (Doc. 10 ¶ 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 people who had significant influence in Clayton County's decisionmaking. (Doc. 10 ¶ 17.) Shortly thereafter, in or around April 2013, Clayton County advised Mr. Bostock it was conducting an internal audit on the CASA program funds that Mr. Bostock managed. (*Id.* ¶ 18.)

Mr. Bostock never engaged in any improper conduct with regard to program funds under his custody or control, and he alleges that Clayton County initiated the audit as a pretext for discrimination based on his sexual orientation and failure to conform to gender stereotype. (Doc. 10 ¶¶ 19-20.) In fact, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board at which 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.)

[6] On or about June 3, 2013, Clayton County fired Mr. Bostock. (*Id.* ¶ 22.) The stated reason for the termination was conduct unbecoming of a county employee. (*Id.* ¶ 23.) However, that purported reason has no basis in fact and was instead a mere pretext for discrimination against Mr. Bostock based on his sex and or sexual orientation, if not direct evidence of the same. (*Id.*)

Mr. Bostock timely filed a charge of discrimination on the basis of sex and sexual orientation with the Equal Employment Opportunity Commission ("EEOC"). (*Id.* ¶ 6.) Mr. Bostock filed this lawsuit within 90 days of the receipt of his Notice of Right to Sue from the EEOC. (*Id.* ¶ 7.)

III. STANDARD OF REVIEW

This Court reviews de novo an order granting a motion to dismiss. *See Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017). In assessing the sufficiency of a claim, the Court accepts all well-pleaded allegations as true and draws all reasonable inferences in the plaintiff's favor. *Montgomery Cnty. Comm'n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1254 (11th Cir. 2015).

IV. SUMMARY OF ARGUMENT

The District Court erred in dismissing Mr. Bostock's claim for sexual orientation discrimination

under Title VII. The District Court relied upon this Court's decision in *Evans v. Ga. Reg. Hosp.*, 850 F.3d 1248 (11th Cir. 2017). [7] However, *Evans* was wrongly decided and conflicts with the precedents of both the United States Supreme Court and the Eleventh Circuit.[3]

The holding in *Evans* that discrimination based on sexual orientation is not actionable under Title VII conflicts with the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). In *Price Waterhouse*, the Supreme Court held that discrimination on the basis of a gender stereotype is in fact sex-based discrimination. When an employer discriminates against a gay or lesbian employee, the employer necessarily discriminates against the employee because he or she does not conform to the employer's stereotypical view of how a person of that gender should behave with respect to whom he or she is attracted. Thus, the employer has discriminated against the employee because of his or her sex in violation of Title VII. *Evans* is therefore in conflict with *Price Waterhouse*.

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[3] Mr. Bostock acknowledges that under the prior panel precedent rule, a panel of this Court is generally bound to follow a prior panel decision except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision. *See*, *e.g.*, *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998). For this reason, Mr. Bostock has filed concurrently with this brief a Petition for Hearing En Banc. As this Court is also aware, a petition for certiorari has been filed in *Evans* and is currently pending before the United States Supreme Court. (Sup. Ct. Case No. 17-370).

In *Evans*, the majority of the panel held that it was bound by the prior precedent rule to follow *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979). [8] *Blum*, however, has been abrogated because it directly conflicts with *Price Waterhouse*'s holding that Title VII prohibits an employer from discriminating against its employee on the basis that she fails to conform to the employer's stereotypical view of how an employee of that gender should act. Moreover, the entire basis upon which *Blum* based its statement regarding sexual orientation, an earlier Fifth Circuit decision, has been abrogated.

Evans also conflicts with this Court's holding in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, this Court held that discrimination against transgender individuals because of their gender-nonconformity is sex discrimination, whether on the basis of sex or gender and stated that all persons are protected from discrimination on the basis of gender stereotype. The same is true for gay or lesbian employees. When an employer discriminates against an employee on the basis of sexual orientation, the employer necessarily discriminates on the basis of sex or gender because the employee does not match the employer's stereotypical view of how an employee of that gender should behave. Such discrimination is prohibited under *Glenn*. Since *Evans* would allow such discrimination to occur, *Evans* conflicts with *Glenn*.

Finally, Title VII already protects employees against discrimination on the basis of sexual orientation because it prohibits discrimination against an

employee [9] because of the employee's sex. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation involves one's sex in relation to the sex of people to whom one is attracted. 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 because it is already prohibited. This Court should overrule its decision in *Evans* and reverse the District Court's dismissal of Mr. Bostock's sexual orientation discrimination claim.

ARGUMENT AND CITATION OF AUTHORITIES

A. *EVANS* CONFLICTS WITH THE SUPREME COURT'S DECISION IN *PRICE WATERHOUSE v. HOPKINS*

In *Price Waterhouse v. Hopkins*, the United States Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination that violates Title VII. *See* 490 U.S. 228, 251 (1989). Six members of the Supreme Court agreed that Title VII prohibits not simply discrimination because of one's biological sex, but also gender stereotyping – that is, failing to act and appear according to stereotypical gender expectations. *Id*. at 250-51(plurality opinion); *id.* at 258-61, (White, J., concurring); *id.* at 272-73(O'Connor, J., concurring). The Supreme Court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes [10] associated with their group . . . " *Id.* at

251. The Court also emphasized that "[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." *Id.* (emphasis added).

As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, "*Price Waterhouse* . . . demand[s] the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination 'because of . . . sex.'" *Evans*, 850 F.3d at 1264 (Rosenbaum, J., concurring in part and dissenting in part). When an employer discriminates against a gay or lesbian employee, "the employer discriminates against the employee because she does not conform to the employer's prescriptive stereotype of what a person of that birth-assigned gender should be. And so the employer discriminates against the employee 'because of . . . sex.'" *Id.* (footnotes and citations omitted). *See also Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 350 (7th Cir. 2017) (noting that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and that "[t]he 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").

[11] In *Evans*, the majority of the panel held that it was bound by the prior precedent rule to follow *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), and

rejected the appellant's argument that *Price Waterhouse* and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), support a cause of action for sexual orientation discrimination under Title VII. *Evans*, 850 F.3d at 1256. The basis of this conclusion was the majority's determination that "*Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum*." 850 F.3d at 1256. With respect to the majority of the *Evans* panel, this is error.

Blum "'directly conflict[s] with' *Price Waterhouse's* holding that Title VII prohibits an employer from discriminating against its employee on the basis that she fails to conform to the employer's view of what a woman should be." *Evans*, 850 F.3d at 1270 (Rosenbaum, J., concurring in part and dissenting in part). As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, "*Price Waterhouse* requires us to apply the rule that '[a]n individual cannot be punished because of his or her perceived gender-nonconformity.'" *Id.* Since continued application of *Blum* would allow a woman to be punished precisely because of her perceived gender non-conformity – in this case, sexual attraction to other women – *Price Waterhouse* undermines these cases to the point of abrogation." *Id.* (internal citations omitted).

[12] Moreover, the entire basis on which the *Blum* Court based its statement regarding sexual orientation discrimination has been abrogated. In *Blum*, the primary issue on appeal was whether the defendant articulated a legitimate nondiscriminatory reason for the plaintiff's discharge. The former Fifth Circuit held

that it did. 596 F.2d at 937. But after reaching this conclusion, which effectively resolved the appeal, the Fifth Circuit went to "comment briefly" on other issues raised on appeal. It was in this section of the opinion in which the former Fifth Circuit offered the statement that "[d]ischarge for homosexuality is not prohibited by Title VII." 597 F.2d at 938. In support of the proposition that Title VII does not prohibit "discharge for homosexuality," the former Fifth Circuit did not provide any analysis and simply cited an earlier holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

In *Smith*, "the claim [wa]s not that [the plaintiff] was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.' " 569 F.2d at 327. The court held that such discrimination was not sex discrimination within the meaning of Title VII, *id.*, and noted in a footnote that "[t]he EEOC itself has ruled that adverse action against homosexuals is not cognizable under Title VII," *id.* n.1. *Smith* is no longer good law on this [13] point since its holding "vis-à-vis discrimination on the basis of sex stereotyping has clearly been abrogated by subsequent Supreme Court cases." *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F. Supp.3d 1334, 1342 n.4 (N.D. Fla. 2016); *see also Price Waterhouse*, 490 U.S. 228 (1989). The District Court in *Winstead* also correctly 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.* Thus, the entire basis on which *Blum* based its language regarding sexual orientation discrimination has been abrogated, and the Court in *Evans* erred in relying upon it as binding precedent. This error led to a decision that is itself in conflict with *Price Waterhouse*. This Court must act en banc to rectify that error.

B. *EVANS* CONFLICTS WITH THIS COURT'S DECISION IN *GLENN V. BRUMBY*

Evans also conflicts with this Court's holding in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, this Court clearly held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." 663 F.3d at 1317. This Court noted that a number of pre-*Price Waterhouse* decisions had concluded that Title VII afforded no protection to transgender victims of sex [14] discrimination. This Court determined, however, that these cases had been "'eviscerated' by *Price Waterhouse's* holding that 'Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.'" *Id.* at 1318 n.5 (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

In *Glenn*, this Court stated that "[a]ll persons, whether transgender or not, are protected from

discrimination on the basis of gender stereotype." *Id.* at 1318 (11th Cir. 2011). The same is true for gay or lesbian employees. In *Hively*, the Seventh Circuit correctly observed that the appellant in that case, a lesbian employee,

> represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.

853 F.3d at 346. Thus, *Glenn*, like *Price Waterhouse*, "demand[s] the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination 'because of . . . sex.'" *Evans*, 850 F.3d at 1264 (Rosenbaum, J. concurring in part and dissenting in part). *Evans* and *Glenn* "cannot be reconciled." *Id.* at 1269.

[15] To quote Judge Rosenbaum again:

> And discrimination against an employee solely because she fails to conform to the employer's view that a woman should be sexually attracted to men only is no different than discrimination against a transsexual because she fails to conform to the employer's view that a birth-assigned male should have male anatomy. In both cases, the employer discriminates because the employee does not comport

> with the employer's vision of what a member of that particular gender should be. It's just as simple as that.

Id. at 1265-66. *Evans* was erroneously decided on the issue of sexual orientation discrimination because it directly conflicts with *Glenn*. This Court must therefore overrule *Evans* and reverse the District Court's dismissal of Mr. Bostock's claim for sexual orientation discrimination under Title VII.

C. TITLE VII ALREADY PROTECTS EMPLOYEES AGAINST DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

Title VII 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). The Supreme Court's precedents make plain that Title VII's prohibition against discrimination because of sex has become a robust source of protection without regard for hyper-technical distinctions.

[16] In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a case addressing same-sex sexual harassment, the Supreme 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. The Supreme Court rejected in *Oncale* the premise that some mistreatment "because of . . . sex" might be outside Title VII's reach, and 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 must apply to discrimination against gay and lesbian employees. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation involves a person's sex in relation to the sex of people to whom that person is attracted. 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. *See Hively*, 853 F.3d at 347 (explaining that "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses [17] differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex," and "[t]hat means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways.")

The EEOC has similarly 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." *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015) "Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* This is so because "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex." *Id.*

As the EEOC correctly explained:

> 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). In other words, "sexual orientation is [18] inseparable from and inescapably linked to sex and, therefore . . . allegations of sexual orientation discrimination involve sex-based considerations." *Id.* at *5. This interpretation is not only common sense, but it is also fully consistent with the Supreme Court's holding in *Oncale*.

Nor does the fact that Title VII has not been specifically amended to expressly include sexual

orientation mean that the statute does not already provide protection against such discrimination. The Supreme Court has warned against relying on Congressional inaction as an interpretative tool because "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted). Indeed, "[i]t 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.'" *Id.*; *accord Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (explaining that "[i]t 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)); *U.S. v. Price*, 361 U.S. 304, 310-311 (1960) (noting that "nonaction by Congress affords the most dubious foundation for drawing positive inferences."). The reason is that "Congressional inaction lacks persuasive significance because several equally [19] 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) (emphasis supplied).[4]

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[4] And "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21; *see also Pension Ben. Guar. Corp.*, 496 U.S. at 650 (noting that "[e]ven less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment.")

Accordingly, *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 – and there is no need to amend Title VII to make the prohibition more clear. Protection against sexual orientation discrimination is already provided by Title VII as *Price Waterhouse*, *Oncale*, and *Glenn* confirm. Accordingly, this Court should overrule *Evans* and reverse the District Court's dismissal of Mr. Bostock's claim for sexual orientation discrimination under Title VII.

V. CONCLUSION

The holding of *Evans* on the issue of sexual orientation discrimination conflicts with the Supreme Court's holding in *Price Waterhouse* and this Court's holding in *Glenn*. Those cases, as well as Title VII's prohibition against discrimination "because of . . . sex" make clear that discrimination on the basis of an employee's sexual orientation is illegal. The District Court relied on *Evans* in [20] dismissing Mr. Bostock's claim for sexual orientation discrimination, but *Evans* was wrongly decided. Mr. Bostock respectfully requests that the Court overrule *Evans* and reverse the District Court's dismissal of his claim for sexual orientation discrimination in violation of Title VII.

Respectfully submitted,

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[Certificate Of Compliance Omitted]

[Certificate Of Service Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 17-13801-BB

GERALD BOSTOCK,

Appellant,

v.

CLAYTON COUNTY, GEORGIA

Appellee.

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

PETITION FOR HEARING EN BANC

(Filed Nov. 13, 2017)

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[C1] *Bostock v. Clayton County*
Docket No.: 17-13801-BB

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record verifies that those persons or entities listed below have or may have an interest in the outcome of this case:

Bostock, Gerald – Appellant/Plaintiff

Buckley Beal, LLP – counsel for Appellant

Buechner, William – counsel for Appellee

Clayton County, Georgia – Appellee/Defendant

Evans, Orinda D. – Senior Judge, United States District Court

Freeman Mathis & Gary, LLP – counsel for Appellee

Green, Brian – counsel for Plaintiff in underlying case

Hancock, Jack – counsel for Appellee

Heller, Martin B. – counsel for Appellee in underlying case

Indian Harbor Insurance Company (Insurer for Appellee)

Johnson, Walter E. (United States Magistrate Judge for the Northern District of Georgia)

Mew, Thomas – counsel for Appellant

Sutherland, Brian J. – counsel for Appellant

[i] **STATEMENT OF COUNSEL REGARDING EN BANC CONSIDERATION**

I express a belief, based on a reasoned and studied professional judgment, that the District Court's decision in this case and the panel decision in *Evans v. Ga. Regional Hospital*, 850 F3d 1248 (11th Cir. 2017) are contrary to the following decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). I also express the belief, based on a reasoned and studied professional judgment, that this proceeding also involves a question of exceptional importance, namely, whether discrimination against an employee on the basis of sexual orientation is actionable as sex discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII").

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[iv] **STATEMENT OF JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal of a final decision of the United States District Court for the Northern District of Georgia.

[1] **I. STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION**

Whether the District Court erred in dismissing Appellant's Complaint for sexual orientation discrimination under the authority of *Evans v. GA Regional Hospital*, 850 F3d 1248 (11th Cir. 2017) because *Evans* was wrongly decided on this point and conflicts with the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and this Court's decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

[2] **II. STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE**

Plaintiff-Appellant Gerald Bostock alleges that his former employer, Defendant-Appellee Clayton County, terminated his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Specifically, he alleges that Clayton County discriminated against him on the basis of his sexual

orientation and also alleges gender stereotype discrimination.[1]

Mr. Bostock filed this lawsuit, *pro se*, on May 5, 2016, alleging that Clayton County violated his rights under Title VII when it terminated his employment in November 2012. (Doc. ¶¶ 1, 12-14.) Specifically, he alleges that Clayton County discriminated against him on the basis of his sexual orientation. (*Id.* at ¶¶ 13-14.) 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 and 10.) The Second Amended Complaint alleges that Clayton County discriminated against Mr. Bostock on the basis of his sexual orientation and also alleges gender stereotype discrimination. (Doc. ¶¶ 17,20-21,23, 24-31.)

[3] On September 26, 2016, Clayton County 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 Mr. Bostock's complaint be dismissed with prejudice. (Doc. 16.) Mr. Bostock filed objections to the Report and Recommendation to which Clayton

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[1] Mr. Bostock does not appeal the dismissal of his gender stereotype discrimination claim but, as set forth in the Argument section, the distinction between sexual orientation discrimination and gender stereotype discrimination is a distinction without a difference since, in either case, the employer has discriminated because of the employee's sex.

County responded and Mr. Bostock replied. (Docs. 18, 19, 20.)

The District Court deferred ruling on the objections pending the outcome of this Court's decision in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017). (*See* Doc. 21.) On March 10, 2017, this Court issued its decision in *Evans*, in which a majority of the panel decided that Title VII's prohibition of sex discrimination does not include discrimination based on sexual orientation. 850 F.3d at 1255-57. This Court denied a petition for rehearing and rehearing en banc on July 6, 2017. (Order dated July 6, 2017, per curiam).[2] The next day, on July 7, [4] 2017, the District Court adopted the Report and Recommendation and granted Clayton County's Motion to Dismiss. (Doc. 24.)[3]

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[2] Mr. Bostock recognizes that the appellant in *Evans* unsuccessfully petitioned for rehearing and rehearing en banc. The order denying that petition simply states: "The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED." (No. 15-15234-BB, July 6, 2017). Mr. Bostock's case is apparently in a different posture procedurally then that of *Evans.* In *Evans*, the District Court questioned the timeliness of the appellant's EEOC charge and whether the allegations in her complaint were sufficiently similar to the EEOC's investigation. The appellant's objections to those issues were determined to be abandoned on appeal. 850 F.3d at 1254 n.3. As alleged in his Second Amended Complaint, however, Mr. Bostock timely filed a charge for sex and sexual orientation discrimination with the EEOC and filed suit within 90 days of the receipt of his Notice of Right to Sue. (Doc. 10 ¶¶ 6-7).

[3] 11th Cir. R. 35-5(k) states that a petition must include "a copy of the opinion sought to be reheard." Although Mr. Bostock

III. STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES[4]

Mr. Bostock is a gay male. (Doc. 10 ¶¶ 12). He began working for Clayton County 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). (Doc. 10 ¶ 13.) During the over ten years Mr. Bostock worked for Clayton County, he received favorable performance evaluations and the program received accolades. (*Id.* ¶ 14.) Clayton County CASA was awarded the established Program [5] 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

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is seeking initial hearing of his appeal en banc rather than rehearing, he has, out of an abundance of caution, attached a copy of the District Court's Order to this Petition.

[4] These are the facts as alleged in Mr. Bostock's Second Amended Complaint. Many of these facts are denied by Clayton County, but this Court reviews an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) *de novo. Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017). In assessing the sufficiency of a claim, the Court accepts all well-pleaded allegations as true and draws all reasonable inferences in the plaintiffs favor. *Montgomery Cty. Comm'n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1254 (11th Cir. 2015).

the Hotlanta Softball League. (Doc. ¶ 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 Clayton County. (Doc. ¶ 17.) Shortly thereafter, in or around April 2013, Clayton County 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 Clayton County initiated the audit as a pretext for discrimination based on his sexual orientation and failure to conform to gender stereotype. (Doc. ¶¶ 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 [6] Mr. Bostock's sexual orientation and identity and his participation in the softball league. (*Id.* ¶ 21.)

On or about June 3, 2013, Clayton County terminated Mr. Bostock. (Doc. 10 ¶ 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 a charge for sex and sexual orientation discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Doc. ¶ 6.) Mr. Bostock filed this lawsuit within 90 days of the receipt of his Notice of Right to Sue from the EEOC. (*Id.* ¶ 7.)

IV. ARGUMENT AND CITATION OF AUTHORITIES

A. *EVANS* CONFLICTS WITH THE SUPREME COURT'S DECISION IN *PRICE WATERHOUSE v. HOPKINS*

In *Price Waterhouse v. Hopkins,* the United States Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination that violates Title VII. *See* 490 U.S. 228, 251 (1989). Six members of the Supreme Court agreed that Title VII prohibits not simply discrimination because of one's biological sex, but also gender stereotyping – that is, failing to act and appear according to stereotypical gender expectations. *Id.* at 250-51(plurality opinion); *id.* [7] at 258-61, (White, J., concurring); *id.* at 272-73(O'Connor, J., concurring). The Supreme Court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group . . ." *Id.* at 251. The Court also emphasized that "[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." *Id.* (emphasis added).

As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, "*Price Waterhouse* . . . demand[s] the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination 'because of . . . sex.'" *Evans*, 850 F.3d at 1264 (Rosenbaum, J., concurring in part and dissenting in part). When an employer discriminates against a gay or lesbian employee, "the employer discriminates against the employee because she does not conform to the employer's prescriptive stereotype of what a person of that birth-assigned gender should be. And so the employer discriminates against the employee 'because of . . . sex.'" *Id.* (footnotes and citations omitted). *See also Hively v. Ivy Tech Cmty. Coll. of Indiana,* 853 F.3d 339, 350 (7th Cir. 2017) (noting that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and that "[t]he 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 [8] 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").

In *Evans*, the majority of the panel held that it was bound by the prior precedent rule to follow *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), and rejected the appellant's argument that *Price Waterhouse* and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.

75 (1998), support a cause of action for sexual orientation discrimination under Title VII. *Evans,* 850 F.3d at 1256. The basis of this conclusion was the majority's determination that "*Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum*." 850 F.3d at 1256. With respect to the majority of the *Evans* panel, this is error.

Blum "'directly conflict[s] with' *Price Waterhouse's* holding that Title VII prohibits an employer from discriminating against its employee on the basis that she fails to conform to the employer's view of what a woman should be." *Evans*, 850 F.3d at 1270 (Rosenbaum, J., concurring in part and dissenting in part). As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, "*Price Waterhouse* requires us to apply the rule that '[a]n individual cannot be punished because of his or her perceived gender-nonconformity.'" *Id.* Since continued application of *Blum* would allow a woman to be punished precisely because of her perceived gender non-conformity – in this case, sexual attraction to other women – [9] *Price Waterhouse* undermines these cases to the point of abrogation." *Id.* (internal citations omitted).

Moreover, the entire basis on which the *Blum* Court based its statement regarding sexual orientation discrimination has been abrogated. In *Blum*, the primary issue on appeal was whether the defendant articulated a legitimate nondiscriminatory reason for the plaintiff's discharge. The former Fifth Circuit held that it did. 596 F.2d at 937. But after reaching this conclusion, which effectively resolved the appeal, the Fifth

Circuit went to "comment briefly" on other issues raised on appeal. It was in this section of the opinion in which the former Fifth Circuit offered the statement that "[d]ischarge for homosexuality is not prohibited by Title VII." 597 F.2d at 938. In support of the proposition that Title VII does not prohibit "discharge for homosexuality," the former Fifth Circuit did not provide any analysis and simply cited an earlier holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

In *Smith*, "the claim [wa]s not that [the plaintiff] was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.' " 569 F.2d at 327. The court held that such discrimination was not sex discrimination within the meaning of Title VII, *id.*, and noted in a footnote that "[t]he EEOC itself has ruled that adverse action against homosexuals [10] is not cognizable under Title VII," *id.* n.1. *Smith* is no longer good law on this point since its holding "vis-a-vis discrimination on the basis of sex stereotyping has clearly been abrogated by subsequent Supreme Court cases." *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F. Supp.3d 1334, 1342 n.4 (N.D. Fla. 2016); *see also Price Waterhouse*, 490 U.S. 228 (1989). The District Court in *Winstead* also correctly 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.* Thus, the

entire basis on which *Blum* based its language regarding sexual orientation discrimination has been abrogated, and the Court in *Evans* erred in relying upon it as binding precedent. This error led to a decision that is itself in conflict with *Price Waterhouse.* This Court must act en banc to rectify that error.[5]

[11] B. *EVANS* CONFLICTS WITH THIS COURT'S DECISION IN *GLENN V. BRUMBY*

Evans also conflicts with this Court's holding in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, this Court clearly held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." 663 F.3d at 1317. This Court noted that a number of *pre-Price Waterhouse* decisions had concluded that Title VII afforded no protection to transgender victims of sex discrimination. This Court determined, however, that these cases had been "'eviscerated' by *Price Waterhouse's* holding that 'Title VII's reference to 'sex'

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[5] Mr. Bostock acknowledges that under the prior panel precedent rule, a panel of this Court is generally bound to follow a prior panel decision except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision. *See, e.g.*, *Chambers v. Thompson,* 150 F.3d 1324, 1326 (11th Cir. 1998). For this reason, Mr. Bostock files this Petition for Hearing En Banc. As this Court is also aware, a petition for certiorari has been filed in *Evans* and is currently pending before the United States Supreme Court. (Sup. Ct. Case No. 17-370).

encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.'" *Id.* at 1318 n.5 (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

In *Glenn*, this Court stated that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype." *Id.* at 1318 (11th Cir. 2011). The same is true for gay or lesbian employees. In *Hively*, the Seventh Circuit correctly observed that the appellant in that case, a lesbian employee,

> represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, [12] which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.

853 F.3d at 346. Thus, *Glenn,* like *Price Waterhouse,* "demand[s] the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination 'because of . . . sex.'" *Evans*, 850 F.3d at 1264 (Rosenbaum, J. concurring in part and dissenting in part). *Evans* and *Glenn* "cannot be reconciled." *Id.* at 1269.

To quote Judge Rosenbaum again:

> And discrimination against an employee solely because she fails to conform to the employer's view that a woman should be sexually attracted to men only is no different than discrimination against a transsexual because she fails to conform to the employer's view that a birth-assigned male should have male anatomy. In both cases, the employer discriminates because the employee does not comport with the employer's vision of what a member of that particular gender should be. It's just as simple as that.

Id. at 1265-66. *Evans* was erroneously decided on the issue of sexual orientation discrimination because it directly conflicts with *Glenn.* This Court must therefore act en banc to overrule *Evans* and reverse the District Court's dismissal of Mr. Bostock's claim for sexual orientation discrimination under Title VII.

V. CONCLUSION

The District Court's decision in this case and the panel's decision in *Evans* are in direct conflict with the Supreme Court's holding in *Price Waterhouse* and [13] this Court's holding in *Glenn.* Mr. Bostock respectfully requests that the Court hear this appeal en banc and

reverse the District Court's dismissal of his claim for sexual orientation discrimination.

Respectfully submitted,

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[14] [Certificate Of Compliance Omitted]

[15] [Certificate Of Service Omitted]

[Exhibit A Omitted]