

**15-1720**

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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KIMBERLY HIVELY,  
Plaintiff-Appellant,

v.

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

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Appeal from the United States District Court  
For the Northern District of Indiana  
Case No. 34-cv-01791-RL-CAN  
The Honorable Judge Rudy Lozano

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**CORRECTED AND REQUIRED SHORT APPENDIX OF  
PLAINTIFF-APPELLANT, KIMBERLY HIVELY**

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## JURISDICTIONAL STATEMENT

### ***A. Statement of Jurisdiction of the United States District Court.***

The jurisdiction of the District Court was founded on Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), and 28 U.S.C. §§ 1331 and 1343. Jurisdiction was not disputed below.

### ***B. Statement of Jurisdiction of the United States Court of Appeals.***

The jurisdiction of the United States Court of Appeals for the Seventh Circuit is provided by 28 U.S.C. §§ 1291 and 2106-07, in that this is an appeal seeking to reverse the final judgment against Plaintiff-Appellant Kimberly Hively (“Appellant” or “Ms. Hively”) entered by the United States District Court for the Northern District of Indiana as well as that court’s grant of a motion to dismiss Ms. Hively’s complaint that included a claim of discrimination in violation of 42 U.S.C. §§ 2000e *et seq.*, (Title VII). The date of entry of the final judgment issued by United States District Court Judge Rudy Lozano that is sought to be reviewed is March 4, 2015; his order granting the motion to dismiss of Defendant-Appellee Ivy Tech Community College (“Appellee” or “Ivy Tech”) was entered March 3, 2015. The appeal is from an order and final judgment that adjudicated all of the claims with respect to all parties, and no parties or issues remain in the District Court. Appellant did not file a motion for new trial or alteration of the judgment. Her Notice of Appeal was timely filed on April 2, 2015.

## STATEMENT OF THE ISSUE PRESENTED

The issue presented is whether Appellant stated a claim of sex discrimination under Title VII by alleging sexual orientation discrimination, *i.e.*, that her employer treated her attraction to women as disqualifying her from full- or continued part-time employment only because she is a woman.

## STATEMENT OF THE CASE

In 2000, Kimberly Hively, who is a lesbian, began teaching as a part-time, adjunct professor at Ivy Tech Community College in South Bend, Indiana. Appendix at 3 (A3). In her *pro se* complaint, she alleged that, even though she had the necessary qualifications for full-time employment and had never received a negative evaluation, she was not even interviewed for six full-time positions she applied for over a five-year period beginning in 2009, let alone being offered full-time employment, and that her part-time employment was not renewed in July 2014. *Id.* On December 10, 2013, Ms. Hively filed a sex discrimination charge regarding these adverse employment actions, which was presented to the Equal Employment Opportunity Commission (the “EEOC”). (A5). In that charge, she asserted that she was “being discriminated against based on [her] sexual orientation.” *Id.*

After getting her right-to-sue letter from the EEOC, Ms. Hively attached her administrative Charge of Discrimination to a *pro se* form federal complaint against Appellee that she filed in U.S. District Court for the Northern District of Indiana on August 13, 2014. (A1-5). On the form complaint, she checked the Title VII box and referenced the sexual orientation discrimination she had endured. (A1) On her Civil Cover Sheet, she wrote “discrimination based on sex” as the “Brief Description of Cause.” (A6).

Ivy Tech filed a motion to dismiss, which simply cited *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000), and two district court decisions similarly holding Title VII inapplicable to sexual orientation discrimination claims under Seventh Circuit law. On March 3, 2015, the district court, relying on the three cases cited by Ivy Tech, dismissed the lawsuit with prejudice. (A9-16) The District Court stated that, although it was “sympathetic to the arguments made by Hively,” it was “bound by Seventh Circuit precedent.” (A14) *Hively v. Ivy Tech Cmty. College*, 2015 U.S. Dist. LEXIS 25813, at \*6 (N.D. Ind. Mar. 4, 2015). Judgment was entered the next day. (A17) On April 2, 2005, Ms. Hively filed a timely appeal from the ruling granting the motion to dismiss and the final judgment.



## STANDARD OF REVIEW

The District Court's purely legal ruling on the motion to dismiss is subject to *de novo* review by this Court. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1266 (7th Cir. 1988).

## SUMMARY OF ARGUMENT

While the District Court understandably felt bound to dismiss Appellant's complaint pursuant to this Circuit's on-point holding in *Hamner*, 224 F.3d at 704, that discrimination "based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII," *Hamner* –and the decision in *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), on which *Hamner* principally relied – cannot be reconciled with Supreme Court authority, other decisions of this Court, or decisions of other federal courts and the EEOC. *Hamner* therefore should be overruled, and the judgment against Appellant and grant of Appellee's motion to dismiss Appellant's complaint with prejudice should be reversed.<sup>1</sup>

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<sup>1</sup>Because of the district court's reliance on this Circuit's precedent in *Hamner*, Appellant is filing a Motion for Initial En Banc Consideration of Appeal simultaneously with this Opening Brief, pursuant to Rule 35 of the Federal Rules of Appellate Procedure and 28 U.S. Code § 46. If that motion is not granted, and if the panel hearing this appeal agrees that *Hamner* should be overruled, it may wish to follow the procedure provided by Seventh Circuit Local Rule 40(e) for rehearing *sua sponte* before decision. That rule provides that "A

*Hamner* should be overruled, and the decision below reversed, on three grounds. **First**, *Hamner* is inconsistent with the Supreme Court’s decision in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), that – with limited exceptions not relevant here<sup>2</sup> – Title VII is violated when an employee suffers mistreatment that would not have occurred had the employee been of the other sex. That is the essence of what Appellant alleged: that her employer took adverse job actions against her because she is a *woman* who is attracted to women that it would not have taken had she been a *man* who is attracted to women. The *Hamner* and *Ulane* courts went off course by insisting that lesbian, gay, and transsexual plaintiffs who sue for sex discrimination under Title VII are asking the courts to define “sex” in Title VII in a way they believed Congress did not intend, but that is not the case. Rather, they are making the straightforward assertion that, but for their sex, their employer would not have taken the action it did. As explained below, the fact that Congress in 1964 may not have foreseen or intended a specific

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proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court ... shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”

<sup>2</sup>Appellant recognizes that there is a very limited “bona fide occupational qualification” (“BFOQ”) defense to adverse employment action claims and that a hostile work environment is actionable only when the offending conduct is sufficiently severe or pervasive. Neither of those limitations on sex discrimination claims is relevant to the present case, however, which involves denial of full-time employment opportunities and non-renewal of a part-time position, none of which involved a BFOQ.

application of Title VII is irrelevant, as is the failure of later Congresses to pass specific “sexual orientation” protections. The Supreme Court unanimously has rejected that approach to interpreting Title VII and repeatedly has condemned reliance on the inaction of later Congresses as a statutory construction tool.

*Hamner* erred in not following the Supreme Court’s rules for interpretation and application of Title VII and must be overruled for that reason. In addition, notwithstanding *Hamner* and *Ulane*, it is not a prerequisite to Title VII liability that an employer mistreat women generally, nor does the law – which remedies discrimination against individuals, not groups – allow mistreatment of a woman that would not occur if she were males imply by also mistreating men in ways that would not occur if they were female.

**Second**, the decision in *Hamner* violates the Supreme Court’s admonition in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), that “gender must be irrelevant in all employment decisions” and that termination of an employee because of a trait that runs counter to gender norms is sex discrimination. *Id.* at 240 (plurality opinion); *see also id.* at 275 (O’Connor, J., concurring) (to avoid liability, the employer must “avoid substantial reliance on forbidden criteria in making its employment decisions.”). In this case, Appellant’s contention is that she was mistreated because she fails to conform to a gender norm that women are supposed to date men rather than other women. *Hamner* also erred, and it and the

decision below should be reversed, for failing to recognize that that claim is actionable under Title VII in accordance with *Price Waterhouse*, and instead essentially engrafting a judicial exception that employers may rely on gender norms when it comes to the sex of the person the employee loves. This is especially problematic in Title VII cases, given that the Supreme Court has underscored *Oncale*'s holding by striking down numerous judicially-created barriers, both substantive and procedural, that have prevented the pursuit of all claims that "meet the statutory requirements" of Title VII. *Oncale*, 523 U.S. at 80. Moreover, while Congress enacted the exact type of judicial exception that the *Hamner* decision interpolated into Title VII, it did so in passing the Americans Disabilities Act in 1990 but did *not* do so with respect to Title VII when it overturned part of the *Price Waterhouse* decision in 1991. That makes it particularly inappropriate for this Circuit to continue to impose such a judicially-crafted exception to Title VII liability.

**Third**, *Hamner* should be overruled and the judgment below reversed for the same reason that courts and the EEOC uniformly have recognized that discrimination based on an employee's interracial relationship is discrimination because of the employee's race. When a white woman asks her supervisor about taking time off to care for her ill spouse, Title VII should no more allow the employer to say "so long as your spouse is a man" than the employer can say "so

long as your spouse is white.” In all these instances, it is the *employee’s* race or sex (relative to the race or sex of the person with whom the employee is in a relationship) that is causing the differential treatment, and *Hamner* erred in parting ways with the many cases in the race context that recognize that differential, adverse treatment of this nature violates Title VII.

In sum, Ms. Hively’s mistreatment for her attraction to women is a violation of Title VII under multiple analytical frameworks, including *Oncale’s* discrimination lens, *Price Waterhouse’s* sex stereotype approach, and the analogy to interracial relationships. None of these approaches require anything other than the traditional male/female definition of “sex.” As further explained below, each of these mandates regarding Title VII requires that *Hamner* be overruled and the judgment below reversed.

## ARGUMENT

### **I. MS. HIVELY’S TITLE VII CLAIM SHOULD HAVE BEEN FOUND VIABLE BECAUSE HER ATTRACTION TO WOMEN WOULD NOT HAVE BEEN A CONCERN HAD SHE BEEN MALE INSTEAD OF FEMALE.**

#### **A. *Hamner* Erred by Relying on *Ulane*.**

As noted above, the district court below dismissed Appellant’s claim based on *Hamner*. *Hamner*, in turn, dismissed in a single paragraph the possibility of Title VII’s coverage of a man’s claim of discrimination based on his attraction to

men that would have been no problem had he been female. Each of the sentences of that single paragraph is correct except the last one:

Title VII prohibits employers from harassing employees "because of [their] sex." *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-79, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998); 42 U.S.C. § 2000e-2(a)(1). Same-sex sexual harassment is actionable under Title VII "to the extent that it occurs 'because of' the plaintiff's sex." *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir. 1999). "The phrase in Title VII prohibiting discrimination based on sex" means that "it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). In other words, Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation. *See id. at 1087.*

*Hamner*, 224 F.3d at 704 (footnotes omitted). *Hamner* offered no explanation, other than the uncritical following of *Ulane*, for the assertion that "harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII." *Id.* *Hamner* did not even attempt to explain why it exonerated mistreatment that befalls only *men* (and not *women*) who are attracted to men, ignoring the standard articulated just a year before in a case that *Hamner* cited while ignoring its import: "So long as the plaintiff demonstrates in some manner that he would not have been treated in the

same way had he been a woman, he has proven sex discrimination.” *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999).<sup>3</sup>

*Hamner* misinterpreted Title VII because, rather than following *Shepherd*, it uncritically reaffirmed *Ulane*, ignoring how that precedent had been “eviscerated” by subsequent Supreme Court authority. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (collecting cases repudiating *Ulane*’s approach). It therefore is particularly important to understand the errors in *Ulane*’s reasoning.

**B. *Ulane* Limited Title VII’s Application Based on its Perception of the Goals of Congress, Rather Than Adhering to Title VII’s Language.**

*Ulane* held that transsexuals are excluded from the sex discrimination protections of Title VII. *See* 742 F.2d at 1085-86. In doing so, *Ulane* relied almost exclusively on what it believed was the intent of the 88<sup>th</sup> Congress that passed Title VII and the intent of subsequent Congresses about the specific

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<sup>3</sup>Proper application of the *Shepherd* framing is exemplified in *Orton-Bell v. Indiana*, 759 F.3d 768 (7th Cir. 2014). There, this Court found that the evidence did not support a woman’s claim that her gender was the reason that the night staff used her desk for sex and that her supervisor ignored her complaints. *Id.* at 774. However, this Court clarified that, with better evidence, even such idiosyncratic gender-motivated mistreatment would establish a Title VII claim. *Id.* (“it would be enough” to establish sex discrimination if “there were evidence that the night-shift staff were using her office [to have sex] because she was a woman, and her supervisors were indifferent.”); *id.* at 774-75 (“If there was evidence that night-shift staff similarly used a man’s office, and her supervisors intervened in that circumstance but not in her circumstance, that would be enough.”).

applications to which Title VII's sex discrimination protections should apply.<sup>4</sup> 742 F.2d at 1084 (“our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex.”); *id.* at 1085 (“When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination.”); *id.* (citing “[t]he total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption”); *id.* (“Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate.”); *id.* (“Members of Congress have, moreover, on a number of occasions, attempted to amend Title VII to prohibit discrimination based upon ‘affectional or sexual orientation.’ Each of these attempts has failed.”) (footnote omitted); *id.* at 1086 (“Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope

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<sup>4</sup> As explained herein, Appellant need not challenge *Ulane*'s assessment of what Congress specifically set out to do. Nevertheless, Appellant wishes to point out what appears to be an unsupported and inaccurate assertion that “[t]he district judge [that heard *Ulane*] did recognize that Congress manifested *an intention to exclude* homosexuals from Title VII coverage.” 742 F.2d at 1085 (emphasis supplied). While that district court judge repeatedly stated that he found no manifestation of a Congressional intent to include lesbians and gay men in the scope of Title VII's protections, Appellant has found no references in that judge's decisions available online that support an affirmative intent on Congress's part to “exclude” lesbians and gay men from the statute's coverage.



of its original interpretation.”); *id.* (“Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term ‘sex’ as used in Title VII.”); *id.* (“Only Congress can consider all the ramifications to society of such a broad view” of the term “sex”).<sup>5</sup>

**C. *Ulane* (and Therefore *Hamner*) Erred by Ignoring the Supreme Court’s Emphatic Rejection in *Oncale* of Attempts to Limit Title VII’s Scope to the Perceived Goals of the 88<sup>th</sup> Congress.**

In its first thirty-four years, the “sex” provision of Title VII was the subject of a spirited debate among the courts, with one side holding that coverage turned only on the question of whether, but for the sex of the employee, the mistreatment would have occurred, and the other side believing that Title VII’s sex discrimination prohibition was passed only to ensure women would have equal opportunity in the workplace, and thus foreswearing any application of the “because of . . . sex” inquiry that would yield a result not in service of that goal. While sexual harassment, in its predominant male-on-female form, posed no conflict between these two competing interpretative approaches, male-on-male sexual harassment did.

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<sup>5</sup>The *Ulane* court also cited as support for its ruling the fact that “[o]ther courts have held that the term ‘sex’ as used in the statute is not synonymous with ‘sexual preference.’” *Id.* at 1084 (citations omitted).

The philosophical standard-bearer among the pre-*Oncale* cases holding that Title VII excludes claims for same-sex sexual harassment was *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).<sup>6</sup> There, the court held that, even though a “wooden application of” the statutory words “because of such individual’s . . . sex” would lead to recognizing same-sex sexual harassment claims, it had chosen “instead to adopt a reading of Title VII consistent with the underlying concerns of Congress” in passing the law and reject such a claim because Congress sought to eradicate gender power imbalances in the workplace and no such circumstance was presented in that case.” *Id.* at 1456 (“*Goluszek* was a male in a *male-dominated* environment. . . . *Goluszek* may have been harassed ‘because’ he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace.”) (emphasis supplied).

*Oncale* could hardly have been more emphatic, however, in rejecting *Goluszek*’s approach in its unanimous ruling to the contrary in the context of an *all-male* (not merely “male-dominated”) workplace. 523 U.S. at 77-79.<sup>7</sup> The

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<sup>6</sup>See *Williams v. District of Columbia*, 916 F. Supp. 1, 8 (D.D.C. 1996) (courts that “have found that same-sex sexual harassment is beyond the reach of Title VII . . . all rely, directly or indirectly, upon the reasoning of *Goluszek*.”).

<sup>7</sup>This important aspect of *Oncale* has been acknowledged by this Court and others. *Shepherd*, 168 F.3d at 1009; *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066 (9th Cir. 2002) (*en banc*) (“*Oncale*’s employer, Sundowner, never employed women on any of its drilling rigs.”).

Supreme Court in *Oncale* unanimously directed courts simply to follow the words in the statute, irrespective of any divergence between that result and the assumed mindset of the members of the 88th Congress. *See id.* at 79 (“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. . . .”). Thus, it is improper to interpret Title VII by guessing at the mindset of the 88<sup>th</sup> Congress, because “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Id.* at 79.

In rejecting the argument in *Oncale* that some mistreatment “because of . . . sex” might be outside Title VII’s reach, the Supreme Court thus repudiated the notion that the scope of the statute is limited to the legislative goals that spurred its passage. *Oncale* held, instead, that the words of the sex discrimination provision in Title VII are dispositive of its scope. 523 U.S. at 79-80. Indeed, *Oncale* echoed what this Court had declared a year earlier in *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998) that the fact that “Congress was concerned with the barriers to equality that women encounter in the workplace ‘does not create ‘a negative inference’ limiting the scope of the Act to the specific problem that motivated its enactment.” *Doe*, 119 F.3d at 572 (citation omitted). *Hamner* accordingly should be overruled due to its

failure to realize that the very core of *Ulane*'s logic had been repudiated by *Oncale*.

**D. *Ulane* (and, Again, *Hamner*) Also Erred in Disregarding the Supreme Court's Further Rejection of Reliance on Congressional Inaction as a Tool of Statutory Interpretation.**

One can be reasonably sure that Justice Scalia and a unanimous *Oncale* Court, in dismissing the relevance of the motivations of the 88<sup>th</sup> Congress that passed Title VII, were not inviting courts deciding coverage issues to shift their focus to what later sessions of Congress did *not* enact into statutory law. And yet that discredited crutch has been used repeatedly to prop up holdings, as *Hamner* did in reaffirming *Ulane* (and has been done by some other circuits).

Many Supreme Court cases warn against the folly of relying on Congressional inaction as an interpretative tool. “[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.” *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted); *accord Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (“It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.”) (*quoting Girouard v. United States*, 328 U.S. 61, 69 (1946)); *United States v. Price*, 361 U.S. 304, 310-311 (1960) (“nonaction by

Congress affords the most dubious foundation for drawing positive inferences.”); *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir. 1976) (“attributing legal significance to Congressional inaction is a dangerous business.”).<sup>8</sup>“Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” *Pension Ben Guar. Corp.*, 496 U.S. at 650.

*Ulane* unconvincingly tried to bolster the legitimacy of relying on Congressional inaction by pointing out that Congress stood still after some courts had ruled that Title VII does not protect transsexuals. 742 F.2d at 1086 (citations omitted). Appellant would respectfully point out that Congress may choose not to correct a misinterpretation until the *Supreme Court* has ruled, and in fact has followed that approach with respect to Title VII. For example, it was not until after *Price Waterhouse* that Congress answered the question of whether an employer that impermissibly considered an enumerated trait can avoid liability by showing that it would have taken the same action regardless – and if so, what showing the employer must make. Congress waited for years while the circuit

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<sup>8</sup>Exceptions to the general principle of discounting Congressional inaction may apply when “the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme.” *Chisholm v. FCC*, 538 F.2d 349, 361 n.26 (D.C. Cir. 1976) quoting *Zuber*, 396 U.S. at 185 n.21.

courts offered answers that conflicted with Congress's eventual resolution of the matter.<sup>9</sup> It was not until the Supreme Court also allowed employers to avoid liability that Congress enacted 42 § U.S.C. 2000e-2(m), clarifying that a violation occurs whenever an enumerated trait is a "motivating factor" in the action, irrespective of whether other factors contributed. Thus, many other factors could explain Congressional inaction other than contentment with current judicial interpretations. "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21; *see also id.* ("Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment.").<sup>10</sup>

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<sup>9</sup>Only the Eighth Circuit had been applying the law consistently with Congress's eventual resolution. *See Walsdorf v. Board of Commn'rs*, 857 F.2d 1047, 1052 (5th Cir. 1988) (setting forth the approaches to employer liability by various circuits); *Hopkins v. Price Waterhouse*, 825 F.2d 458, 470 n.8 (D.C. Cir. 1988) (same).

<sup>10</sup>Despite the Supreme Court's frequent admonitions against relying on Congressional inaction, such inaction repeatedly has been cited by a number of other Courts of Appeal as well to justify excluding sexual orientation claims from Title VII's scope. *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001) ("Title VII has not been amended to prohibit discrimination based on sexual orientation. . . . We are therefore bound to follow this construction of Title VII [set forth in *DeSantis*]."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand

**E. *Hamner* Was Wrong in Assuming that Lesbians and Gay Men Require an Expanded Definition of “Sex” in Order to Invoke Title VII’s Protections.**

Plaintiffs subjected to discrimination because they are gay or lesbian do not need a broader definition of “sex” under Title VII to prevail, but merely faithful application of the test that makes mistreatment at work actionable if it is based on a trait that is deemed problematic only because the employee is a woman. An employer who fires women, but not men, who have premarital sex has engaged in sex discrimination, despite the fact that the enumeration of “sex” in Title VII does not mean “engaging in premarital sex.” *See Cline v. Catholic Diocese*, 206 F.3d 651, 667 (6th Cir. 1999). Thus, the protest in *Ulane* and *Hamner* that “sex” must be narrowly to refer to gender simply misses the mark. Appellant is not seeking a broader definition, but simply recognition that, but for her being a female, her attraction to women would not have been an issue.<sup>11</sup>

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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.”); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (quoting the aforementioned passages from *Bibby* and *Simonton*). This appeal allows this Court to rectify this incorrect approach to Title VII interpretation, as numerous district courts now have begun to do. See Section I.F. of this Brief, below.

<sup>11</sup>Appellant recognizes that other cases have made the same error as *Hamner*, *see, e.g., Dillon v. Frank, supra*, No. 90-2290, 1992 U.S. App. LEXIS 766, at \*11 (Jan. 15, 1992) (rejecting plaintiff’s argument that “asks us to define ‘because of sex’ to mean ‘because of anything relating to being male or female, sexual roles, or to sexual behavior.’”); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306

In sum, while *Hamner*'s sweeping assertion that sexual orientation discrimination is "not, under any circumstances, proscribed by Title VII," 224 F.3d at 708, compelled the District Court to dismiss Ms. Hively's complaint, it should not foreclose this Court from reconsidering contrary arguments made by Appellant that were not considered in *Hamner*. "[A]s a practical matter an opinion that contains no discussion of a powerful ground later advanced against it is more vulnerable to being overruled than an opinion which demonstrates that the court considered the ground now urged as a basis for overruling." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995), citing *Schiffels v. Kemper Fin. Servs.*, 978 F.2d 344, 351 (7th Cir. 1992); compare *McGautha v. California*, 402 U.S. 183, 196 (1971) (rejecting Fourteenth Amendment argument against death penalty) with *Furman v. Georgia*, 408 U.S. 238 (1972) (holding death penalty violative of the Eight Amendment).

**F. This Court Should Follow More Recent Judicial Decisions That Have Returned to the Correct Analysis of *Oncale* and *Shepherd*.**

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(2d Cir. 1986) ("sex" must "refer to membership in a class delineated by gender, rather than sexual activity or sexual affiliations."); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) ("There is no arguable legal basis for contending that perceived sexual preference merits protection merely because it concerns sex. The clear meaning of 'sex' under Title VII is not 'intercourse,' but 'gender' . . ."), but those cases also ignore basic Title VII principles in order to preclude claims of sex discrimination by lesbian and gay employees.



Courts in other circuits have used the basic *Shepherd* framing (which is consistent with the Supreme Court's admonitions in *Oncale*) to uphold Title VII's applicability to claims brought by lesbians and gay men for discrimination that would not have occurred had they been of the other sex. *See* *Hall v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 132878, 124 Fair Empl. Prac. Cas. (BNA) 1419, 9 (W.D. Wash. Sept. 22, 2014) ("Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (citing evidence "that Miceli 'harbored ill-will' because [Koren] changed his name but that she would not have done so if a female employee had changed her name"); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("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.") (footnote omitted); *see also Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329 (S.D.N.Y. 1999) (approvingly citing the judicial and academic support for the proposition that discrimination because of sex can occur when a man in a different-sex domestic partnership is denied benefits available to couples in same-sex domestic partnerships, but holding that the unavailability of marriage

to same-sex couples at that time rendered same-sex domestic partners not similarly situated). Under this framework, which should control for the reasons set forth above, Appellant has articulated “in some manner that [s]he would not have been treated in the same way had” she been a man; therefore she “has [alleged] sex discrimination.” *Shepherd*, 168 F.3d at 1009. Indeed, this court recently in *Rabé v. United Air Lines*, 636 F.3d 866 (7th Cir. 2011) ignored *Hamner* in upholding statutory coverage of a lesbian’s claim for discrimination on the basis of, *inter alia*, “sexual orientation in violation of Title VII.” *Id.* at 868; *id.* at 870 (Rabé alleged “substantial (*i.e.*, non-frivolous or colorable) claims for coverage directly under Title VII . . .”); *id.* at 872 (Rabé “asserted a colorable claim for coverage directly under the terms of the federal statutes.”). However, the better approach for this appeal would be to overrule *Hamner* explicitly and reverse the dismissal of Ms. Hively’s suit.

**II. HIVELY’S TITLE VII CLAIM ALSO SHOULD HAVE BEEN FOUND VIABLE BECAUSE PRICE WATERHOUSE PRECLUDES THE CONSIDERATION OF GENDER AND NONCONFORMITY WITH GENDER NORMS IN EMPLOYMENT DECISIONS.**

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court ruled that Ann Hopkins suffered discrimination “because of . . . sex” when her quest for partnership was denied, and evidence surfaced that decision makers viewed her as “macho,” aggressive, and in other ways not regarded as

stereotypically feminine. The Court explained that, “As for the legal relevance of sex stereotyping, 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. *Price Waterhouse* held that “gender must be irrelevant in all employment decisions” and that termination of an employee because of a trait that is counter to gender norms is sex discrimination. 490 U.S. at 240 (plurality opinion); *see also id.* at 275 (O’Connor, J., concurring) (to avoid liability, the employer must “avoid substantial reliance on forbidden criteria in making its employment decisions.”).

**A. Title VII Is Violated If an Employee Is Mistreated for Failing to Conform to Any Gender Norm, Including the Stereotype that Women Should Date Men.**

As explained above, the Supreme Court in *Price Waterhouse* reaffirmed Title VII’s proscription of the consideration of a worker’s sex in employment decisions, with special emphasis on discrimination that occurs because of nonconformity with gender stereotypes. This Court repeatedly has followed *Price Waterhouse* in castigating discrimination based on gender nonconformity whether the targeted employees were gay or straight, and it should do so here by rejecting *Hamner* and reinstating Appellant’s Title VII claim.

For example, in *Doe by Doe v. City of Belleville, Ill.*, this Court held that a plaintiff stated a valid claim of sex discrimination under Title VII when he was

harassed by co-workers by being called a “fag” and a “queer.” 119 F.3d at 566-67. *Doe* explained that “it is not at all uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets; one need only browse the federal reporters to see that the two routinely go hand in hand.” *Id.* at 593.

Likewise in *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997), this Court observed that “[T]he harassers in *Doe* expressed and exhibited hostility to the way in which plaintiff H. exhibited his sexuality, which *Price Waterhouse v. Hopkins* [] tells us is discrimination “because of” sex.” *Id.* at 413-414 (citations omitted). This Court further recognized in *Bellaver v. Quanex Corp./Nichols-Homeshield*, 200 F.3d 485, 492-493 (7th Cir. 2000), that sex discrimination occurs when an employee is fired based on “unequal ideas of how man and women should behave.” *Id.* at 492-493.

The EEOC – whose interpretations of Title VII are entitled to “great deference,” *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)– has specifically recognized that Title VII proscribes mistreatment experienced by an employee in an intimate relationship deemed contrary to societal norms for the employee’s gender. *See Castello v. Postmaster General*, Request No. 0520110649, 2011 EEO PUB LEXIS 3966, December 20, 2011 \*5 (sex discrimination claim could proceed, based on allegation that harasser of lesbian

employee “was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman”); *Veretto v. Postmaster General*, Request No. 0120110873, 2011 EEOPUB LEXIS 1973, July 1, 2011 \* 8 (sex discrimination claim could proceed, based on allegation that harasser of gay man “was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when Complainant did not adhere to this stereotype”).

So have a number of courts. In *Heller v. Columbia Edgewater Country Club*, the court held that “a jury could find that [executive chef] Cagle repeatedly harassed (and ultimately discharged) [line cook] Heller because Heller did not conform to Cagle’s 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.” 195 F. Supp. 2d at 1224. In *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002), the Court similarly held that Title VII’s ban on sex stereotyping discrimination covers when “an employer acts upon stereotypes about sexual roles in making employment decisions.”

Likewise, the court in *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014), recognized that, among the potential types of permissible *Price Waterhouse* “sex-stereotyping” evidence a plaintiff might use to plead and prove a viable Title VII sex-discrimination claim, was that the plaintiff is “a homosexual male whose

sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [the alleged discriminating official's] supervision or at the [defendant's workplace]," and that "his orientation as homosexual had removed him from [the alleged discriminator's] preconceived definition of male.," *Id.* at 116 (record citations omitted). The court held that the plaintiff had "met his burden" to "allege[] that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes." *Id.*, citing *Price Waterhouse*, 490 U.S. at 251); *see also Koren*, 894 F. Supp. 2d at 1038 (denying defendant's summary judgment motion where plaintiff alleged his supervisor discriminated against him based on sex stereotypes because "Koren chose to take his spouse's surname—a 'traditionally' feminine practice. . .").

Of course, while the stereotyping framing is undoubtedly useful from a human resources perspective in explaining problematic workplace conduct, there should not be an excessive judicial focus on whether the trait for which the employee is being mistreated really is stereotypical or not. This Court's decision in *Bellaver* is instructive, in that it recognized that the trait for which Elizabeth Bellaver was being harshly reviewed – "being hard to get along with" – was decidedly less "striking" in how "inherently gendered" it was than the supposedly

masculine traits held against Ann Hopkins by the Price Waterhouse partnership. 200 F.3d at 492. Nevertheless, this Court properly concluded that holding that trait against only her, but not her male colleagues, was sex discrimination. *Id.* This recognition will be more important over time, as it should not be the case that someday an employee can be mistreated because of having a same-sex spouse, simply because being married to a spouse of a different sex will have come to be viewed as less a gender norm than in the past.<sup>12</sup>

**B. *Hamner* Must Be Overruled and Appellant’s Claim Reinstated Because *Hamner* Repeats *Ulane*’s Mistake of Ignoring the Supreme Court’s Holding in *Price Waterhouse* and Disregarding That Case’s Progeny**

*Hamner* did not even mention the Supreme Court’s decision in *Price Waterhouse*. By relying on *Ulane*, which also ignore *Price Waterhouse*, the *Hamner* court erred in ways that should not be perpetuated. *See Hayden v. Greensburg Cmty. School Corp.*, 743 F.3d 569, 578 (7th Cir. 2014) (expressing dismay that *Price Waterhouse* and its progeny have “been ignored entirely in this appeal” concerning a gender-based restriction on hair length).For the reasons set

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<sup>12</sup>In other words, so long as the person mistreating the employee is motivated by gender, it is irrelevant whether the employee or society sees the employee as gender-nonconforming. *See EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 456-457 (5th Cir. 2013) (en banc) (“We do not require a plaintiff to prop up his employer’s subjective discriminatory animus by proving that it was rooted in some objective truth; here, for example, that Woods was not, in fact, ‘manly.’”).

forth above, the Supreme Court's ruling in *Price Waterhouse*, and the subsequent decisions of this and other courts that properly have applied that case's holding regarding improper sex stereotyping, mandate that *Hamner* be overturned and that Appellant's sex discrimination claim be allowed to proceed so that she can prove that she was discriminated against because her sexual orientation does not match gender stereotypes about the proper object of women's attractions.

**III. IMMUNIZING DISCRIMINATION AGAINST THOSE WHO FORM SAME-SEX RELATIONSHIPS ALSO CANNOT BE SQUARED WITH THE CONSENSUS THAT DISCRIMINATION BECAUSE OF INTERRACIAL RELATIONSHIPS VIOLATES TITLE VII.**

It is impossible to reconcile the unanimous view of the courts and the EEOC for decades that discrimination based on an employee's interracial marriage or interracial friendships is "manifestly" or "irrefutab[ly]" race discrimination proscribed by Title VII, *see, e.g., Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (citation omitted), with an argument that discrimination based on one's same-sex intimate relationships is not sex discrimination. The same principles of construction apply to determining what constitutes discrimination "because of race" and "because of . . . sex," and thus should dictate the same treatment of relationships involving the enumerated traits in Title VII.



**A. Courts and the EEOC Unanimously Condemn Discrimination Because of an Employee's Interracial Relationship as Discrimination "Because of Such Individual's Race" Under Title VII.**

The EEOC consistently has held that an employer who takes adverse action against an employee or a potential employee because of interracial association violates Title VII. *See* Decision No. 76-23, 1983 EEOC Dec. (CCH) para. 6615 (Aug. 25, 1975) (Title VII claim properly alleged where job applicant not hired due to his white sister's relationship with an African-American); Decision No. 71-1902, 1973 EEOC Dec. (CCH) para. 6281 (April 29, 1971) (charging party's interracial dating was a factor in discharging her and thus presented a Title VII claim); Decision No. 71-909, 3 F.E.P 269 (1970) (Title VII applied to a white employee's claim that he was discharged because of associations with African-American employees); *see also* Decision No. 79-03, 1983 EEOC Dec. (CCH) para. 6734 (Oct. 6, 1978) (recognizing that an interracial relationship could be the basis for a Title VII claim, although evidence did not support the allegation). The courts to consider the question unanimously agree.<sup>13</sup> *Floyd v. Amite County Sch. Dist.*, 581

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<sup>13</sup>The three known cases to reject this view were all in districts in the Eleventh Circuit and all decided before the Eleventh Circuit in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986), ruled that Title VII *does* cover discrimination based on interracial relationships. *See* Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 Harv. J.L. & Gender 209, nn.40-46, nn.61-68 (Jan. 2012), and accompanying text (discussing *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973), *Adams v. Governor's Committee on Postsecondary Educ.*, No. C80-624A, 1981 WL 27101, at 1 (N.D.

F.3d 244, 250 (5th Cir. 2009); *Holcomb v. Iona College*, 521 F.3d 130, 138-39 (2d Cir. 2008); *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 588-89 (5th Cir. 1998); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 n.6 (8th Cir. 1994); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986); *Sperling v. United States*, 515 F.2d 465, 484 (3d Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *Chacon v. Ochs*, 780 F. Supp. 680 (C.D. Cal. 1991); *Gresham*, 586 F. Supp. at 1445; *Holiday v. Belle's Restaurant*, 409 F. Supp. 904 (W.D. Pa. 1976); *Whitney v. Greater N.Y. Corp. of Seventh Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975); *see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (in black employee's Title VII action, trial court incorrectly ignored evidence of a white co-worker's harassment because of his support for black employees because "Title VII has . . . been held to protect against adverse employment actions taken because of the employee's close association with black friends or coworkers") (citation omitted); *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 269 (N.D. Ind. 1985) (holding that white plaintiff satisfied the Title VII requirement that, "but for the fact of her race, she would not have been the object of harassment" with evidence that her two harassers "specifically objected to [her] dating blacks"); *Schwartz*, *supra*, 35 Harv. J. L. & Gender at 246

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Ga. Sept. 3, 1981), and *Parr v. United Family Life Insurance Co.*, C-83-26-6, 1983 WL 1774 (N.D. Ga. June 15, 1983).

(“In the past thirty years, every case to consider a relational discrimination claim in the context of race has held that Title VII applies to such claims.”).<sup>14</sup>

Indeed, the courts holding that Title VII’s race provision is implicated by mistreatment because of one’s interracial relationship are often dismissive of the notion that one could contend otherwise. *See Holcomb*, 521 F.3d at 139 (“The reason is simple: where 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.”); *Gresham*, 586 F. Supp. at 1445 (“the logic . . . is irrefutable. Clearly, . . . but for their being white, the plaintiffs in these cases would not have been discriminated against. This Court cannot imagine what more need be alleged to bring such plaintiffs within the plain meaning of Title VII’s proscription of discrimination against an individual ‘because of such individual’s race.’”); *Whitney*, 401 F. Supp. at 1366 (“Manifestly,” if the firing was because “the defendant disapproved of a social

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<sup>14</sup>The principle also has been held to apply to discrimination based on categories other than race in Title VII. *See, e.g., Reiter v. Center Consol. School Dist.*, 618 F. Supp. 1458, 1460 (D. Colo. 1985) (recognizing Title VII’s coverage of “discrimination in employment based on [Reiter’s] ‘close association with the Spanish citizens of the district.’”). Additionally, the principle has been recognized under other antidiscrimination laws as well. For example, most circuits have allowed claims to proceed under 42 U.S.C. § 1981 when a white person alleges discrimination because of his association with a black person. *See Patrick v. Miller*, 953 F.2d 1240, 1250 (10th Cir. 1992) (citing cases); *Chandler v. Fast Lane*, 868 F. Supp. 1138, 1143 (E.D. Ark. 1994) (citing cases).

relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend.”).

While this Circuit has not reached the issue formally, it seems fair to characterize *Drake v. 3M*, 134 F.3d 878 (7th Cir. 1998), as endorsing the validity of these holdings. In *Drake*, this Court cited *Gresham* and *Moffett* approvingly for recognizing that discrimination against those in interracial marriages is “because of the employee’s race, as § 2000e-2(a) requires.” 134 F.3d at 884. While 3M conceded the point, it did argue that Title VII might tolerate discrimination because of interracial friendships, a proposition this Court rejected. *Id.* (“the key inquiries should be whether the employee has been discriminated against and whether that discrimination was ‘because of’ the employee's race. Contrary to 3M's assertions, we do not believe that an objective ‘degree of association’ is relevant to this inquiry.”).<sup>15</sup>

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<sup>15</sup>This Court’s holding in *Drake* is but one reason that there is no persuasive value to *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979), *overruled on other grounds*, *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001). In rejecting coverage for sexual orientation discrimination, the *DeSantis* court dismissed the relevance of EEOC decisions holding discrimination against an employee based on his interracial friendships to be actionable, reasoning that friendships and intimate relationships stood on different legal footing, even though numerous cases also have applied the principle to intimate interracial relationships. *DeSantis*, 608 F.2d at 331; see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 Calif. L. Rev. 3, 160-161 (Jan 1995) (the *DeSantis* “court’s response to this analogizing disregarded the reasoning of precedent, and was as strained and superficial as the rest of its

**B. Discrimination Based on Same-Sex Relationships Should Stand on Equal Legal Footing Under Title VII as Discrimination Based on Interracial Relationships.**

Appellant is unaware of any serious argument why the consensus that Title VII bans discrimination founded on an interracial relationship would not apply with equal force to discrimination because of a same-sex relationship. As a starting point, the “statute on its face treats each of the enumerated categories exactly the same.” *Price Waterhouse*, 490 U.S. at 244 n.9 (justifying reliance on statements of legislative intent regarding the treatment of race in the workplace as authoritative regarding the appropriate treatment of sex). Additionally, the Supreme Court repeatedly has held that, absent a good reason otherwise, the standards concerning actionable conduct should be harmonized among the categories enumerated in Title VII. “Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment. [citations] . . . Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1

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opinion. . . . This distinction—presumably between ‘friends’ on the one hand and ‘certain relationships . . . with certain friends’ on the other—seems slippery, and is incongruent with the statute’s anti-discrimination principles because it serves to license rather than to limit bigotry.”).

(1998) (citations omitted); *accord Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997) (noting that courts had been applying the same “principles to harassment based on race, religion, and national origin as well as sex in the [past] twenty-five years”); *see also AMTRAK v. Morgan*, 536 U.S. 101, 116 n.10 (2002) (“Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.”); *Oncale*, 523 U.S. at 78 (deciding as a threshold matter that a man can discriminate against a man, citing “the related context of racial discrimination in the workplace [where] this Court has rejected any conclusive presumption that an employer will not discriminate against members of his own race.”); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (citing racial harassment hostile work environment holdings as authority for construing Title VII to cover sexual harassment even without pecuniary loss to the employee).<sup>16</sup>

Based on logic, the statutory parallelism, and Supreme Court authority applying the same standards to assess race and sex discrimination under Title VII, the analogy to discrimination based on interracial relationships should hold, and

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<sup>16</sup> Also, while not reaching the question due to inadequate briefing, the *Heller* court acknowledged that its holding that discrimination against a lesbian for romantic interests and conduct that would be lauded in a male employee, should apply with equal force to the interracial component of the plaintiff’s lesbian relationship, observing that it “might be argued that the animus resulted in part from Heller’s race, *i.e.*, that [the supervisor] would not have acted as she did had Heller been of the same race as her lover.” *Heller*, 195 F. Supp. 2d at 1229 n.22.

the consensus that such discrimination is forbidden by Title VII should apply with equal force to discrimination based on one's intimate same-sex relationships. For this reason as well, *Hamner* should be overruled and the dismissal of Appellant's Title VII claim should be reversed.

**IV. *HAMNER'S OTHER REASONS FOR REJECTING COVERAGE OF SEXUAL ORIENTATION DISCRIMINATION CLAIMS AS SEX DISCRIMINATION ALSO ARE INVALID, AS TITLE VII DOES NOT REQUIRE GENERAL MISTREATMENT OF EITHER GENDER, NOR ALLOW EQUAL "BOTTOM LINE" MISTREATMENT OF BOTH GENDERS.***

*Hamner* narrowly viewed *Oncale's* relevance, holding that the plaintiff in that case would have a claim only if gay males, but not lesbians, were mistreated, or if there was a general antipathy to males in the workplace. 224 F.3d at 707 and n.5. Neither proposition is correct.

**A. *Title VII Focuses on the Individual and Does Not Require, for Example, a Woman Claiming Sex Discrimination to Show That Other Women Were Mistreated.***

Under Title VII, sex discrimination can be the appropriate legal designation to apply to mistreatment of lesbians, even in what is generally a very good workplace for women. In a two-paragraph, per curiam opinion in 1971, the U.S. Supreme Court interred the notion that even an overwhelmingly female workplace could get away with disqualifying some women based on a criterion that did not

disqualify men. *Phillips v. Martin Marietta, Inc.*, 400 U.S. 542, 543-44 (1971) (having pre-school children could not disqualify women under Title VII absent a BFOQ).

In 1978, the Supreme Court further held that an employer violated Title VII in asking women to pay more in pension contributions, even though the request was based on “unquestionably true” actuarial data regarding women’s longer lifespans. *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978). The reason why the fair treatment of women as a group does not satisfy Title VII is the same reason that the uniqueness of a harassment incident will not exonerate an employer: The statute makes it unlawful “to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual’s* race, color, religion, sex, or national origin.” *Id.* at 708, quoting 42 U. S. C. § 2000e-2 (a)(1) (emphasis added by Court).

The statute’s focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . That proposition is of critical importance in this case because there is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department’s policy is based.

*Manhart*, 435 U.S. at 708. This focus on the individual is reinforced by rulings that even a single instance of sexual harassment states a claim against an employer.



*See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). And, of course, *Oncale* is the final nail in the coffin that an employee can claim discrimination based on his or her sex only if there is general mistreatment of that sex, given that Joseph Oncale had a viable sex discrimination claim despite the fact that he labored in a “single-sex work environment” and may have been the only target of discrimination in his workplace. *See Shepherd*, 199 F.3d at 1009.

**B. Title VII Does Not Allow “Bottom Line” Mistreatment of Both Genders.**

The Supreme Court also has rejected the notion that Title VII is concerned only with fair treatment, in the aggregate, of those sharing a covered trait. In *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court rejected an employer’s suggestion for an affirmative defense allowing it to argue that it generally had treated blacks fairly and “reach[ed] a nondiscriminatory ‘bottom line.’” *Id.* at 453. “We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII.” *Id.*; *see also Venezia v. Gottlieb Mem’l Hosp., Inc.*, 421 F.3d 468 (7th Cir. 2005) (if a company has a supervisor who harassed a man because of his sex, the presence of another supervisor who harassed a woman because of her sex will not eliminate exposure under Title VII, but instead will double it).

The attempt to exonerate the equal mistreatment of lesbians and gay men is reminiscent of the “equal application” argument advanced by Virginia, that a ban on interracial marriage was valid if applied equally to whites and blacks. This was unanimously rejected by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), as it had been before in *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (“equal application” of a law among the races is not sufficient; there can be no “proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise.”).<sup>17</sup> The corollary of *McLaughlin* is that a proscription of relations between two people of the same sex, but not between those of different sexes, is not saved by its “equal application” to both men and women (*i.e.*, its equal enforcement against lesbians and gay men).

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<sup>17</sup>One cannot cabin *Loving* and *McLaughlin* as being cases about white supremacy that are inapplicable to sex, given the opinions’ focus on the fact that all “statutes containing racial classifications” are presumptively repugnant to the law; Title VII’s equivalent treatment of race and sex; and the fact that all not all concerns about interracial relationships are rooted in belief in the supremacy of whites, or even the supremacy of any race. See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (courts cannot accede to concerns that custody of child with parent in interracial relationship will lead to stigmatizing of the child); Madeline Baars, “Marriage in Black and White: Women’s Support for Law Against Interracial Marriage, 1972-2000,” *intersections* 10, no. 1 (2009): 219-23.

**V. THIS COURT SHOULD NOT DEFER TO DECISIONS FROM OTHER CIRCUITS STATING THAT TITLE VII EXCLUDES SEXUAL ORIENTATION DISCRIMINATION FROM ITS COVERAGE.**

This Court should not be concerned about cases from other circuits declaring sexual orientation discrimination outside Title VII's scope. Many of those decisions, like *Hamner*, rely on assumptions about the role of Congressional intent rejected by *Oncala*, improper framing of the coverage argument as requiring a judicial expansion of the term "sex," disregard of *Price Waterhouse's* condemnation of sex stereotyping, and inattention to the implications of the case law recognizing discrimination based on interracial relationships as race discrimination. Thus, they simply lack persuasive value.

In addition, many of the cases cited in courts throughout the country as establishing that Title VII does not cover sexual orientation discrimination do not involve holdings to that effect at all. For example, the Fourth Circuit's statement about non-coverage in *Wrightson v. Pizza Hut*, 99 F.3d 138 (4th Cir. 1996), was an aside in rejecting the defendant's characterization of the plaintiff's claim, as alleging not harassment because of sex, but instead because of his heterosexual orientation. The court stated that "while it is true Title VII does not afford a cause of action for discrimination based upon sexual orientation, [citations] . . .

Wrightson does not allege that he was discriminated against because he is heterosexual. . . . [but] “because of his sex.” *Wrightson*, 99 F.3d at 143-44.<sup>18</sup>

Likewise, in *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), the plaintiff, a black gay man, claimed his employer “discharged him on the basis of his race” because “similarly situated white homosexual employees, working in the same department at Edwards, were not harassed or terminated as he had been.” *Id.* at 70. Appealing summary judgment, he complained that the district court misunderstood his case to be about sexual orientation discrimination. The opinion of the Eighth Circuit says that “Title VII does not prohibit discrimination against homosexuals,” but *holds*— on plaintiff’s only claim, which was race discrimination (brought under both Title VII and 42 U.S.C. § 1981) — that he failed to allege “that other similarly situated white employees were treated differently. He did not claim that the other white, alleged homosexuals behaved as he did (openly discussed their sex lives while at work)” and were treated better. *Id.*<sup>19</sup>

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<sup>18</sup>Despite obviously being *dicta*, *Wrightson*’s statement regarding the limits of Title VII’s coverage has been cited authoritatively for that proposition in many courts in at least four circuits other than the Fourth Circuit. *E.g.*, *Medina*, 413 F.3d at 1135; *Simonton*, 232 F.3d at 35; *Higgins v. New Balance Ath. Shoe*, 21 F. Supp. 2d 66, 74 (D. Me. 1998), *aff’d in relevant part*, 194 F.3d 252 (1st Cir. 1999); *Ernesto v. Rubin*, Civil Action No. 97-4683, 1999 U.S. Dist. LEXIS 21501 (D.N.J. Aug. 31, 1999).

<sup>19</sup>Despite not even being a case about sexual orientation discrimination, *Williamson* has been cited as authoritative support for Title VII’s lack of coverage thereof by the First, Second, Third, and Sixth Circuits in *Higgins*, *Simonton*, *Bibby*, and *Dillon*, respectively; by *Wrightson* in its own dictum on the subject, *see* 99 F.3d at

Also questionably cited as definitive authority on the subject is the First Circuit's decision in *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). As the first post-*Oncale* circuit court decision to address Title VII's coverage of sexual orientation, *Higgins* understandably would have been expected to be an influential and oft-cited case on that subject. And so it has been, despite the fact that the only two arguments *Higgins* made on appeal supporting sex discrimination coverage were held to be *waived* for failure to present them to the district court. *Id.* at 259. Thus, the court did not discuss in any significant detail the only two theories the plaintiff offered to reevaluate Title VII case law in light of *Oncale* and *Price Waterhouse*. See *Higgins*, 194 F.3d at 259-61; see also *Centola*, 183 F. Supp. 2d at 409 n.7 ("In both *Higgins* and *Simonton*, the Circuit Courts refused to consider arguments based upon a sexual stereotyping theory at the

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143-44, as well as by district courts in the Fourth, Fifth, Ninth, Tenth, and Eleventh circuits. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 832 n.17 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996); *Berry v. Bailey*, Case No. CV411-022, 2011 U.S. Dist. LEXIS 22260, at \*5 (S.D. Ga. Mar. 2, 2011); *Fowler v. Honeywell Int'l, Inc.*, No. CV-06-2285-PHX-SMM, 2008 U.S. Dist. LEXIS 29726, at \*9 (D. Ariz. Apr. 10, 2008); *Metzger v. Compass Group U.S.A., Inc.*, CIVIL ACTION No. 98-2386-GTV, 1999 U.S. Dist. LEXIS 14224 (D. Kan. Aug. 31, 1999); *Sarff v. Continental Express*, 894 F. Supp. 1076, 1082 (N.D. Tex. 1995) (citing *Williamson* as "affirming summary judgment for the Defendant on the basis that Title VII does not prohibit discrimination against homosexuals"). See also Schwartz, *supra*, 35 Harv. J.L. & Gender 209, 237-38 nn. 210-219 and accompanying text (similarly dismantling the authoritativeness of the passage regarding coverage of sexual orientation in *Hopkins v. Baltimore Gas & Electric Co.*).

appellate level because the plaintiffs had not properly raised these arguments first with the trial courts below.”).<sup>20</sup>

Finally, it should be noted that there is no definitive authority in the U.S. Supreme Court or the Fifth, Eleventh, and District of Columbia Circuits regarding Title VII coverage of sexual orientation discrimination claims. See, e.g., *Espinosa v. Burger King Corp.*, 2012 U.S. Dist. LEXIS 135162, 16 (S.D. Fla. Sept. 21, 2012) (“[n]either the Supreme Court nor the Eleventh Circuit has specifically addressed this issue” of whether Title VII “appl[ies] to discrimination claims based on sexual orientation.”);<sup>21</sup> *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 137 n.2 (S.D. Tex. 1993) (citing only cases from other circuits declaring Title VII inapplicable); *TerVeer*, 34 F. Supp. 3d at 116 (approving a Title VII claim based on sexual orientation discrimination, noting that “the Court of Appeals for

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<sup>20</sup>Nevertheless, the Second Circuit based its holding that Title VII excludes sexual orientation discrimination on *Higgins*’ “reaffirmance” of that position “subsequent to . . . *Oncale*.” *Simonton*, 232 F.3d at 35. A year later, the Third Circuit similarly cited both *Simonton* and *Higgins* (and *Williamson*) in error as support for its holding that sexual orientation is outside Title VII’s scope. *Bibby*, 260 F.3d at 261.

<sup>21</sup>*Espinosa* does note the portion of a two-page 1979 *per curiam* opinion of the “former Fifth Circuit” stating that “Discharge for homosexuality is not prohibited by Title VII or Section 1981.” *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). But that passage plainly is dictum, given that the court in that case rejected Blum’s other claims of discrimination on the clearly covered grounds of race, religion, and sex, holding that even if “appellant has presented a prima facie Title VII case . . . Gulf articulated a legitimate reason for his discharge,” and Blum failed to show that that reason was pretextual. *Id.* at 937. Thus, the court’s musing about Title VII’s coverage of sexual orientation was irrelevant, given its holding that Gulf prevailed in the latter stages of the *McDonnell-Douglas* burden-shifting framework.

the District of Columbia has held that to survive a motion to dismiss under Rule 12(b)(6), all a complaint need state is: 'I was turned down for a job because of my race.'" (citation omitted).

In short, what has been superficially portrayed as a thorough judicial consensus regarding Title VII's coverage of sexual orientation discrimination is anything but.

## **VI. JUDICIAL ENGRAFTING OF A SEXUAL ORIENTATION EXCEPTION TO TITLE VII'S SEX DISCRIMINATION PROVISION IS INAPPROPRIATE.**

*Hamner*'s holding should be viewed for what it is: a judicial engrafting of an exception onto Title VII that, irrespective of whether an otherwise valid claim may be stated for discrimination based on sex, no such claim will be recognized to the extent that the employee was mistreated because of his or her homosexuality. Indeed, some courts seem to have talked themselves into believing that a statutory exclusion of sexual orientation claims is written into Title VII and that courts must be vigilant to ensure that lesbian and gay employees not be allowed to circumvent this illusory exclusion by invoking their rights to be free from discrimination because of sex or religion. See, e.g., *Dillon*, 1992 U.S. App. LEXIS 766, at \*22 (rejecting applicability of *Price Waterhouse*, stating that "Thus, *Dillon* cannot escape our holding, and those of other circuits" that sexual orientation is not covered by Title VII). To illustrate this error, consider a hypothetical where the

Acme Company issues a memorandum stating that the following employees were terminated for behavior unbecoming of “an Acme Lady”: Agnes for driving a motorcycle to and from work, Beth for wearing pants and not wearing makeup or jewelry every day for six months, and Christine for having a relationship with another woman. If each employee sued under Title VII, they all should be allowed to proceed, because *all* have viable sex discrimination claims that they would not have been terminated for their conduct had they been male, based on the plain language of the statute, *Oncale*, and *Shepherd*.

**A. The Supreme Court Consistently Has Followed *Oncale*’s Command That Courts Entertain All Claims That “Meet The Statutory Requirements” Of Title VII.**

While it is generally bad judicial practice to engraft exceptions onto statutes, it is especially so regarding Title VII, where Supreme Court holdings repeatedly have reaffirmed the principle that courts should entertain all claims that “meet the statutory requirements of Title VII.” See *Oncale*, 523, U.S. at 80. “It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.” *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) (citing *Oncale*). *Lewis* unanimously held that, if applying the textual words of Title VII leads to a situation where “Congress allowed claims to be brought against an employer” in an expansive fashion, and “that effect was



unintended, it is a problem for congress, not one that federal courts can fix.” 560 U.S. at 217.

The Supreme Court repeatedly has struck down judicial barriers and rules, unsupported by statutory language, that had the effect of potentially immunizing conduct unlawful under Title VII. *See Thompson v. North American Stainless, L.P.*, 562 U.S. 170, 174-75 (2011) (rejecting “a categorical rule that third-party reprisals do not violate Title VII.”); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-458 (2006) (per curiam) (unanimously rejecting circuit court’s ruling that the decision maker’s reference to each black plaintiff as “boy” was “not evidence of discrimination” as a matter of law); *id.* at 456-57 (castigating as “unhelpful and imprecise” the lower court’s requirement that, to “infer[] pretext from superior qualifications,” the disparity had to be “so apparent as virtually to jump off the page and slap you in the face.”) (internal quotations and citations omitted); *see generally Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) (unanimously rejecting, under statute “very similar to Title VII,” the lower court’s unduly narrow view of bias as “motivating factor” in termination). In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court unanimously cast aside the law of no fewer than four circuits that had held that a plaintiff must present “direct evidence” to establish “mixed motive” liability. *See id.* at 95 (citing cases). Similarly, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), the Court unanimously

rejected the Second Circuit's use of a heightened pleading standard for Title VII cases. *See id.* at 515. While *Swierkiewicz* discussed the Second Circuit's erroneous interpretation of the Federal Rules of Civil Procedure, the decision also explained another fundamental error wrought by approving the dismissal of the allegations: "they state claims upon which relief could be granted under Title VII and the ADEA." *Id.* at 514. Likewise, in *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court unanimously held that an employee is entitled to a jury if the employee refutes the employer's pretextual reason(s), pointing out that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review." 530 U.S. 133, 148 (2000); *see also Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002) (en banc) (accurately depicting *Oncale* as "[s]ticking to the statutory wording . . . in reject[ing] various circuits' special requirements for same-sex sexual harassment cases."), *aff'd*, 539 U.S. 90 (2003).

This principle has been applied in the sexual orientation context as well. In *TerVeer*, the district court noted ample authority supporting the plaintiff's claim of religious discrimination based on his mistreatment for behavior that conflicted with his supervisor's religious beliefs. 34 F. Supp. 3d at 117. The court allowed his claim to proceed, "see[ing] no reason to create an exception to these cases for

employees who are targeted for religious harassment due to their status as a homosexual individual.” *Id.* at 117-18.<sup>22</sup>

**B. Engrafting a Judicial Exception Onto Title VII Coverage Is Especially Inappropriate Given That Congress Chose Not to Do So a Year After Enacting Such an Exception as Part of the Americans with Disabilities Act.**

The actions of Congress subsequent to the *Price Waterhouse* decision weigh even more heavily against judicially engrafting a sexual orientation exception to Title VII’s coverage. The Supreme Court has placed great weight on the significance of what amendments were and were not made in the Civil Rights Act of 1991 (“the 1991 Act.”). *Univ. of Texas Southwestern Med. Center v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Especially significant in *Nassar* was the 1991 Act’s failure to amend Title VII’s anti-retaliation provision a year after Congress passed the Americans with Disabilities Act (the “ADA”) with very specific anti-retaliation provisions. 133 S. Ct. at 2531. Indeed, as a general matter, the Supreme Court has been notably

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<sup>22</sup>This authority suggests that the district court in *Ulane* was prescient in recognizing the problem with judicial interpolation of exception to Title VII’s coverage. *Ulane v. Eastern Airlines*, No. 81 C 4411, 1982 U.S. Dist. LEXIS 13049, at \*\*2-3; 28 Fair Empl. Prac. Cas. (BNA) 1438 (N.D. Ill. Apr. 21, 1982) (“the literal language of the statute does apply and [] it is not the function of this Court to disregard that plain language.” It should be “be the function of the Legislature . . . [to] adopt some modifying language which would exclude cases of the kind that are before the Court.”)

hesitant to adopt an employer's proposed, limiting statutory interpretation that Congress readily could have adopted but did not. *See, e.g., Thompson*, 562 U.S. at 177 (rejecting contention that “‘person aggrieved’ . . . refers only to the employee who engaged in the protected activity. We know of no other context in which the words carry this artificially narrow meaning, and if that is what Congress intended it would more naturally have said ‘person claiming to have been discriminated against’ rather than ‘person claiming to be aggrieved.’”); *Desert Palace*, 539 U.S. at 99 (“If Congress intended the term ‘demonstrates’ to require that the ‘burdens of production and persuasion’ be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in § 2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances”); *United Steelworkers v. Weber*, 443 U.S. 193, 205 (1979) (“Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have . . . provid[ed] that Title VII would not *require or permit* racially preferential integration efforts” as opposed to merely using the word “require”) (emphasis supplied).

Congress passed the Americans with Disabilities Act in 1990. The ADA incorporated Title VII in significant parts. *See* 42 U.S.C. § 12117 (“The powers, remedies, and procedures set forth in section[s] . . . 2000e-5 . . . of this title shall

be the powers, remedies, and procedures this title provides to the Commission . . . or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter[.]”). Relevant for lesbians and gay men is the fact that the ADA included an explicit exclusion that “disability” would not include homosexuality. *See* 42 U.S.C. §§ 12211(a) (“For purposes of the definition of ‘disability’ . . . , homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.”).<sup>23</sup>

But Congress in 1991 did not amend Title VII to exclude coverage of sexual orientation discrimination, as it had a year earlier in passing the ADA. Its failure to add the ADA exception for sexual orientation coverage speaks volumes. The 1991 Act took dead aim at the *Price Waterhouse* decision; indeed, the House Report included a section “The Need To Overturn *Price Waterhouse*.” H.R. Rep. No. 40, 102d Cong., 1<sup>st</sup> Sess., Pt. 1 at 48 (1991). But Congress addressed only *Price Waterhouse*’s mixed motive holding, not its holding that sex discrimination may inhere in an adverse employment action based on the employee’s nonconformity with gender stereotypes, 490 U.S. at 250-51, a holding that obviously has significant implications for lesbians and gay men. Both courts favorable and hostile to Title VII claims by lesbians and gay men have recognized the obvious:

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<sup>23</sup>Such a provision was gratuitous, considering that homosexuality had been declassified as a disorder by the American Psychiatric Association in 1973. *See Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014).

“all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices,” *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006); *see also Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) (“Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former”); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (“[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”) (citation omitted); *Kay v. Independence Blue Cross*, 142 F. App’x 48, 51 (3d Cir. 2005) (“The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics.”); *Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 42, 45 n.3 (D. Mass 2007) (“Certainly, some discrimination directed towards homosexual employees is based on those employees’ non-compliance with associational gender stereotypes.”); *Birkholz v. City of New York*, 2012 U.S. Dist. LEXIS 22445, at \*\*21-23 (E.D.N.Y. Feb. 17, 2012) (“courts have candidly recognized the analytical difficulties” inherent in distinguishing between “stereotypical notions about how men and women should behave” and “ideas about heterosexuality and homosexuality.”) (citation omitted); *Centola*, 183 F. Supp. 2d at 410 (“In fact,

stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women.”); *Heller*, 195 F. Supp. 2d at 1223.

To recap: In 1989, *Price Waterhouse* ruled that it is sex discrimination for employees to be fired for their nonconformity with gender norms. In 1990, Congress passed the ADA and incorporated a specific provision excluding homosexuality from the definition of “disability,” despite the fact that it had not been viewed as an impairment since 1973. A year later, Congress passed the Civil Rights Act of 1991, specifically repealing that part of *Price Waterhouse* regarding mixed-motive liability but not limiting in any way its sex stereotyping holding. It thus was wrong of *Hamner* and other courts to judicially engraft the type of “gay exception” found in the ADA on Title VII when Congress declined to do so.

## CONCLUSION

Ms. Hively facially stated a perfectly legitimate claim that she endured discrimination that would not have been visited on a male employee who shared her attraction to women. The only way to deny Ms. Hively the right to pursue a Title VII claim, short of Congressional action, is to engraft a judicial exception onto Title VII's coverage, and doing that conflicts with the governing precedent of the Supreme Court. As a result, *Hamner* should be overturned, the judgment of the court below should be reversed, and this case should be remanded for further proceedings.

Dated: May 12, 2015

/s/ Gregory R. Nevins

Gregory R. Nevins

LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.

730 Peachtree St. NE, Suite 1070  
Atlanta, GA 30308

Phone: (404) 897-1880

Facsimile: (404) 897-1884

gnevins@lambdalegal.org



**CERTIFICATE OF COMPLIANCE**

I certify that this brief was prepared using 14-point Times New Roman font and contains 12,844 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby further certify that this Corrected Brief contains no substantive changes from the brief submitted May 12, 2015

So certified this 19<sup>th</sup> day of May, 2015.

/s/ Gregory R. Nevins

Gregory R. Nevins

## **CERTIFICATE OF SERVICE**

I certify that on May 19, 2015, I utilized this court's ECF system to file a copy, resulting in the automatic service of counsel of record.

So certified this 19<sup>th</sup> day of May, 2015.

/s/ Gregory R. Nevins

Gregory R. Nevins

**15-1720**

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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KIMBERLY HIVELY,  
Plaintiff-Appellant,

v.

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

---

Appeal from the United States District Court  
For the Northern District of Indiana  
Case No. 34-cv-01791-RL-CAN  
The Honorable Judge Rudy Lozano

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**SHORT APPENDIX**

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Gregory R. Nevins  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
730 Peachtree St. NE, Suite 1070  
Atlanta, GA 30308  
Phone: (404) 897-1880  
Facsimile: (404) 897-1884

Attorney for Plaintiff-Appellant,  
Kimberly Hively

## SHORT APPENDIX TABLE OF CONTENTS

### Documents Bound With Brief:

Exhibit A: Employment Discrimination Complaint with attached EEOC charge.

Exhibit B: Civil Cover Sheet

Exhibit C: Motion to Dismiss

Exhibit D: Opinion and Order

Exhibit E: Judgment

### Statement Pursuant to Circuit Rule 30(d)

All of the materials required by part (a) and part (b) of Circuit Rule 30 are included in this Short Appendix.

/s/ Gregory R. Nevins

Gregory R. Nevins

## **EXHIBIT A**

3011070

USDC IN/ND case 3:14-cv-01791-RL-CAN document 1 filed 08/15/14 page 1 of 3

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
DIVISION

AUG 15 PM 12:03

U.S. DISTRICT COURT  
NORTHERN DISTRICT  
OF INDIANA

Kimberly A. Hively  
(Plaintiff)

vs.

Ivy Tech Community College  
South Bend (Defendant).

3:14cv1791

**EMPLOYMENT DISCRIMINATION COMPLAINT**

Plaintiff brings a complaint against defendant Ivy Tech Community College for discrimination as set forth below.

Plaintiff  DOES  DOES NOT (indicate which) demand a jury trial.

**I. PARTIES**

Plaintiff's Name: Kimberly A. Hively

Plaintiff's Address: 1112 S. 25th St.  
South Bend, IN 46615

Plaintiff's Telephone: 574-232-7986

Defendant's Name: Ivy Tech Community College

Defendant's Address: 220 Dean Johnson Blvd.  
South Bend, IN 46601

**II. BASIS OF CLAIM AND JURISDICTION**

I. This complaint is brought pursuant to:

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-5), and jurisdiction is based on 28 U.S.C. §§1331 and 1343(a);

The Age Discrimination in Employment Act (29 U.S.C. §621), and jurisdiction is based on 28 U.S.C. §§1331 and 1343(a);

The Americans with Disabilities Act (42 U.S.C. §12101), and jurisdiction is based on 28 U.S.C. §§1331 and 1343(a);

The Rehabilitation Act (29 U.S.C. §701, *et seq.*), and jurisdiction is based on 28 U.S.C. §§1331 and 1343(a);

Equal rights under law (42 U.S.C. §1981), and jurisdiction is based on 28 U.S.C. §§1331 and 1343(a);

Other (list): \_\_\_\_\_

2. Plaintiff  DID  DID NOT (indicate which) file a charge of discrimination with the Equal Employment Opportunity Commission or the Indiana Civil Rights Commission. [If the plaintiff did file a charge of discrimination, Plaintiff should attach a copy of the charge to the complaint].

3. Plaintiff's Right to Sue Notice from the Equal Employment Opportunity Commission or the Indiana Civil Rights Commission was RECEIVED on or about 6/18/14 (insert date the plaintiff received the notice -- in most instances this will not be the same date stamped on the notice). [Plaintiff should attach a copy of the Notice of Right to Sue to this complaint.]

**III. STATEMENT OF LEGAL CLAIM**

Plaintiff is entitled to relief in this action because (if more space is needed, attach additional pages):

Denied fulltime employment and promotions based  
on sexual orientation.

**IV. FACTS IN SUPPORT OF COMPLAINT**

The facts on which this complaint is based are the following (if you need additional space, please attach additional pages)

I have been at Ivy Tech Community College working

(Facts, continued)

for 14 years. I have ~~to~~ applied for 6 fulltime positions, having the required Masters Degree and grades, and have either not been interviewed or not been granted ~~for~~ full-time employment. I have never had a negative evaluation.

**V. PRAYER FOR RELIEF**

Based on the foregoing, plaintiff seeks the following relief:

I am seeking damages to cover the fulltime pay lost, benefits such as insurance etc lost and Pension amounts that would have been provided by the State plus accrued interest. I am asking for monetary damages in the approximate of 1.7 million dollars. This amount may change based on any new evidence not known at this time.

**VI. AFFIRMATION OF PLAINTIFF**

I, Kimberly A. Hively, the plaintiff in the aforementioned cause, do affirm that I have read all of the statements contained in the complaint and those which are attached in the accompanying financial statement. I believe them to be, to the best of my personal knowledge, true and correct.

Further, I do understand that this complaint and this affidavit will become an official part of the United States District Court files and that ANY FALSE STATEMENTS knowingly made by me are illegal and may subject me to criminal penalties.



(Signature of Plaintiff)

8/13/14

(Date)



USDC IN/ND case 3:14-cv-01741-EP-GAM-ND-COURT-COMMUNITY COLLEGE 05/14 page 1 of 2

**NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)**

To: Kimberly A. Hively  
✓ 1112 S. 25th Street  
South Bend, IN 46615

From: Indianapolis District Office  
101 West Ohio St  
Suite 1900  
Indianapolis, IN 46204

On behalf of person(s) aggrieved whose identity is  
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
24M-2014-00073	Michelle D. Ware, Enforcement Supervisor	(317) 226-5161

(See also the additional information enclosed with this form.)

**NOTICE TO THE PERSON AGGRIEVED:**

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), or the Genetic Information Nondiscrimination Act (GINA): This is your Notice of Right to Sue, issued under Title VII, the ADA or GINA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII, the ADA or GINA must be filed in a federal or state court **WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

- More than 180 days have passed since the filing of this charge.
- Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.
- The EEOC is terminating its processing of this charge.
- The EEOC will continue to process this charge.

**Age Discrimination in Employment Act (ADEA):** You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below applies to your case:

- The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court **WITHIN 90 DAYS** of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.
- The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.

**Equal Pay Act (EPA):** You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred **more than 2 years (3 years)** before you file suit may not be collectible.

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission  
  
Webster N. Smith,  
Director

**JUN 18 2014**  
(Date Mailed)

Enclosures(s)

cc: Jim Clark  
Assistant General Counsel  
IVY TECH COMMUNITY COLLEGE  
80 W. Fall Creek Parkway North Drive  
Indianapolis, IN 46206



## **EXHIBIT B**

USDC IN/ND case 3:14-cv-01791-RL-CAN Document 1-3 filed 08/15/14 page 1 of 1

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<p><b>I. (a) PLAINTIFFS</b>  <i>Kimberly A. Hively</i></p> <p><b>(b) County of Residence of First Listed Plaintiff</b> <u>St. Joseph</u>                  (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p><b>(c) Attorney's (Firm Name, Address, and Telephone Number)</b></p>	<p><b>DEFENDANTS</b>  <i>Ivy Tech Community College - South Bend</i></p> <p>County of Residence of First Listed Defendant <u>St. Joseph</u>                  (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known) <i>3:14CV1791</i></p>
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<p><b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p><b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Citizen of This State</td> <td style="width:10%;"><input checked="" type="checkbox"/> 1</td> <td style="width:10%;"><input checked="" type="checkbox"/> 1</td> <td style="width:33%;">Incorporated or Principal Place of Business in This State</td> <td style="width:10%;"><input type="checkbox"/> 4</td> <td style="width:10%;"><input checked="" type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	<input checked="" type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6														

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Delinquent Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 363 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p><b>PERSONAL PROPERTY</b></p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <p><b>LABOR</b></p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Algmt. Relations <input type="checkbox"/> 730 Labor/Algmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <p><b>IMMIGRATION</b></p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p><b>PROPERTY RIGHTS</b></p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <p><b>SOCIAL SECURITY</b></p> <input type="checkbox"/> 861 HIA (13951f) <input type="checkbox"/> 863 Black Lung (923) <input type="checkbox"/> 864 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p><b>FEDERAL TAX SUITS</b></p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 430 Commerce <input type="checkbox"/> 460 Deposition <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 830 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

**V. ORIGIN** (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):  
*42 USC Section 2000e-5, 42 USC Sec 1981*

Brief description of cause: *Discrimination based on sex*

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

**DEMAND \$**

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY** (See Instructions):

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE \_\_\_\_\_ SIGNATURE OF ATTORNEY OF RECORD \_\_\_\_\_

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

## **EXHIBIT C**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

KIMBERLY A. HIVELY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO.: 3:14-cv-01791-RL-CAN
	)	
IVY TECH COMMUNITY COLLEGE,	)	
	)	
Defendant.	)	

**DEFENDANT'S MOTION TO DISMISS**

Defendant Ivy Tech Community College, by counsel, respectfully submits its Motion to Dismiss Plaintiff's Complaint. As stated more fully in the supporting Brief filed with this Motion, Plaintiff Kimberly A. Hively's Complaint should be dismissed with prejudice, in its entirety, pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,  
BARNES & THORNBURG LLP

*s/ Adam L. Bartrom*  
 Jason T. Clagg (#24123-02)  
[jason.clagg@btlaw.com](mailto:jason.clagg@btlaw.com)  
 Adam L. Bartrom (#27019-02)  
[adam.bartrom@btlaw.com](mailto:adam.bartrom@btlaw.com)  
 600 One Summit Square  
 Fort Wayne, Indiana 46802  
 Telephone: (260) 423-9440  
 Facsimile: (260) 424-8316

ATTORNEYS FOR DEFENDANT  
IVY TECH COMMUNITY COLLEGE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the above and foregoing document has been served this 29th day of September, 2014, by depositing a copy of the same in the United States mail, first-class postage prepaid and properly addressed to the following *pro se* Plaintiff:

Ms. Kimberly Hively  
1112 S. 25<sup>th</sup> Street  
South Bend, IN 46615

*s/ Adam L. Bartrom*  
Adam L. Bartrom

## **EXHIBIT D**



**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION**

KIMBERLY HIVELY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 3:14-cv-1791
	)	
IVY TECH COMMUNITY COLLEGE,	)	
	)	
Defendant.	)	

**OPINION AND ORDER**

This matter is before the Court on the Motion to Dismiss, filed by Defendant, Ivy Tech Community College ("Ivy Tech"), on September 29, 2014 (DE #8). For the reasons set forth below, the motion (DE #8) is **GRANTED**. The Clerk is **ORDERED** to **DISMISS** Plaintiff's complaint **WITH PREJUDICE** in its entirety, and to **CLOSE** this case.

**BACKGROUND**

Pro se Plaintiff, Kimberly Hively, filed her two-count complaint against Ivy Tech on August 15, 2014. (DE #1.) She alleges she was "[d]enied fulltime employment and promotions based on sexual orientation" in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. (DE #1, p. 2.) She attached her administrative charge of discrimination which stated as follows:

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I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under the Title VII of the Civil Rights Act of 1964 were violated.

(DE #1-1, p. 2.)

Ivy Tech filed the instant motion to dismiss on September 29, 2014 (DE #8), arguing Plaintiff failed to set forth a claim upon which relief may be granted, and the complaint should be dismissed under Federal Rule of Civil Procedure Rule 12(b)(6). Specifically, Ivy Tech contends that sexual orientation is not a protected class under Title VII or Section 1981. (DE #9.)

Hively filed a response in opposition on November 12, 2014 (DE #12). In it, she sets forth facts about the percentage of states recognizing same sex marriages/civil unions, and argues that sexual orientation should be protected. Additionally, she quotes Ivy Tech's employee handbook, which states that the College "will not discriminate against any person because of . . . sexual orientation. . . ." (DE #12, p. 2.) Finally, in the last sentence of her response, Hively requests permission "to amend the initial complaint to include the state and local rules and Ivy Tech Community College's employment policy." (*Id.*, p. 3.)

Ivy Tech filed a reply in support of its motion to dismiss on November 21, 2014 (DE #13). As such, this motion is fully briefed and ripe for adjudication.

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DISCUSSION

Motion to Dismiss for Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, or any portion of a complaint, for failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted); see also *Ray v. City of Chicago*, 629 F.3d 660, 662-63 (7th Cir. 2011) (citation omitted) ("While the federal pleading standard is quite forgiving . . . the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.").

A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Plus, *Iqbal* requires that a plaintiff plead content which allows this Court to draw a reasonable inference that the defendant is liable for the alleged misconduct. 556 U.S. at 678.

In ruling on a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must draw all reasonable inferences that favor the plaintiff, construe the

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allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002); *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir. 1991). In order to withstand a motion to dismiss, a complaint must allege the "operative facts" upon which each claim is based. *Kyle v. Morton High Sch.*, 144 F.3d 448, 454-55 (7th Cir. 1998); *Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir. 1992). A plaintiff is required to include allegations in the complaint that "plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level' " and "if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting in part *Twombly*, 550 U.S. at 569 n. 14 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (quotation marks, ellipsis, citations and footnote omitted). Thus, a "plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, might suggest that something has happened to her that might be redressed by the law." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (emphasis in original).

The Court notes that Plaintiff is appearing pro se in this

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matter. Generally, although "pro se litigants are masters of their own complaints," and "[d]istrict judges have no obligation to act as counsel or paralegal to pro se litigants," *Myles v. United States*, 416 F.3d 551, 552 (7th Cir. 2005), a document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, "on a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (quotation marks omitted)).

#### Title VII

Title VII states that:

It shall be unlawful employment practice for an employer - (1) 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 race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a)(1). While Title VII expressly prohibits employers from refusing to hire employees "because of [their] sex," the Seventh Circuit has held that "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation. *Hamner v. St. Vincent Hosp. and Health Care Center, Inc.*, 224 F.3d 701, 704 (7th Cir. 2000). Thus,

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"harassment based solely upon a person's sexual preference or orientation . . . is not an unlawful employment practice under Title VII." *Id.*, see also *Wright v. Porters Restoration, Inc.*, 2:09-CV-163-PRC, 2010 WL 2559877, at \*4 (N.D. Ind. June 23, 2010) (granting dismissal of claim alleging discrimination for sexual orientation, stating "[t]o the extent the Plaintiff may be alleging discrimination based on sexual orientation, the Seventh Circuit has unequivocally held that this type of discrimination is not, under any circumstances, proscribed by Title VII"); *Hamzah v. Woodmans Food Market, Inc.*, No. 13-cv-491, 2014 WL 1207428, at \*2 (W.D. Wis. Mar. 24, 2014) (finding "[t]o the extent [plaintiff] claims harassment due to his heterosexuality - that is, his sexual orientation, not his sex - he cannot bring a Title VII claim against [defendant] for these alleged instances of harassment, and the court will dismiss that claim with prejudice.").

While this Court is sympathetic to the arguments made by Hively in her response brief, this Court is bound by Seventh Circuit precedent. Because sexual orientation is not recognized as a protected class under Title VII, that claim must be dismissed.

#### Section 1981

Although Hively has alleged a claim under Section 1981, it is clear that section 1981 covers only racial discrimination. "[O]nly race discrimination claims may be brought under [Section 1981]" and

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"sexual orientation based claims are not cognizable under § 1981." *Perez v. Norwegian-American Hosp., Inc.*, 93 Fed. Appx. 910, 913 n.1 (7th Cir. 2004); *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 177 (7th Cir. 1996) (Section 1981 also "does not provide a cause of action for sex discrimination claims"); *Friedel v. Madison*, 832 F.2d 965, 967 n. 1 (7th Cir. 1987). As such, Hively's section 1981 claim must also be dismissed for failure to state a claim.

Request to Amend the Complaint

At the end of her response in opposition to the motion to dismiss, Hively requests "permission to amend the initial complaint to include the state and local rules and Ivy Tech Community College's employment policy." (DE #12, p. 3.) She references "regulations that govern both the State and City" in which Ivy Tech operates, Indiana's constitution, and an employee handbook. (*Id.*, pp. 1-2.) First, this request is procedurally improper as motions should not be combined (N.D. Ind. L.R. 7-1(a)), and Hively did not include a "signed proposed amendment as an attachment" in accordance with N.D. Ind. L.R. 15-1(a). Additionally, any amendment would be futile. This Court would have no jurisdiction over the proposed amendment "to include the state and local rules and [an] employment policy" as these would be purely state claims and diversity is lacking. See Ind. Code § 21-22-2-2 ("Ivy Tech

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Community College of Indiana" is a "state educational institution"); DE #1 (Plaintiff's address is in South Bend, Indiana). Here, where an amendment would be futile, it is appropriate to dismiss the case without leave to amend. See, e.g., *Braun v. Gonzales*, No. 13-3183, 2013 WL 3038630, at \*1 (E.D. Pa. June 18, 2013) (denying pro se motion to amend as "amendment would be futile because it is apparent that this case concerns matters of state law and that there is no basis for diversity jurisdiction"); *Disanto v. Genova Prods., Inc.*, No. 1:10-cv-120, 2011 WL 90243, at \*1 (N.D. Ind. Jan. 10, 2011) (finding it futile to grant motion to amend where proposed amended complaint does not establish diversity jurisdiction). Moreover, if Hively attempted to articulate a different federal claim, Ivy Tech, as an arm of the state, would likely be immune under the Eleventh Amendment. See *McCullough v. IPFW Univ.*, No. 1:12-cv-398, 2013 WL 587886, at \*1-\*2 (N.D. Ind. Feb. 11, 2013) (denying motion to amend complaint as state university was immune from federal claims). As such, Plaintiff's request to amend her complaint is futile, and is **DENIED**.

CONCLUSION

For the reasons stated above, the Motion to Dismiss (DE #8) is **GRANTED**. The Clerk is **ORDERED** to **DISMISS** Plaintiff's complaint **WITH PREJUDICE** in its entirety, and to **CLOSE** this case.

**DATED: March 3, 2015**

**/s/ RUDY LOZANO, Judge**  
**United States District Court**



## **EXHIBIT E**

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT  
for the  
Northern District of Indiana

KIMBERLY A HIVELY

Plaintiff

v.

Civil Action No. 3:14-cv-1791

IVY TECH COMMUNITY COLLEGE, South Bend

Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one*):

the plaintiff \_\_\_\_\_  
recover from the defendant \_\_\_\_\_ the amount of \_\_\_\_\_  
dollars \$ \_\_\_\_\_, which includes prejudgment interest at the rate of \_\_\_\_\_% plus post-  
judgment interest at the rate of \_\_\_\_\_% along with costs.

the plaintiff recover nothing, the action is dismissed on the merits, and the defendant \_\_\_\_\_  
recover costs from the plaintiff \_\_\_\_\_.

Other: The plaintiff's complaint is DISMISSED WITH PREJUDICE in its entirety.

This action was (*check one*):

tried to a jury with Judge \_\_\_\_\_ presiding, and the jury has  
rendered a verdict.

tried by Judge \_\_\_\_\_ without a jury and the above decision was  
reached.

decided by Judge Rudy Lozano on a motion to dismiss

DATE: 3/4/2015

ROBERT TRGOVICH, CLERK OF COURT

by /s/R. Covey  
*Signature of Clerk or Deputy Clerk*