No. 15-15234

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMEKA K. EVANS,
Plaintiff-Appellant,

v.

GEORGIA REGIONAL HOSPITAL, et al.,
Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of Georgia
Hon. J. Randal Hall, Judge

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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Evans v. Georgia Regional Hospital, No. 15-15234

Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the individuals and entities listed on the Appellant's Certificate of Interested Persons and Corporate Disclosure Statement, the following individuals and entities have an interest in this case:

Coleman, Gail S. (EEOC attorney)

Equal Employment Opportunity Commission (*amicus curiae*)

Goldstein, Jennifer S. (EEOC Associate General Counsel)

Lopez, P. David (EEOC General Counsel)

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

Table of Contents

Table of Authorities

Cases

Statutes

Rules and Regulations

Other Authority

Statement of Interest

The Equal Employment Opportunity Commission ("EEOC") is charged by Congress with interpreting, administering, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This appeal addresses whether claims of sexual orientation discrimination are cognizable under Title VII as claims of sex discrimination. Because such claims necessarily involve illegal sex stereotyping, illegal gender-based associational discrimination, and impermissible consideration of a plaintiff's sex, the EEOC believes that they fall squarely within Title VII's prohibition against discrimination on the basis of sex. Additionally, the EEOC has an interest in addressing the district court's retaliation analysis, which wrongly failed to acknowledge the reasonableness of Evans's belief that she was opposing conduct made unlawful by Title VII when she complained of sexual orientation discrimination. This Court's resolution of these two issues will significantly affect the EEOC's enforcement efforts. Accordingly, the EEOC offers its views to the Court. The EEOC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

Statement of Related Case

This Court is currently considering *Burrows v. College of Central Florida*, No. 15-14554 (11th Cir. appeal docketed Oct. 14, 2015), which asks the same

question posed here: whether sexual orientation discrimination is cognizable as a form of sex discrimination under Title VII.

Statement of the Issues

1. Is discrimination on the basis of sexual orientation cognizable under Title VII as a form of sex discrimination?
2. Did the district court err in dismissing Evans's retaliation claim on the ground that she did not engage in protected conduct when she complained of sexual orientation discrimination?
3. Did the district court err by suggesting that Evans did not comply with administrative prerequisites to suit?

Statement of the Case

This is an appeal from the dismissal of Evans's in forma pauperis complaint under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim on which relief may be granted.

A. Statement of Facts

Georgia Regional Hospital is a state-funded mental health facility operated by the Department of Behavioral Health and Developmental Disabilities. R.1 at 1; R.1-1 at 10. Jameka Evans worked in the Hospital's security department. *Id.* at 1-4. In her pro se complaint, Evans alleged that Charles Moss, the chief of security, targeted her for termination "due to the fact that I do not carry myself in a

traditional woman manner." R.1 at 3. She stated, "I am a gay female, I … did not broadcast my sexuality." Evans added that "it is evident I identify with the male gender because [of how] I presented myself visually (male uniform, low male haircut, shoes, etc.)." *Id.*

Evans alleged that Moss harassed her on the basis of her sexual orientation, as evidenced by the fact that, during the subsequent internal investigation of the alleged harassment, the senior human resources manager asked her about her "sexuality." *Id.* She stated that she believed that Moss and upper management discussed "the fact that [she is] gay" and her "sexual preference" generally. *Id.* at 4, 5. Evans's complaint alleged that she believed she was "being punished because [of] my status as a gay female [who] did not conform to … [Moss's] gender stereotypes associated with women." *Id.* at 4. Evans also alleged that Moss promoted a less qualified person as her supervisor. *Id.* Finally, Evans alleged that she was subjected to retaliation for complaining to the HR department about Moss's treatment of her. *Id.*

Evans filed suit and sought leave to file in forma pauperis. R.1; R.2. The magistrate judge granted her motion but then sua sponte, prior to service of process, recommended that the district court dismiss her complaint under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim on which relief may be granted. R.4.

B. Magistrate's Report and Recommendation

The magistrate judge recommended that the court dismiss Evans's discrimination claim on the ground that Title VII "was not intended to cover discrimination against homosexuals." R.4 at 4-5 (citing *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Arnold v. Heartland Dental, LLC*, 101 F. Supp. 3d 1220, 1225-26 (M.D. Fla. 2015)); *see also* R.4 at 5-6 ("Other courts have held that homosexuality is *not* a 'protected class' within the meaning of Title VII, which means any substantive claims based on it fail as a matter of law.") (citing *Harder v. New York*, ___ F. Supp. 3d ___, 2015 WL 4614233, at *5 (N.D.N.Y. Aug. 3, 2015); *Hively v. Ivy Tech Cmty. Coll.*, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015), *appeal pending*, No. 15-1720 (7th Cir. appeal docketed Apr. 2, 2015)). Not only is sexual orientation unprotected, the magistrate judge ruled, but "perceived sexual orientation" also is not a permissible basis for a Title VII claim. R.4 at 6 (citations omitted).

Moreover, the magistrate judge stressed, "to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation." *Id.* at 6-7. "To inflict an adverse employment action … because a male is too effeminate or a female too masculine is to discriminate based on sexual orientation ('gender nonconformity'), which is

reflected in the gender image one presents to others – that of a male, even if one is biologically female." *Id.* at 7. "Hence," stated the magistrate judge, "Evans' allegations about discrimination in response to maintaining a male visage also do not place her within Title VII's protection zone, even if labeled a 'gender nonconformity' claim, because it rests on her sexual orientation no matter how it is otherwise characterized." *Id*. The magistrate judge added that "[o]ther courts have similarly rejected gender non-conformity claims stemming from a plaintiff's homosexuality." *Id.* at 7 n.7 (citing *Anderson v. Napolitano*, 2010 WL 431898, at *6 (S.D. Fla. Feb. 8, 2010)).

The magistrate judge next turned to Evans's retaliation claim. The magistrate judge concluded that Evans "failed to allege that she opposed 'an unlawful employment practice'" because "it is simply not unlawful under Title VII to discriminate against homosexuals or based on sexual orientation." *Id.* at 9; *see also id.* at 10 ("[T]here evidently was no protected activity here [because] plaintiff was complaining about an employment practice (homosexual or sexual orientation discrimination) that is not unlawful under Title VII."). The magistrate judge did not directly address whether Evans might have had a reasonable, good-faith belief that the challenged discrimination was unlawful but cited decisions stating that a "mistaken belief" that Title VII covers sexual orientation discrimination is not sufficient to fall within the protections of Title VII's anti-retaliation provision. *Id.*

at 10-11 & n.8 (citing *Hamzah v. Woodmans Food Mkt., Inc.*, 2014 WL 1207428, at *5 (W.D. Wisc. Mar. 24, 2014); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000); *Cunningham v. City of Arvada*, 2012 WL 3590797, at *1 (D. Colo. Aug. 19, 2012)).

Finally, the magistrate judge suggested that "there may also be some knock-out punches that otherwise drain her case of any vitality," namely that she may have filed her EEOC charge too late or that she may not have raised the claims asserted in her complaint in an administrative charge before the EEOC. R.4 at 12-13 n.9. The magistrate judge did not indicate what the applicable filing deadline was in Georgia or why he believed that Evans's charge might be untimely. *Id.* at 3 n.2 (citing an Alabama case for the proposition that Evans needed to file within 180 days). Nor did he consider the full scope of Evans's administrative materials, stating only that none of the documents she had attached to her complaint (her handwritten letter to the EEOC, her EEOC right-to-sue letter, and her own typed materials) "recount discriminatory acts based on gender, homosexuality, or sexual orientation." *Id.* at 4 n.4.

The district court conducted a de novo review of the record and, without discussion, concurred with the magistrate judge's report and recommendation. R.12. The court dismissed Evans's complaint with prejudice, without an opportunity to amend. R.12.

Summary of Argument

The district court erred by dismissing Evans's complaint for failure to state a claim. For three reasons, the magistrate judge was wrong that Title VII's prohibition on sex discrimination does not encompass sexual orientation discrimination.

First, sexual orientation discrimination involves the adverse treatment of individuals for their failure to conform to heterosexually defined gender norms. As the Supreme Court explained in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), *superseded in part on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166 sec. 7, discrimination based on failure to comply with gender norms violates Title VII. Sexual orientation discrimination, which is premised on sex-based stereotypes, falls squarely within the rule of *Price Waterhouse*.

Second, sexual orientation discrimination treats individuals differently based on their sex because of their personal associations. This Court has held that "where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race [in violation of Title VII]." *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986). Title VII provides no reason to treat associational discrimination based on sex differently from associational

discrimination based on race. Thus, Title VII forbids an employer from taking adverse employment action against a man, but not a woman, who dates men.

Third, Title VII generally prohibits employers from considering sex. Discrimination based on sexual orientation necessarily requires employers to do just that. Both a male and female employee, for example, might display a photo of their wives. An employer who takes adverse action only against the female employee discriminates against her based on her sex.

The district court also erred by dismissing Evans's retaliation claim. Relying on his erroneous belief that Title VII does not prohibit sexual orientation discrimination, the magistrate judge wrongly concluded that the anti-retaliation provision does not protect opposition to such conduct. The magistrate judge also misapplied precedent holding that the anti-retaliation provision protects opposition to conduct that an individual reasonably believes is unlawful under Title VII, even if she is mistaken. Based on the EEOC's well-publicized position that sexual orientation discrimination violates Title VII, together with the opinions of several district courts to that effect, Evans reasonably believed that she was opposing illegal conduct. The district court should have allowed her retaliation claim to proceed.

Finally, this Court should not adopt the magistrate judge's speculations regarding the timeliness or content of Evans's EEOC charge. The record does not show that Evans's complaint is defective on either ground.

Argument

A. Sexual orientation discrimination is cognizable as sex discrimination under Title VII.

This case presents an issue of first impression in this Circuit: Whether Title VII's prohibition against sex discrimination encompasses claims of discrimination based on sexual orientation.[1] The EEOC acknowledges that Congress likely did not specifically contemplate sexual orientation discrimination when it enacted Title VII in 1964, and also acknowledges that the EEOC's own understanding of Title VII's application to sexual orientation discrimination has developed over time. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *9 n.13 (EEOC July 15, 2015). However, this Court must apply Title VII as written. For the reasons stated below, this Court should rule that sexual orientation discrimination is a form of prohibited sex discrimination.

[1] This Court has expressly left open the question whether "discrimination because of sexual orientation is actionable." *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *see also* R.4 at 4 ("the Eleventh Circuit has not addressed this issue"); *Isaacs v. Felder Servs., LLC*, 2015 WL 560655, at *3 (M.D. Ala. Oct. 29, 2015) ("In the Eleventh Circuit, the question [whether Title VII covers sexual orientation discrimination] is an open one."); *Arnold v. Heartland Dental, LLC*, 2015 WL 1456661, at *5 (M.D. Fla. Mar. 30, 2015) ("the Eleventh Circuit has not addressed this issue").

The Supreme Court has rejected the notion that Title VII only proscribes the types of discrimination that Congress specifically considered. The 1964 Congress probably never considered same-sex harassment, for instance, but the Supreme Court has unanimously interpreted Title VII's prohibition on sex discrimination to reach that conduct. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-80, 118 S. Ct. 998, 1001-02 (1998); *see also Fredette*, 112 F.3d at 1505 ("The obvious Congressional focus on discrimination against women has not precluded the courts from extending the protections of Title VII to men."). The *Oncale* Court observed, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79, 118 S. Ct. at 1002; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381, 97 S. Ct. 1843, 1878 (1977) (Marshall, J., concurring in part and dissenting in part) ("the evils against which [Title VII] is aimed are defined broadly").

The fact that Congress has rejected numerous efforts to enact a federal law explicitly prohibiting sexual orientation discrimination in employment says nothing about what the existing statute prohibits. As the Supreme Court has cautioned, "[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress" and is "a particularly dangerous ground on which to

rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668, 2678 (1990) (citation omitted). The Court added that "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Id.* (citation omitted).

As explained in more detail below, Title VII's prohibition on sex discrimination encompasses a prohibition on sexual orientation discrimination. This interpretation is most consistent with the statutory language prohibiting employment discrimination "because of . . . sex." 42 U.S.C. § 2000e- 2(a). It also flows naturally from binding precedent because sexual orientation discrimination (1) relies on illegal sex stereotyping, (2) constitutes gender-based associational discrimination, and (3) involves impermissible sex-based considerations.

1. Title VII prohibits discrimination based on sex stereotypes.

Although neither the Supreme Court nor this Court has expressly addressed sexual orientation discrimination, both have held that discrimination based on gender stereotypes is actionable. *Price Waterhouse*, 490 U.S. at 250-51, 109 S. Ct. at 1791; *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011). The magistrate judge, who rejected gender non-conformity claims as "just another way

to claim discrimination based on sexual orientation," did not mention either of these binding precedents. Rep. at 6-7.

The plaintiff in *Price Waterhouse* was a woman whose employer perceived her as insufficiently feminine. Several partners in her firm commented that the plaintiff was "macho" and "overcompensated for being a woman," and said that she would have a better chance of becoming a partner if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235, 109 S. Ct. at 1182. Six members of the Court agreed that these comments indicated gender discrimination based on sexual stereotypes.[2] The plurality held that Title VII prohibited such discrimination because "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251, 109 S. Ct. at 1791. The Court's conclusion followed from its earlier recognition that Congress passed Title VII "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13, 98 S. Ct. 1370, 1375 n.13 (1978)).

[2] The four Justices in the plurality, as well as Justice White and Justice O'Connor, who both concurred separately, all agreed with this conclusion. *See Glenn*, 663 F.3d at 1316.

Applying *Price Waterhouse*, this Court held in *Glenn* that discrimination against a transgender woman is sex discrimination. The plaintiff in that case was a biological male who was in the process of transitioning from male to female. Her supervisor fired her because he believed that "[her] intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make [her] coworkers uncomfortable." *Glenn*, 663 F.3d at 1314. Affirming summary judgment for the plaintiff under 42 U.S.C. § 1983, this Court said, "All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . An individual cannot be punished because of his or her perceived gender-nonconformity. . . . [D]iscrimination on this basis is a form of sex-based discrimination." *Id.* at 1318-19.

Other circuits have also applied *Price Waterhouse* to prohibit discrimination based on gender stereotypes. *See, e.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) (liability warranted under Title VII if a jury concluded harassment occurred because the victim "fell outside of [the harasser's] manly-man stereotype"); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("[E]mployers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are . . . engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *Nichols v.*

Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) ("At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act."); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) ("Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."), *vacated and remanded on other grounds*, 523 U.S. 1001,118 S. Ct. 1183 (1998).

Although no circuit has extended the reasoning of the gender stereotyping cases to discrimination based on sexual orientation, the logic of those cases applies in full. An employer that discriminates because of an employee's homosexuality necessarily discriminates because of that employee's failure to conform to a gender-based stereotype: the stereotype of opposite-sex attraction. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."); *Baldwin*, 2015 WL 4397641, at *5 ("Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."). Intentional discrimination on the basis of sexual orientation therefore necessarily implicates stereotypes relating to "proper" sex-specific roles in romantic and/or sexual relationships.

This Court should now clarify that Title VII prohibits discrimination based on *any* gender stereotype, including the stereotype that individuals should be

attracted only to members of the opposite sex. There is no legal or logical basis for carving out a sexual orientation exception to the gender stereotype rule.

Several district courts have already reached this conclusion. Most recently, Judge Pregerson of the Central District of California stated, "[T]he line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct." *Videckis v. Pepperdine Univ.*, __ F.Supp. 3d ___, 2015 WL 8916764, at *5-6 (C.D. Cal. Dec. 15, 2015). He explained that "[s]tereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women – and the relationships between them. . . . If the women's basketball staff in this case had a negative view of lesbians based on lesbians' perceived failure to conform to the staff's views of acceptable female behavior, actions taken on the basis of these negative biases would constitute gender stereotype discrimination." *Id.* at *7.

Judge Gertner of the District of Massachusetts agrees. In *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002), she explained, "The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, 'real men don't date men.' The gender stereotype at work here is that 'real' men should date women, and not other men." *See also Isaacs v. Felder Servs., LLC*, __ F. Supp. 3d ___, 2015 WL

6560655, at *3 (M.D. Ala. Oct. 29, 2015) ("[C]laims of sexual orientation-based discrimination are cognizable under Title VII."); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (same); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed . . . Heller because [she] did not conform to [his] stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.").

A majority of circuits have ruled that Title VII does not prohibit sexual orientation discrimination, but those decisions rest on shaky ground. Most of the opinions are conclusory and rely on precedents that pre-date *Price Waterhouse*. [3] The First Circuit, for instance, relied on an Eighth Circuit case that pre-dated *Price Waterhouse* to conclude, "[W]e regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation." *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (citing *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69,

[3] Dicta in a pre-1981 Fifth Circuit case observed without analysis that "discharge for homosexuality is not prohibited by Title VII. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). *Blum* cited *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978), which involved a plaintiff who was discharged for being "too womanly." *Id.* at 326-27. *Smith* was abrogated by *Price Waterhouse*. *See EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 454-55 & n.4 (5th Cir. 2014) (en banc) ("More than two decades ago, the Supreme Court held that a plaintiff may rely on gender-stereotyping evidence to show that discrimination occurred "because of . . . sex" in accordance with Title VII.") (citing *Glenn*, 663 F.3d at 1316).

70 (8th Cir. 1989)). *Williamson* is not persuasive following the Supreme Court's explicit condemnation of sex stereotyping. The *Higgins* Court also relied on a section of *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745 (4th Cir. 1996), that was written by a single judge and not joined by the rest of the panel. *Higgins*, 194 F.3d at 259 (citing *Hopkins*, 77 F.3d at 751-52 & n.3 (Niemeyer, J., writing for himself)). Judge Niemeyer's dissent is not precedential.

The Second, Fourth, and Seventh Circuits likewise relied on pre-*Price Waterhouse* law to hold that Title VII does not prohibit sexual orientation discrimination. *See Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (citing *DeCintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986); and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *abrogation recognized by Glenn*, 663 F.3d at 1318 n.5); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (citing *Williamson*, 876 F.2d at 70; and *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), *abrogation recognized by Nichols*, 256 F.3d at 874-75); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084-85 (7th Cir. 2000) (citing *Ulane*, 742 F.2d at 1085). The Third Circuit, in turn, relied on the First, Second, and Eighth Circuits to support its own holding that sexual orientation discrimination is not a form of sex discrimination. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (citing *Simonton*, 232 F.3d at 35; *Higgins*, 194 F.3d at 259; and *Williamson*, 876 F.2d at 70).

The Seventh Circuit recently amended an opinion to omit language stating that sexual orientation discrimination "[i]s not proscribed by Title VII." *See Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014), *as amended on denial of reh'g* (Oct. 16, 2014) (original opinion at Docket Entry No. 41, Appeal No. 12-1723). The Court's original opinion cited to *Hamner*, 224 F.3d 701, slip op. at 8, a case that the district court relied upon here. R.4 at 10-11. *Hamner* relies on precedent pre-dating *Price Waterhouse*. The Seventh Circuit's deletion of its citation to *Hamner* suggests that it may be backing away from its pre-*Price Waterhouse* analysis.

The Sixth Circuit, which also holds that Title VII does not prohibit sexual orientation discrimination, acknowledged *Price Waterhouse* but relied upon a crabbed interpretation of that case. In *Vickers*, 453 F.3d 757, the Sixth Circuit said, "[T]he Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace," unlike the private behavior associated with sexual orientation. *Id.* at 763. The *Vickers* Court did not consider that the *Price Waterhouse* Court was limited to the facts before it. Nor did it explain why Title VII would require discriminatory animus to be linked to characteristics that are observable at work. Title VII "prohibits certain *motives*, regardless of the state of the actor's knowledge," and an employer may violate Title VII "even if he has no more than an unsubstantiated suspicion" that statutory

protections may apply. *EEOC v. Abercrombie & Fitch Stores, Inc.*, ___ U.S. ___, ___, 135 S. Ct. 2028, 2033 (2015); *see also Videckis*, ___ F. Supp. 3d ___, 2015 WL 8916764, at *6 ("[I]t is the biased mind of the alleged discriminator that is the focus of the analysis.").

The better reading of Title VII, and the one most consistent with *Price Waterhouse* and *Glenn*, is that sexual orientation discrimination is a prohibited form of sex discrimination. Otherwise, employers could mistreat gay and lesbian employees, but not straight employees, in sex-specific ways. If a supervisor makes repeated, unwanted comments about a straight employee's sex life, for example, the employee could sue for sexual harassment under Title VII. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67, 106 S. Ct. 2399, 2405 (1986). If that same supervisor makes repeated, unwanted comments to a gay employee about his sex life, however, the employee could be unprotected. "The result [of numerous unwanted offensive comments regarding the plaintiff's sex life] should not differ simply because the victim of the harassment is homosexual." *Heller*, 195 F. Supp. 2d at 1222-23.

2. Title VII prohibits discrimination based on association.

This Court has already held that Title VII protects a white employee who is married to a black woman. "Where a plaintiff claims discrimination based upon an interracial marriage or association," this Court said, "he alleges, by definition, that

he has been discriminated against because of *his* race." *Parr*, 791 F.2d at 892. The Court explained that Title VII requires "a liberal construction" and pointed to the EEOC's consistent view that discrimination based on an interracial association constitutes race discrimination under the statute. *Id.*; *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."); *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (interracial teacher-student friendship); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (interracial friendships or associations among coworkers); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (having a biracial child).

Nothing in Title VII authorizes this Court to treat sex-based associational discrimination claims differently from race-based associational discrimination claims. To the contrary, Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9, 109 S. Ct. at 1787 n.9; *see also Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F. 3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."); *Williams v. Owens-Ill., Inc.*, 665 F.2d 918, 929 (9th Cir.) ("Under [Title VII] the standard for proving sex discrimination and race

discrimination is the same."), *modified on other grounds on denial of reh'g*, 1982 WL 308873 (9th Cir. June 11, 1982); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980) ("Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination.").

An employer that discriminates against a gay employee for dating a man behaves exactly like an employer that discriminates against a white employee for dating a black woman. In both cases, the employer bases its actions on the protected characteristic of its employee, viewed in relation to the individuals with whom that employee associates. An employee who is part of an interracial couple is a victim of race discrimination, *Parr*, 791 F.2d at 892, and an employee who is part of a same-sex couple is a victim of sex discrimination. There is no logical difference between the two, and both employees are equally deserving of protection. *See generally Obergefell v. Hodges*, __ U.S. ___, 135 S. Ct. 2584 (2015) (marriage is a fundamental right to which same-sex couples are entitled).

As this Court has recognized in the context of race, no employee should be fired for dating, marrying, or simply associating with the individual of his or her choice. Unless this Court recognizes sexual orientation discrimination as a prohibited form of sex discrimination, however, employers will be free to discriminate against gays and lesbians in ways that they cannot discriminate

against interracial couples. Same-sex couples who exercise their Constitutional right to marry may find themselves unemployed as a result. Title VII, which forbids associational discrimination, should not permit this inequity.

3. Title VII prohibits employers from considering a plaintiff's sex.

Title VII generally forbids employers from considering sex when making employment decisions.[4] *Price Waterhouse*, 490 U.S. at 239, 109 S. Ct. at 1784. As the Supreme Court has explained, "In passing Title VII, Congress made the simple but momentous announcement that sex . . . [is] not relevant to the selection, evaluation, or compensation of employees." *Id.* Accordingly, the Court continued, "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute." *Id.* at 239, 109 S. Ct. at 1785.

Sexual orientation is intimately tied to an individual's sex. An employer cannot discriminate based on sexual orientation without considering the sex of its employee in relation to the sex of the persons to whom its employee is physically and/or emotionally attracted. *See Baldwin*, 2015 WL 4397641, at *5 ("[S]exual orientation is inseparable and inescapably linked to sex and, therefore

[4] Employers may consider sex under Title VII only where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1).

. . . allegations of sexual orientation discrimination involve sex-based considerations."); *see also Videckis*, 2015 WL 8916764, at *5 ("[S]exual orientation discrimination is not a category distinct from sex or gender discrimination."); *Heller*, 195 F. Supp. 2d at 1223 ("A jury could find that Cagle would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender.").

This principle is evident in the case of spousal benefits. In *Hall v. BNSF Railway*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), for instance, the court held that a male plaintiff stated a plausible Title VII sex discrimination claim where his employer provided spousal benefits to men married to women but not to men married to men. *Id.* at *3. Likewise, in *In re Levenson*, 560 F.3d 1145 (9th Cir. Jud. Council Feb. 2, 2009), the Ninth Circuit found a violation of the Court's Employment Dispute Resolution Plan where a male plaintiff was unable to make his male spouse a family member for purposes of benefits "due solely to his spouse's sex." *Id.* at 1146.

As these cases demonstrate, sexual orientation discrimination fails the Supreme Court's "simple" test for sex discrimination: "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be

different.'" *Manhart*, 435 U.S. at 711, 98 S. Ct. at 1377 (citation omitted); *see also Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83, 103 S. Ct. 2622, 2630-31 (1983) (applying *Manhart*'s "simple test of Title VII discrimination"). But for an employee's sex, for instance, an employer discriminating on the basis of sexual orientation would not object to a woman displaying a photo of her wife or a man displaying a photo of his husband.

The consideration of sex remains true even though employers discriminating on the basis of sexual orientation do not discriminate against *all* men or women, but only against those who are gay or lesbian. Title VII has never required an employer to discriminate against all employees in a protected class before recognizing an individual employee's claim. It is sufficient for liability that an employer discriminates against a subset of a class as long as the discrimination is based on a protected characteristic. *See Connecticut v. Teal*, 457 U.S. 440, 442, 102 S. Ct. 2525, 2528 (1982) (Title VII does not provide "bottom line" defense).

Moreover, sexual orientation discrimination is sex discrimination even though the employer discriminates against both men and women. By analogy, an employer that fires a white employee for having a black spouse and a black employee for having a white spouse is discriminating against both employees based on race. The discrimination against one does not negate the discrimination against the other.

4. This Court should publish an opinion on this issue of first impression.

The Hospital has declined to file a brief because the district court dismissed the complaint prior to service of process. 11th Cir. Docket Entry of 12/24/2015. This Court, however, routinely publishes its decisions regarding dismissals under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim, even when the dismissals are prior to service of process. *See Hughes v. Lott*, 350 F.3d 1157, 1159 (11th Cir. 2003) (addressing merits of dismissal, prior to service of process, of in forma pauperis pro se complaint); *Phillips v. Mashburn*, 746 F.2d 782, 785 (11th Cir. 1984) ("We must therefore decide whether the district court erred by dismissing sua sponte [and prior to service of process] an in forma pauperis pro se complaint . . . ."); *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) ("The claim, on its face, is sufficient to carry this cause of action through the service of process stage.").

If the Hospital does not defend the district court's decision, the magistrate judge's opinion can speak for itself. As the Eighth Circuit has explained, "[s]ua sponte dismissals . . . 'cast the district court in the role of a "proponent rather than an independent entity."'" *Munz v. Parr*, 758 F.2d 1254, 1257-58 (8th Cir. 1985) (citations omitted); *see also Williams v. White*, 897 F.2d 942, 945 (8th Cir. 1990) (reversing dismissal where defendant had never been served and appellant was ex parte); *United States v. Criden*, 681 F.2d 919, 921-22, 923 (3d Cir. 1982) (majority

op. and Weis, J., concurring and dissenting) (reversing district court ruling where "United States Attorney's Office has disclaimed any interest in the appeal . . . [and] the broadcast networks have presented their case ex parte").

B. The district court erred in dismissing Evans's retaliation claim on the ground that she did not engage in protected conduct when she complained of sexual orientation discrimination.

Title VII prohibits employers from retaliating against an employee who "has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). There is no dispute that Evans "opposed" an employment practice. The district court dismissed her retaliation claim, however, based on the magistrate judge's conclusion that the employment practice she opposed was not "unlawful." (R.4 at 9) For the reasons discussed above, the magistrate judge was wrong. Sexual orientation discrimination *is* an unlawful employment practice under Title VII.

Even if this Court disagrees that sexual orientation discrimination is covered by Title VII, the district court was wrong to dismiss Evans's retaliation claim. Title VII shields not only employees who oppose acts that are illegal under the statute, but also employees who object in good faith to practices that they reasonably *believe* are illegal, even if they are not. *Dixon v. Hallmark Cos.*, 627 F.3d 849, 857 (11th Cir. 2010). The plaintiff "need not prove the underlying discriminatory conduct that he opposed was actually unlawful [because] such a

requirement '[w]ould . . . chill the legitimate assertion of employee rights under Title VII.'" *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 959-60 (11th Cir. 1997).

The magistrate judge focused on whether the complained-of conduct was actually illegal, rather than on whether Evans might have had a good-faith, reasonable belief that it was. R.4 at 9-11. Acknowledging that Title VII "'arguably does prohibit retaliation against persons who file charges of discrimination based on a reasonable (albeit mistaken) belief that the complained-of practice was prohibited,'" the magistrate judge nonetheless held that it was not reasonable for Evans to believe that Title VII prohibits sexual orientation discrimination. *Id.* at 10-11(quoting *Cunningham v. City of Arvada*, 2012 WL 3590797, at *1 (D. Colo. Aug. 9, 2012)) . He relied in part on Seventh Circuit law to reach this conclusion without noting that the Seventh Circuit, unlike this Court, has already held that Title VII does not prohibit discrimination on the basis of sexual orientation. *Id.* at 10-11 & n.8 (citing *Hamner*, 224 F.3d at 707; *Hamzah*, 2014 WL 1207428, at *5).

The legal landscape in this Circuit is different. This Court has never ruled on the viability of a sexual orientation claim under Title VII. It can now decide this question in light of *Price Waterhouse* and evolving law. Unlike a plaintiff in the Seventh Circuit, Evans was not faced with adverse precedent. Moreover, this

Circuit has held that discrimination against transgender individuals "is a form of sex-based discrimination," and explained that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype." *Glenn*, 663 F.3d at 1318-19. It is reasonable for a plaintiff to believe that this language encompasses discrimination on the basis of sexual orientation.

Also relevant to the reasonableness of Evans's belief is the position of the EEOC, the primary federal agency charged with interpreting and enforcing Title VII. The EEOC has publicly taken the position that Title VII prohibits sexual orientation discrimination. *See, e.g.*, EEOC Publication, "Gender Stereotyping: Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Workers," *available at* http://www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm (rev. Aug. 2013); EEOC Management Directive, "Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Employees," *available at* http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm. Encouraged by the EEOC's stance, hundreds of charging parties have come forward in recent years to complain of sexual orientation discrimination. *See* EEOC Publication, "What You Should Know about EEOC and the Enforcement Protections for LGBT Workers," *available at* http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers

.cfm (EEOC received 643 charges of sexual orientation discrimination in final three quarters of FY 2013, 918 charges in FY 2014, and 505 charges in first two quarters of FY 2015).

The magistrate judge erred by not considering the context of Evans's complaint. In light of the EEOC's position, as well that of several district courts, *see, e.g.*, *Videckis*, 2015 WL 8916764; *Centola*, 183 F. Supp. 2d 403; *Isaacs*, 2015 WL 6560655; *Terveer*, 34 F. Supp. 3d 100; *Heller*, 195 F. Supp. 2d 1212, it was reasonable for Evans to believe that she was opposing conduct made illegal by Title VII. The district court therefore erred by dismissing her retaliation claim. *See Dawson v. Entek Int'l*, 630 F.3d 928, 936 (9th Cir. 2011) (Title VII's anti-retaliation provision covers the filing of a complaint alleging sexual orientation discrimination); *Bennefield v. Mid-Valley Healthcare, Inc.*, 2014 WL 4187529, at *4 (D. Or. Aug. 21, 2014) (same); *Terveer*, 2014 WL 1280301, at *11 (same).

C. The district court had no basis for suggesting that Evans did not comply with administrative prerequisites to suit.

The magistrate judge wrongly speculated that Evans's EEOC charge might be untimely or might not have alleged discrimination on the basis of sex or sexual orientation. R.4 at 3 n.2, 4 n.4, 12 n.9. This Court should reject both suggestions.

As to timeliness, employees of a department of the State of Georgia are subject to a 300-day limitations period, not the 180-day period applicable in Alabama that the magistrate judge cited. 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R.

§ 1601.74(a) & n.7. The document stamped "received" by the EEOC is dated February 3, 2014, 115 days after Evans's last day of employment, 123 days after the September 2, 2013, date that Evans identified as part of the ongoing discrimination, and roughly 264 days after the mid-May 2013 date that she identified as the beginning of the allegedly discriminatory treatment. R.1-1 at 1, 8. Thus, the evidence in this record indicates that her charge was timely.

The record does not disclose whether Evans alleged sex and/or sexual orientation discrimination in her EEOC charge. The Hospital never raised this issue and the charge is not part of the record.

The magistrate judge correctly noted that, regardless of the content of Evans's charge, her complaint could properly state claims based on "those discriminatory acts which were in fact considered during the EEOC's investigation." R.4 at 4 n.4. The record is devoid of evidence concerning the EEOC's investigation because at the time Evans filed her complaint, she had not received details from the EEOC. R.9 at 1-2. In her objections to the magistrate judge's Report and Recommendation, Evans stated that she had "new supplemental evidence . . . that affirm[s] the consistency of the claims alleged in my complaint with the claims investigated in the EEOC charge, satisfying the administrative consistency doctrine." *Id.* Had the district court dismissed her complaint *without* prejudice, Evans could have included these additional documents when she refiled.

Conclusion

Binding precedent from the Supreme Court and this Court indicate that sexual orientation discrimination is a prohibited form of sex discrimination under Title VII. Cases holding to the contrary rely almost exclusively on older precedents that have been superseded by *Price Waterhouse*. This Court should hold that Title VII forbids sexual orientation discrimination. Additionally, whether or not this Court holds that Title VII covers sexual orientation discrimination, it should rule that Evans's complaint was protected under Title VII's anti-retaliation provision. Finally, this Court should reject the magistrate judge's speculations about the timeliness and content of Evans's EEOC charge.

For the foregoing reasons, the EEOC respectfully requests that this Court reverse the dismissal of Evans's complaint and remand for further proceedings.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,663 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, size 14 point.

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January 11, 2016

Certificate of Service

I hereby certify that I filed one original plus six paper copies of the foregoing brief with the Court by UPS overnight delivery on this 11th day of January, 2016. I also certify that on this 11th day of January, 2016, I submitted the brief electronically in PDF format through the Electronic Case File (ECF) system.

I certify that I served one paper copy of the foregoing brief by UPS overnight delivery on this 11th day of January, 2016, to the following individuals:

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