IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	**Civil Action No. 2:16-cv-00225**
v.	)	
SCOTT MEDICAL HEALTH CENTER, P.C.,	)	
Defendant.	)	

PLAINTIFF EEOC'S BRIEF IN OPPOSITION TO DEFENDANT'S RULE 12(b)(1) and 12(b)(6) MOTION TO DISMISS

Plaintiff U.S. Equal Employment Opportunity Commission, by and through its undersigned counsel, files this Brief in Opposition to Defendant's Motion to Dismiss.

Respectfully submitted,

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DEBRA M. LAWRENCE
Regional Attorney
Baltimore, Maryland

/s/ *Ronald L. Phillips*
RONALD L. PHILLIPS
Supervisory Trial Attorney
EEOC, Baltimore Field Office
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201
410-209-2737
ronald.phillips@eeoc.gov

/s/ *Deborah A. Kane*
DEBORAH A. KANE
Senior Trial Attorney
EEOC, Pittsburgh Area Office
1000 Liberty Avenue, Suite 1112
Pittsburgh, PA 15222
412-395-5866
deborah.kane@eeoc.gov

INTRODUCTION

"Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015). The full promise of liberty is not just the right to marry or have other intimate relationships, but necessarily includes the right to work and earn a living free from abuse on the job because of those relationships. Defendant argues that gay and lesbian persons are not protected from such workplace abuse. However, the text of Title VII expressly prohibits discrimination "because of sex," and in the final analysis it is the language of our laws, not guesswork about legislative intent, which governs. That language already guarantees the full promise of liberty. Given well-established, controlling principles of law under Title VII and the nature of sexual orientation discrimination itself, the conclusion is inescapable that discrimination against persons because of their sexual orientation is *inherently* discrimination "*because of sex*" prohibited by Title VII. As such, EEOC's complaint on behalf of Dale Baxley states a violation of Title VII. Moreover, Defendant's assertion that EEOC has not satisfied its conditions precedent is meritless. Defendant's motion to dismiss should be denied.

FACTUAL SUMMARY

Dale Baxley was employed by Defendant as a telemarketer, reporting to supervisor Robert McClendon. *See* Complaint (ECF No. 1) at ¶11(a-b). From mid-July to August 19, 2013, McClendon subjected Baxley to unwelcome and offensive sex-motivated comments, including referring to him as "fag," "faggot," "fucking faggot," and "queer," and making statements such as "fucking queer can't do your job." *Id.* at ¶11(d). Almost immediately after learning that Baxley was in a committed relationship with another male, McClendon made highly offensive comments about Baxley's relationship, such as "I always wondered how you fags have sex," "I don't understand how you fucking fags have sex," and "Who's the butch and who is the bitch?"

Id. at 11(e). These comments occurred frequently, at least three to four times a week. *Id.* at 11(d). Baxley complained about the harassment to Dr. Gary Hieronimus, Defendant's President, who refused to take any action to stop it. *Id.* at 11(g). As a result, Baxley reasonably concluded that the hostile work environment to which he was subjected would persist unabated, and he resigned. *Id.* at 11(g). By August 19, 2013, Baxley was constructively discharged. *Id.*

ARGUMENT

I. EEOC's Complaint States A Claim For Sex Harassment And Constructive Discharge On Behalf Of Dale Baxley, A Gay Male.

Title VII prohibits discrimination "because of . . . sex." 42 U.S.C. §2000e-2(a)(1). "[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993). The plaintiff must establish that he/she suffered intentional discrimination because of his or her sex. *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013). Here, EEOC has pleaded sufficient facts to state a claim that Dale Baxley was harassed and constructively discharged because of his sex (male) in violation of Title VII.

It is well established that the term "sex" in Title VII includes both sex-related biological differences, as well as gender. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). The prohibition of discrimination "because of sex" also includes discrimination based on sex stereotyping – that is, discrimination against a person who does not

conform to stereotypical ideas or norms about how a person of that sex should appear, behave or think. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

It is true that Title VII does not expressly include the phrase "sexual orientation," nor does it contain any definition of the term "sex." For instance, the Act does not expressly state that sex necessarily includes "gender characteristics," though the federal courts have concluded it necessarily must include concepts of gender. Similarly, it is also likely that at the time of the enactment of Title VII, Congress did not examine whether sexual orientation is necessarily subsumed within the prohibition of discrimination "because of sex." Certainly, the legislative history of the sex discrimination prohibition is sparse, and that history is silent concerning the precise contours of the term "sex."

However, since the enactment of Title VII, federal courts have consistently relied on the plain text of the statute to conclude that the law's reach extends to cover myriad situations that are not expressly referenced in the text of the Act and may not have been contemplated by Congress when the law was enacted, including gender or sex stereotyping, transgender status, and other types of claims not contemplated at the time of enactment but that are logically subsumed within the language that Congress selected. *See, e.g., Price Waterhouse* (coverage on the basis of sex stereotyping); *Meritor*, 477 U.S. at 66 (recognizing hostile environment sex harassment claims); *Smith*, 378 F.3d at 574-75 (coverage for transgender plaintiff).

In that regard, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), is a key decision in this line of Title VII interpretive cases. At issue in *Oncale* was whether Title VII's "because of sex" prohibition included same-sex harassment, which in that case was harassment

by a male perpetrator against a male victim. *See id.* at 77. The Court acknowledged that same-sex harassment was unlikely to have been contemplated by Congress when it enacted Title VII, but nevertheless held that such claims are cognizable. *See id.* at 79-81. The Court declined to rely on supposition about congressional intent, instead turning its attention to the logical meaning of the statutory text and articulating an important principle of Title VII interpretation: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79.

Thus, the fact that Title VII does not contain an express reference to certain forms of discrimination that involve a protected trait such as sex, and that Congress may not have contemplated every conceivable form of discrimination implicated by its choice of language when the law was passed, does not detract from the force and import of the language that it enacted. The lack of an express reference to sexual orientation in the statutory text is not controlling. The plain text of the Act is controlling, and all forms of discrimination that are logically subsumed within that text are prohibited by Title VII.

As explained more fully below, the sexual orientation-based harassment Baxley endured is illegal sex harassment under Title VII. Three lines of analysis demonstrate the accuracy of that conclusion: (1) Baxley was targeted because he is a male, for had he been female instead of a male, he would not have been subjected to discrimination for his intimate relationships with men; (2) Baxley was targeted and harassed because of his intimate association with someone of the same sex, which necessarily takes Baxley's sex into account; and (3) Baxley was targeted because he did not conform to his harasser's concepts of what a man should be or do. Under any or all of these analyses, EEOC's sex discrimination claims are cognizable. As the federal courts

have begun to acknowledge, Defendant's argument that EEOC has not stated cognizable sex discrimination claims is based on a "faulty construct," i.e., the false dichotomy of "sex discrimination" versus "sexual orientation discrimination." Sexual orientation discrimination by definition is discrimination "because of sex" and is therefore illegal under Title VII.

A. <u>But For Baxley's Sex, He Would Not Have Been Harassed</u>.

It is well established that an employer may not rely on sex-based considerations or take gender into account when making employment decisions. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-42 (1989). In this regard, sexual orientation discrimination is necessarily sex discrimination because sexual orientation is inseparable from sex. Sexual orientation cannot be understood without reference to sex. Any definition of sexual orientation, for instance, necessarily includes consideration of sexual and emotional attraction to, and by, persons of a particular sex. *See, e.g.,* American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation," (Feb. 2011) ("*Sexual orientation* refers to the *sex* of those to whom one is sexually attracted") (second emphasis added).[1]

In any sex discrimination case involving any individual, whether male or female of any sexual orientation, the critical test is whether or not that individual is treated differently because of his or her sex. As the Supreme Court has held, the question of whether Title VII's sex discrimination prohibition has been violated involves application of a "simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978). *See also Oncale*, 523 U.S. at 80 (describing the "critical issue" under Title VII as whether the discrimination would have occurred if the sex of the victim had been different).

[1] This source is available at http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf (last viewed on Feb. 4, 2016).

Cases involving gay and lesbian persons are no different in this respect. An employer cannot discriminate against an employee based on that employee's sexual orientation without taking the employee's sex into account. Consider the case of a male employee who is suspended because he keeps a picture of his male spouse on his desk. A female co-worker, however, who also keeps a picture of her male spouse on her desk is not suspended. But for the male employee's sex, then, he would not have been suspended.[2] Therefore, applying the simple test required by controlling law, the male employee has been subjected to discrimination because of his sex. Sexual orientation discrimination *is* sex discrimination.

Consistent with Supreme Court precedent, various federal courts have correctly applied this but-for sex analysis to cases involving gay or lesbian employees. *See Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002) (holding reasonable jury could find that lesbian employee would not have been harassed and discharged had she been a man dating a woman; "[n]othing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone. Rather, Congress intended that all Americans should have an opportunity to participate in the economic life of the nation."); *Hall v. BNSF Ry. Co.*, No. 13-2160, 2014 WL 4719007, *4-5 (W.D. Wash. Sept. 22, 2014) (denying motion to dismiss brought by gay male, who alleged sex discrimination in denial of spousal benefits, holding complaint plausibly alleged a violation of Title VII, as the plaintiff had alleged that he, a male married to a male, was treated differently than females married to males); *Videckis v. Pepperdine Univ.*, --- F. Supp. 3d ---, 2015 WL 8916764, *8 (C.D. Cal. Dec. 15, 2015) (holding in Title IX case that sexual orientation discrimination cannot be differentiated

[2] The same result would occur if the suspended employee were heterosexual – if for instance a female was suspended for having a picture of her male spouse on her desk but a gay male was not similarly suspended for having a picture of his male spouse.

from sex discrimination; if lesbian plaintiffs "had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment.").[3]

In this case, McClendon was aware that Baxley was gay and in a romantic relationship with another male. McClendon harassed Baxley about his sexuality, including barraging Baxley with various vulgar epithets and comments about his sexual practices. Thus, McClendon targeted Baxley for harassment because Baxley was a male dating another male. But for Baxley's sex (male), he would not have been harassed. Therefore, EEOC has alleged that Baxley was harassed and constructively discharged "because of sex."

B. Baxley Was Targeted Because Of His Association With Another Male.

Sexual orientation discrimination also constitutes sex discrimination under Title VII because it subjects individuals to adverse treatment based on the sex of persons with whom they associate. Such associational discrimination is, necessarily, discrimination "because of sex." The federal courts have long adhered to this principle in the context of Title VII race discrimination claims, holding that employees who were discriminated against because of their association with someone of a different race were necessarily subjected to discrimination because of their own race. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) ("We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race."); *Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 892 (11th Cir.1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."). *See also Holiday v. Belle's Rest.,* 409 F. Supp. 904, 908 (W.D. Pa.

[3] The motivating factor standard is the least demanding causation standard applicable to Title VII cases. *See* 42 U.S.C. §2000e-2(m). However, in this case use of that framework is unnecessary because "but for" causation is readily apparent.

1976) (ruling that court has subject matter jurisdiction in associational race case brought by white woman married to black man); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) ("Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships").

Courts applying Title VII's protections in the race associational context have reasoned that had the plaintiff been of the same race as the person with whom he/she associated, the plaintiff would not have been subject to discrimination. *See e.g.*, *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999). In *Tetro*, a white employee was harassed almost immediately after bringing his multi-racial daughter to the workplace. The Sixth Circuit observed that if the plaintiff had been black, or the daughter had been white, there would not have been any harassment. *Id.* It was the plaintiff's own race, and the fact that it was different from his daughter's race, that led to the harassment because his supervisor was displeased by the plaintiff's association with persons of another race. *Id.* at 995 ("The net effect is that the [employer] has allegedly discriminated against Tetro because of his race"). Other courts have similarly reasoned that 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. *See Holcomb*, 521 F.3d at 139 (white plaintiff claiming he was fired because of his marriage to black woman protected by Title VII).

The result is no different in the context of sex. Title VII "on its face, treats each of the enumerated categories" – race, color, religion, sex, and national origin – "exactly the same." *Price Waterhouse*, 490 U.S. at 243, n.9. *See also Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims.") (internal citation omitted); *Williams v. Owens-Illinois, Inc.*,

665 F.2d 918, 929 (9th Cir. 1982) ("Under [Title VII] the standard for proving sex discrimination and race discrimination is the same."); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980) (holding that standards and orders of proof used in race discrimination cases "are generally applicable to cases of sex discrimination").

Title VII's prohibition of discrimination "because of sex" therefore includes discrimination against an individual because that individual has a close or intimate association with a person of a particular sex. Such discrimination *necessarily* involves taking consideration of the employee's sex, because it is the sex of the employee that renders their marital or other intimate association with a person of the same sex unacceptable in the mind of the perpetrator.[4]

In this instance, Defendant targeted Baxley for egregious discriminatory harassment because of his intimate, romantic relationships with men. Here, McClendon was aware that Baxley is gay and therefore forms intimate emotional and sexual relationships with other men and, indeed, McClendon was also specifically aware that Baxley was having a romantic relationship with a particular male partner at that time, to whom Baxley is now married. Baxley was targeted because of those associations. McClendon's anti-gay hostility generally, and his hostile and highly offensive response upon learning that Baxley was in a relationship with another male, is associational discrimination and therefore states a cognizable claim that Baxley was subjected to sex discrimination under Title VII.

[4] Applying the associational discrimination standard in cases involving sex is crucial in light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). As it has in the past, the Court emphasized the central role of marriage in the lives of individuals and as a societal institution. *Id.* at 2599-2601 ("[M]arriage is a keystone of our social order"). A same-sex couple's fundamental constitutional right to marry is significantly eroded, however, if their employers are free to take away their livelihoods because of the marriage. Failing to protect employees who have intimate associations with others of the same sex from discrimination in the workplace renders hollow the Court's pronouncements on the central importance of marriage to society.

C. Baxley Was Targeted Because He Did Not Conform To The Harasser's Sex-Based Stereotypes And Norms About How A Man Should Behave Or Think.

The Title VII prohibition of discrimination "because of sex" forbids adverse employment actions based on sex stereotypes and gender-role norms, and it is such stereotypes and norms that define and animate sexual orientation based-animus. For this reason, sexual orientation discrimination is, necessarily, discrimination because of sex.

In the seminal decision *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court recognized that sex discrimination claims under Title VII include discrimination based on non-conformity to sex stereotypes or gender norms. *See id. at* 250-51 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Since *Price Waterhouse*, the federal courts have consistently applied the prohibition against sex stereotyping discrimination in cases involving both males and females who failed to conform to gender norms because of their appearance or mannerisms. *See, e.g., Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 581-82 (7th Cir. 1997) ("[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009) (discussing evidence of plaintiff's appearance and mannerisms); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (applying *Price Waterhouse* in a case involving a male who was perceived as acting too feminine); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459-60 (5th Cir. 2013) (*en banc*) (holding Title VII's protection from gender-stereotyping discrimination applies in same-sex harassment case where the victim "fell outside of [the harasser's] manly-man stereotype.").

The prohibition against sex-stereotyping discrimination has also developed to include

cases that go beyond outward displays of perceived masculine and feminine behavior and reach the full range of sex stereotypes that interfere with equal employment opportunities. *See, e.g.*, *Centola v. Porter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Heller*, 195 F. Supp. 2d at 1224 (belief that women should only be attracted to and date men is a gender stereotype); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037-38 (N.D. Ohio 2012) (denying defendant's summary judgment motion where plaintiff alleged his supervisor discriminated against him based on sex stereotypes because he is married to a man and took his husband's last name, holding that "[t]hat *is* a claim of discrimination because of sex") (emphasis in original). *See also Rachuna v. Best Fitness*, No. 1:13-cv-365, 2014 WL 1784446, at *6 (W.D. Pa. May 5, 2014) (noting that alleging effeminacy is not the only way for a male plaintiff to make a claim for sex-stereotyping discrimination, denying motion to dismiss where plaintiff alleged he did not engage in crude sexual banter and conduct as expected by his male manager); *Barrett v. Penn. Steel Co.*, No. 2:14-1103, 2014 WL 3572888, at *3 (E.D. Pa. Jul. 21, 2014) (enough for plaintiff to allege he was targeted because he refused to engage in crude sexual talk with co-workers). Any action based on sex stereotyping or failure to comply with gender norms, including those that involve less overt differences, is illegal sex discrimination under Title VII.

An employer who discriminates based on an employee's sexual orientation necessarily discriminates because of the employee's failure to conform to sex stereotypes – the stereotype of opposite-sex attraction. *See Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying motion to dismiss where plaintiff alleged that he was denied promotions and harassed because his sexual orientation did not conform to the employer's gender stereotypes associated with men). Discriminating against a person because of the sex of that person's romantic partner necessarily involves stereotypes about "proper" roles in sexual relationships – that men are and

should only be sexually attracted to women, not men. This is true even if the employee is otherwise gender norm conforming. "Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do." *Centola*, 183 F. Supp. 2d at 410. *See also* ANDREW KOPPELMAN, WHY DISCRIMINATION AGAINST LESBIANS AND GAY MEN IS SEX DISCRIMINATION, 69 N.Y.U. L. REV. 197, 235 (1994) ("There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so"). Discriminating against a person based on the fact that the person forms romantic and sexual relationships with those of the same sex is the epitome of sex stereotyping, as such discrimination emanates from traditional sex norms that persons should only be attracted to the opposite sex. Any purported distinction between such stereotyping and stereotyping based on physical appearance and mannerisms is entirely arbitrary. It is post-hoc rationalization of a predetermined outcome.

The false dichotomy between sex and sexual orientation is incompatible with Title VII principles and reflects the kind of tortured logic that flows from an attempt to draw a legal distinction that is inherently untenable. Indeed, after years of wrestling with the question, the federal courts have handed down decisions that are logically irreconcilable. Some federal courts have held that if a gay person is harassed because of that individual's sexual orientation, the claim is considered to be improper "bootstrapping" onto a sex-stereotyping theory and is not cognizable. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005). But if the same claim involving precisely the same conduct and harm is made by a heterosexual person – harassment because of perceived homosexuality – it is actionable. *See Riccio v. New Haven Bd.*

of Educ., 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (citing *Oncale*, 523 U.S. at 82). The fallacy of the distinction was further illustrated by one district court using the following example:

> "If an employer fires her female employee because the employer believes that women should defer to men, but the employee sometimes challenges her male colleagues, such action would present a cognizable claim under Title VII. If the same employer fires her female employee because the employer believes that women should date men, but the employee only dates women, the prevailing construction of Title VII would find no cognizable claim under that statute."

Christiansen v. Omnicom Group, Inc., No. 15 Civ. 3440 (KPF), 2016 WL 951581, at *14 (S.D.N.Y. Mar. 9, 2016).

But the focus in sex discrimination cases, indeed in any discrimination case regardless of the specific protected category, rightly belongs on the bias and perception of those who discriminate, rather than the actual status of their victims:

> In sexual orientation discrimination cases, focusing on the actions or appearance of the alleged victim of discrimination rather than the bias of the alleged perpetrator asks the wrong question and compounds the harm. A plaintiff's "actual" sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis.

Videckis, 2015 WL 8916764 at *6; *See also Heffernan v. City of Patterson*, 136 S. Ct. 1412, 1417-19 (2016) (holding plaintiff may establish violation of First Amendment rights when employer was motivated by mistaken belief that employee engaged in protected speech). The animus manifested by a perpetrator of sexual orientation discrimination derives from the victim's failure to conform to the perpetrator's ideas about how men or women should behave or think. Such discrimination is based on impermissible sex stereotyping, and the victim is protected under Title VII precisely because his/her sexual orientation motivated the discriminatory act.[5]

[5] Violations of Title VII have been found in cases of "mistaken" beliefs, particularly in cases involving national origin or religion, which illustrate that the focus should properly be placed on the bias of the perpetrator. *See Arsham v. Mayor & City Council of Baltimore*, 85 F. Supp. 3d 841, 845-49 (D. Md. 2015) (rejecting defendant's argument that Title VII does not prohibit

In the retaliation context, the Third Circuit has recognized that it is the state of mind and perception of the discrimination perpetrator that matters – not the conduct of the victim. *See Fogleman v. Mercy Hosp.,* 283 F.3d 561 (3d Cir. 2002). In *Fogleman*, the court was faced with a claim of retaliation based upon an employer's perception that an employee had engaged in protected activity under the Americans with Disabilities Act and the Age Discrimination in Employment Act when, in fact, the employee had not done so. "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable." *Id.* at 565. To support its reasoning, the court provided the following example:

> As an illustration by analogy, imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. *What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute*.

Id. at 571 (emphasis added). There is no principled reason for distinguishing cases involving sex discrimination, particularly in the context of sex stereotyping. When an individual is subject to discrimination or harassment for failure to conform to sex stereotypes, that conduct is actionable, and it does not matter whether that person is homosexual or heterosexual. *See Prowel v. Wise Business Forms, Inc.,* 579 F.3d 285, 292 (3d Cir. 2009) (holding Title VII authorizes sex stereotyping claims for perceived effeminacy of male plaintiff regardless of his sexual

---

discrimination based on perceived national origin; harasser mistakenly believed plaintiff was a member of the Parsee ethnic group from India, when she was actually of Iranian/Persian descent); *EEOC v. WC & M Enters., Inc.,* 496 F.3d 393, 402 (5th Cir. 2007) (plaintiff born in India submitted sufficient evidence of national origin bias though harassers referred to him as "Arab," stating that "a party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim's actual country of origin").

orientation); *Videckis*, 2015 WL 8916764 at *6 (actual sexual orientation of the victim of sex discrimination under Title IX or Title VII is irrelevant).

In this regard, the district court in *Videckis v. Pepperdine Univ.*, --- F. Supp. 3d ---, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015), identified the better-reasoned approach to sex stereotyping analysis. Adopting the reasoning in the Commission's recent federal sector decision in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015), the district court concluded that "sexual orientation discrimination is not a category distinct from sex or gender discrimination." 2015 WL 8916764, at *5. The court was especially critical of attempts by other courts to draw a line between sexual orientation and sex, because such distinctions are "illusory and artificial." *Id.* at *5. As the *Videckis* court stated:

> Other courts have acknowledged the difficulty of distinguishing sexual orientation discrimination from discrimination based on sex or gender stereotypes. *See, e.g., Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (stating that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (acknowledging that it would be difficult to determine if an actionable Title VII claim was stated when a plaintiff stated she was discriminated against based on her sex, her failure to conform to gender norms, and her sexual orientation, because "the borders [between these classes] are so imprecise" (alteration in original)); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002)(acknowledging that "the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear"). *Simply put, the line between sex discrimination and sexual orientation discrimination is "difficult to draw" because that line does not exist, save as a lingering and faulty judicial construct*.

Id. at *6 (emphasis added).

As acknowledged by *Videckis*, the Third Circuit in *Prowel v. Wise Business Forms, Inc.,* 579 F.3d 285 (3d Cir. 2009), and various other decisions, the federal courts have struggled mightily over the years to distinguish between sex stereotyping and sexual orientation discrimination. The fact of that struggle is itself telling. Resulting decisions have yet to produce

any clear distinction between such claims, because there is no logical, principled way to make such a distinction. As one federal court recently observed:

> The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims. * * * In light of the EEOC's recent decision on Title VII's scope, and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask – and, lest there be any doubt, this Court is asking – whether that line should be erased.

Christiansen v. Omnicom Group, Inc., No. 15 Civ. 3440 (KPF), 2016 WL 951581, at *14-15 (S.D.N.Y. Mar. 9, 2016). [6]

Sexual orientation discrimination is inextricably entwined with concepts of sex and the "proper roles of men and women[.]" *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The reason the courts have struggled and failed to draw the legal distinction between sex stereotyping discrimination and sexual orientation discrimination in any rational, workable manner is simple: it doesn't exist.

Here, McClendon targeted Baxley precisely because Baxley did not conform to McClendon's ideas about how men should behave – meaning that Baxley did not form romantic and sexual relationships with women and therefore was not a so-called "real man." By referring to him as a "faggot," and questioning his sexual practices, McClendon engaged in illegal sex-stereotyping harassment. Under existing precedent, this is sufficient to withstand a motion to dismiss. *Price Waterhouse*, 490 U.S. at 250-51; *Prowel*, 579 F.3d at 290-91 (applying *Price Waterhouse* sex-stereotyping analysis, reversing summary judgment because there was sufficient evidence that plaintiff was harassed for not conforming to gender norms). It is not necessary for

[6] The Commission acknowledges that its own understanding of Title VII's use of the term "sex" and its relationship to sexual orientation discrimination has evolved over time. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *9 n.13 (EEOC July 15, 2015).

EEOC to allege that Baxley was harassed because he was perceived to be effeminate, because that is not the only way to demonstrate non-conformance with sex or gender norms:

> Defendants argue that, although Plaintiff alleges that Taylor's actions were motivated by a belief that he did not conform to the stereotype of a heterosexual male, his allegations are insufficient because he has not alleged that he was being harassed for being effeminate. Rather, they argue that his claims are essentially that he was offended by Taylor discussing sex-related topics with him, such as asking him about his personal sex life and encouraging him to have sex more often. However, Defendants cite no authority in support of this argument, only cases in which courts permitted claims to proceed when male plaintiffs proffered evidence that they were harassed for being effeminate and/or for exhibiting characteristics of the opposite gender. *This does not mean that these are the only circumstances that can support a claim of same-sex harassment based on gender stereotyping*.

Rachuna v. Best Fitness, No. 1:13-cv-365, 2014 WL 1784446, at *6 (W.D. Pa. May 5, 2014) (Mitchell, J.) (emphasis added). EEOC's allegation that Baxley was harassed because he did not conform to McClendon's notions of how men should behave or think, and specifically whom they should be sexually attracted to or love, is sufficient to state a claim for violation of Title VII, and Defendant's motion to dismiss must therefore be denied.

D. <u>EEOC Has Set Forth A Cognizable Claim Of Discrimination Because Of Sex, and Third Circuit Law Does Not Require Dismissal.</u>

Defendant urges this Court to dismiss EEOC's Complaint based on the Third Circuit decision in *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), which was cited in a subsequent decision, *Prowel v. Wise Business Forms, Inc.,* 579 F.3d 285 (3d Cir. 2009). In *Bibby*, the Third Circuit affirmed a district court's dismissal of the plaintiff's Title VII claim, stating "It is clear . . . that Title VII does not prohibit discrimination based on sexual orientation." *Id.* at 261. The court noted the failure of Congress to enact proposed legislation that explicitly references sexual orientation as a prohibited form of employment discrimination (i.e., the Employment Non-Discrimination Act, or "ENDA") as support for its conclusion. *Id.*

But *Bibby* does not require dismissal in the present case. There have been intervening

developments in the law since *Bibby* that undermine its value as precedent. Moreover, the *Bibby* court did not have occasion to consider the arguments or the analytical framework advanced by EEOC in this case, arguments accepted by more recent decisions that reflect the federal courts' evolving understanding of the nature of sex discrimination.

First, *Bibby*'s central rationale – congressional inaction on ENDA – is in tension with subsequent Third Circuit jurisprudence regarding statutory interpretation. Even before *Bibby*, the Supreme Court has been highly dismissive of congressional inaction arguments as mode of statutory construction. As the court has held, "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 Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation and internal quotations omitted). Subsequent to *Bibby* and *Prowel*, the Third Circuit has invoked that interpretive principle in rejection of inaction arguments, now recognizing that "[e]vidence of congressional inaction is generally entitled to *minimal* weight in the interpretive process." *In re Visteon Corp.*, 612 F.3d 210, 230 (3d Cir. 2010) (rejecting argument that Congress' failure to amend certain provisions of the Bankruptcy Code was relevant in interpreting a provision that the court found to be unambiguous) (emphasis added). Finally, the *Bibby* court also did not have the benefit of more recent Supreme Court jurisprudence that has broadly interpreted similar or identical non-discrimination language to include retaliation.[7]

[7] Since *Bibby*, the Supreme Court has also continued to expansively interpret anti-discrimination language in analogous civil rights statutes, concluding that the phrases "on the basis of sex" and "based on age" include retaliation for complaints of such discrimination, notwithstanding (1) the absence of any express reference to retaliation in the relevant statutory text and (2) the fact that Congress has expressly prohibited retaliation in other, analogous civil rights statutes, or in other portions of the same statutes. *See Jackson v. Birmingham Board of Education*, 544 U.S. 167, 172-77 (2005) (same involving a case under Title IX); *Gomez-Perez v. Potter*, 553 U.S. 474,

The *Bibby* court also did not have the benefit of considering the analysis and arguments advanced by EEOC in this case. For instance, there is no mention in *Bibby* of the case law barring discrimination because of interracial association or the implications of that case law for proper analysis of sex discrimination cases such as this one. That result is, perhaps, unsurprising in light of the briefing in *Bibby*. The *Bibby* plaintiff did not make the arguments presented by EEOC that sexual orientation discrimination is sex discrimination, not even the obvious sex stereotyping argument, but instead simply asserted that the district court had impermissibly imposed an additional requirement that a same-sex harassment plaintiff prove that the harassment was *not* based on sexual orientation. *See* Brief for Appellant, 2001 WL 34117874, *24-25.[8] In other words, it appears that in *Bibby* all parties simply assumed there was a legal distinction between discrimination "because of sex" and sexual orientation discrimination. As a result, the Third Circuit's analysis focused almost exclusively on the issue of whether the plaintiff had made out a same-sex harassment case under the framework announced in *Oncale*, with minimal discussion of sexual orientation. *See Bibby,* 260 F.3d at 264-65.

Furthermore, note that the sexual orientation cases that were cited in *Bibby* are of limited persuasive authority, as they in turn relied on pre-*Price Waterhouse/Oncale* decisions or contained little to no analysis. *See Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (a race-based discharge case, in which the court stated, in dicta and without analysis, that Title VII does not cover sexual orientation discrimination); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) (stating, without analysis and citing *Williamson*, that it was "well settled" that Title VII does not prohibit sexual orientation discrimination); *Simonton v.*

479-482 (2008) (similarly holding that the Age Discrimination in Employment Act's prohibition of discrimination "based on age" includes retaliation).

[8] A copy of the brief is attached as Exhibit 1.

Runyon, 232 F.3d 33 (2d Cir. 2000) (court did little more than cite to *Williamson* and *Higgins* as well as Congress' failure to enact ENDA). None of these cases analyzed the question of coverage in any significant way, let alone considered the arguments EEOC has made here. In light of the Supreme Court's pronouncements in *Price Waterhouse* and *Oncale*, the Circuit decisions cited by the *Bibby* court no longer have any power to persuade. *Price Waterhouse* firmly rejected the pure biological interpretation of the term "sex" and held that sex stereotyping is actionable. *Oncale* commands the federal courts to apply the plain language of the Act to all circumstances that it logically embraces rather than limit the Act's protections to only those matters of immediate concern to Congress when it selected that language.

More recent decisions, of which the Third Circuit did not have the benefit, reflect a more thorough, considered approach than the persuasive authorities cited in *Bibby* and are more faithful to the type of analysis required by *Price Waterhouse* and *Oncale*.

In *Isaacs v. Felder Services, LLC*, No. 2:13cv693, 2015 WL 6560655 (M.D. Ala. Oct. 29, 2015), the plaintiff contended that he was fired because of his sexual orientation. After noting that the Eleventh Circuit had not yet considered the question, the district court held that sexual orientation discrimination is cognizable as a form of sex discrimination. *Id.* at *3-4. In doing so, the district court cited approvingly the Commission's decision in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).[9] In particular, the *Issacs* court

[9] In *Baldwin*, the Commission considered an appeal of a dismissal of a discrimination claim brought by an air traffic controller who had alleged that he was passed over for promotion because of his sexual orientation. The Federal Aviation Administration argued that the Commission did not have jurisdiction under Title VII to hear the appeal, but the Commission disagreed. In reversing the dismissal, the Commission ruled that Title VII's prohibition of sex discrimination included discrimination because of an individual's sexual orientation. "[S]exual orientation is inseparable from and inescapably linked to sex and, therefore, . . . allegations of sexual orientation discrimination involve sex-based considerations." 2015 WL 4397641, at *5. In addition to analyzing the case in the associational and sex-stereotyping contexts, the

found persuasive the Commission's reliance on race association cases in ruling that Title VII protects individuals in same-sex relationships from sex discrimination. *Id.* at *3. The court also relied on the Commission's determination that Title VII's prohibition on sex stereotyping also applies to persons who are victimized because of perceived deviations from "heterosexually defined gender norms." *Id.* at *3-4 (quoting *Baldwin*, 2015 WL 4397641, at *7-8).

The district court in *Videckis v. Pepperdine Univ.*, --- F Supp.3d ---, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015), a recent Title IX decision, came to the same conclusion – that sex discrimination necessarily includes sexual orientation discrimination.

> [T]he Court finds that sexual orientation discrimination is a form of sex or gender discrimination, and that the "actual" orientation of the victim is irrelevant. It is impossible to categorically separate "sexual orientation discrimination" from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.

Videckis, 2015 WL 8916764, at *7. The court first held that the lesbian student-basketball players stated a claim for sexual orientation discrimination, by alleging that the basketball staff harbored negative views of lesbian persons based on their perceived failure to conform to the staff's views of acceptable female behavior.

> The type of sexual orientation discrimination Plaintiffs allege falls under the broader umbrella of gender stereotype discrimination. Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women—and the relationships between them. Discrimination based on a perceived failure to conform to a stereotype constitutes actionable discrimination under Title IX.

Id. (citing *Centola*, 183 F. Supp. 2d at 410). The court then went on to hold that the plaintiffs had also stated a claim for straightforward sex discrimination, in addition to a sex stereotyping claim.

Commission determined that sexual orientation discrimination is also sex discrimination because the discriminatory actions would not occur "but for" the victim's sex. *Id.*

> Here, Plaintiffs allege that they were told that "lesbianism" would not be tolerated on the team. If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment. Plaintiffs have stated a straightforward claim of sex discrimination under Title IX.

Id. at *8. In doing so, the court cited approvingly the tri-partite analysis set forth by the Commission in *Baldwin*, agreeing that an employee could show that sexual orientation discrimination was sex discrimination "because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex." *Id.* (quoting *Baldwin*, 2015 WL 4397641, at *10).[10]

Finally, the Third Circuit also did not have the benefit of considering numerous federal court decisions over the last 15 years reflecting a consensus that actionable sex stereotyping takes many forms other than perceived masculine and feminine traits. *See* discussion at 11-12, *supra*. That recognition would have necessitated re-examination of the sexual orientation question, for as the Supreme Court has stated, a central purpose of the statute is to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251.

At the end of the day, the plain text of the statute, logically applied in light of Supreme Court precedent discussing the meaning of that text, requires denial of Defendant's Motion. The harassment that Dale Baxley endured was "because of sex." But for Baxley's sex, he would not have been harassed. Had he been in a romantic relationship with a woman instead of another

[10] Recently, the Seventh Circuit has also taken the unusual step of amending an opinion to remove a statement similar to the one in *Bibby* that Title VII did not prohibit sexual orientation discrimination. *See Muhammad v. Caterpillar Inc.*, 767 F.3d 694 (7th Cir. 2014) (*as amended on denial of reh'g*) (original opinion at Docket Entry No. 41, Appeal No. 12-1723).

man, he would not have been harassed. Had he conformed to the perpetrator's stereotypical view of whom men should find sexually attractive or love, he would not have been harassed. Defendant's motion to dismiss must be denied.

II. There Are No Procedural Barriers To EEOC's Suit Alleging Illegal Sexual Harassment Of Dale Baxley.

Defendant seeks to have EEOC's complaint dismissed because it alleges (1) that the claims involving Baxley were beyond the scope of an investigation "reasonably expected to grow out of a charge of discrimination;" and (2) that it did not have "prompt" notice of the claims involving Dale Baxley, and that as a result EEOC's complaint violates due process because EEOC did not act on a charge within 300 days of the alleged discriminatory acts. Defendant's arguments confuse and conflate a number of procedural issues, and betray a misunderstanding of EEOC's role in the enforcement of civil rights laws, but no matter how they are sliced the result is the same – the arguments are without merit.

A. EEOC Litigation Authority Is Governed By The Reasonable Investigation Rule, Which Is Satisfied In This Case; Defendant's Argument Is Based on the Private Litigant Administrative Exhaustion Standard That Is Inapplicable to EEOC.

Defendant contends that EEOC's suit should be dismissed because EEOC has not satisfied all conditions precedent to suit. *See* ECF No. 12 at 5.[11] Specifically, Defendant contends that EEOC cannot sue on behalf of Dale Baxley because the sex harassment claim concerning him could not have reasonably been expected to grow out of EEOC's investigation of five sex harassment charges filed by females. Essentially, by alleging that EEOC's suit is not reasonably related to the underlying charges, Defendant is contending that EEOC failed to exhaust

[11] Defendant incorrectly frames its procedural challenge as a question of this Court's subject matter jurisdiction over the case. However, EEOC conditions precedent to suit are not jurisdictional, and Defendant's Motion is more accurately characterized as a motion for summary judgment concerning conditions precedent.

administrative remedies. But that is the incorrect standard to apply to this case. EEOC authority to litigate claims of discrimination not alleged in an administrative charge is defined by the reasonable investigation standard. In contrast, the permissible scope of a private plaintiff's lawsuit and his/her ability to litigate claims not alleged in his/her administrative charge is controlled by the exhaustion of administrative remedies requirement. These are two different legal standards. Defendant's procedural argument conflates the two standards, applying the wrong test to EEOC litigation. For this reason, its argument fails.

1. *The private exhaustion of administrative remedies standard*

In its motion brief, Defendant confuses the issues by citing to various cases dealing with administrative exhaustion by private parties such as *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3d Cir. 1976). But private plaintiff exhaustion requirements do not define EEOC litigation authority. In this regard, it is critical to understand the difference, procedurally, between a case filed by a private party who has filed a charge of discrimination with the EEOC, and a lawsuit filed by the Commission itself. In the first scenario, before filing a lawsuit, a private individual must exhaust administrative remedies by filing a charge and receiving a notice of right to sue. *Ostapowicz*, 541 F.2d 394 at 398. The reason for the exhaustion requirement is rooted in the purpose of the anti-discrimination statutes. In enacting Title VII, Congress designated the Commission to be the primary federal agency to enforce that law. By also creating the administrative procedures set out in the statute, Congress sought to ensure that the Commission had an opportunity to conduct investigations into allegations of discrimination, notify employers of violations, and seek to eliminate the violations through the conciliation process before there was any court action. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974).

Recognizing the importance of the administrative scheme put in place by Congress,

courts have placed limitations on private suits in order to provide the Commission with the first opportunity to investigate allegations of discrimination. *Ostapowicz*, 541 F.2d at 398. Therefore, a private party is limited to pursuing claims in a lawsuit that "can reasonably be expected to grow out of the charge of discrimination." *Id.* at 398-399; *Gamble v. Birmingham Southern R.R. Co.*, 514 F.2d 678, 687-89 (5th Cir. 1975) (allowing suit to proceed where claim of discrimination in promotion to supervisor positions was not actually investigated by EEOC; sufficient that the claim was "like or related to" the failure to promote claims alleged in the charge). "Were the private party permitted to add claims that had not been presented in the administrative charge filed with the EEOC, the Commission's informal procedures *for resolving* discrimination charges would be by-passed, in derogation of the statutory scheme." *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (internal citations omitted) (emphasis added).

2. *The reasonable investigation standard, not the exhaustion test, applies to EEOC*

EEOC lawsuits are far different from private plaintiff lawsuits in purpose, and unlike private plaintiff suits that involve non-charged discrimination claims, all EEOC Title VII lawsuits are necessarily preceded by pre-litigation administrative procedures calculated to redress the violations that are the subject of the lawsuit (i.e., the EEOC reasonable cause determination and conciliation efforts). As a consequence, EEOC enjoys much broader statutory authority to redress non-charged violations of Title VII.

EEOC is tasked with being the primary enforcer of Title VII, and when it files suit EEOC does not serve as a proxy for discrimination victims but instead acts on its own independent authority to vindicate the public interest in eliminating discrimination in the workplace. *See EEOC v. Waffle House Inc.*, 534 U.S 279, 286-88, 296 (2002) (discussing origin and purpose of EEOC litigation authority).

Significantly, unlike a private lawsuit, before EEOC may file a lawsuit, certain conditions precedent must be met: "[T]here must be a charge filed with the EEOC, notice of the charge to the employer, investigation by the EEOC, a determination of reasonable cause, and an effort at conciliation." *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981); 42 U.S.C. § 2000e-5(b), (f)(1). Clearly, then, the concerns in private party lawsuits about bypassing the administrative process do not arise when EEOC is the litigant. When a private party files suit, the claims raised in the suit must be "like and related" to the claims made in the charge of discrimination, such that the claims could "reasonably be expected to grow out of" an investigation *if* the EEOC were to actually investigate the claims, even if it did not. But when the Commission sues, the lawsuit will have already been based on an *actual* investigation, reasonable cause finding, and conciliation attempt, so the question is not whether the claims could "reasonably be expected to grow" out of the investigation, but whether the claims were *actually ascertained* during the course of the investigation.

For this reason, the EEOC is not limited to litigating only claims presented in the four corners of a charge, that affect the person filing the charge, or that are deemed to have a sufficient nexus to the charge. Rather, "any violations that the EEOC ascertains in the course of a *reasonable investigation* of a charging party's complaint are actionable." *Gen. Tel. Co. of the Northwest, Inc. v. EEOC,* 446 U.S. 318, 331 (1980) (citations omitted) (emphasis added). *See also Caterpillar, Inc.,* 409 F.3d at 833 ("The charge incites the investigation, but if the investigation turns up additional violations, the Commission can add them to its suit"). "Once the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation." *EEOC v. Kronos, Inc.,* 620 F.3d 287, 297 (3d Cir. 2010) (citing *EEOC v. General Electric Co.*,

532 F.2d 359, 364-65 (4th Cir. 1976) and Supreme Court decision in *General Telephone*). As the Fourth Circuit has held in *EEOC v. General Electric Co.,* 532 F.2d 359 (4th Cir. 1976), a case cited with approval by the Third Circuit, "The charge merely provides the EEOC with 'a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices;' and that investigation may well 'disclose, as in this instance, illegal practices other than those listed in the charge.'" *Id.* at 365 (quoting *EEOC v. Huttig Sash & Door Co.,* 511 F.2d 453 (5th Cir. 1975)).

Accordingly, under the reasonable investigation standard EEOC lawsuits are not limited to the types of discrimination typified by the allegations set forth in the administrative charge that triggered the investigation. As the Seventh Circuit has explained:

> The difference between the two classes of case is that exhaustion of administrative remedies is an issue when the suit is brought by a private party but not when the Commission is the plaintiff. Were the private party permitted to add claims that had not been presented in the administrative charge filed with the EEOC, the Commission's informal procedures for resolving discrimination charges … would be by-passed, in derogation of the statutory scheme. That is not an issue when the EEOC itself is the plaintiff, which is why a suit by the EEOC is not confined "to claims typified by those of the charging party," and why Caterpillar is mistaken to think that the EEOC's complaint must be closely related to the charge that kicked off the Commission's investigation. "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." The charge incites the investigation, but if the investigation turns up additional violations the Commission can add them to its suit.

Caterpillar, Inc., 409 F.3d at 832-33 (citations omitted).

Consequently, and contrary to Defendant's assertions, the federal courts have consistently held that EEOC has authority to litigate types of discrimination that were not alleged in the administrative charge that triggered EEOC's investigation but were later uncovered by EEOC during the course of investigating the charge, such as sex discrimination against persons who did not file charges that was uncovered in the course of investigating a race discrimination charge.

See e.g., EEOC v. Chesapeake & O. Ry. Co., 577 F.2d 229, 232 (4th Cir. 1978) (vacating partial summary judgment dismissing claims on behalf of women, where administrative charge only alleged race discrimination, holding that EEOC may proceed because the sex discrimination claims were discovered during the course of investigating the race discrimination allegations); *EEOC v. St. Anne's Hosp. of Chicago, Inc.*, 664 F.2d 128, 130-31 (7th Cir. 1981) (reversing dismissal where complaint asserted a claim for retaliation for plaintiff's hiring of a black male, while charge of discrimination only alleged discrimination on the basis of the plaintiff's sex and religion); *EEOC v. Hearst Corp., Seattle Post-Intelligencer Div.*, 553 F.2d 579, 570-81 (9th Cir. 1976) (EEOC had authority to bring action for sex discrimination against males and females and race discrimination against minority persons though administrative charge only alleged sex discrimination against white male).

In contrast, applying exhaustion requirements, the federal courts have consistently refused to permit private plaintiffs to litigate types of discrimination different from that alleged in their own charges. *See, e.g., Webb v. City of Philadelphia*, 562 F.3d 256, 263 (3d Cir. 2009) (plaintiff failed to exhaust sex discrimination claims where her EEOC charge only claimed religious discrimination); *Bryant v. Bell Atl. Maryland, Inc.*, 288 F.3d 124, 133 (4th Cir. 2002) (plaintiff failed to exhaust color and sex discrimination claims where his EEOC charge only claimed race discrimination); *Fair v. Norris*, 480 F.3d 865, 867 n.2 (8th Cir. 2007) (failure to exhaust administrative remedies where plaintiff did not include claims of sexual harassment in her EEOC charge, which alleged only race discrimination).

So unlike the private plaintiff exhaustion standard, EEOC need not demonstrate any nexus to the original charge allegations because any non-charged Title VII violations found have been the subject of an investigation, reasonable cause finding and conciliation attempt. It is

undisputed that EEOC uncovered the alleged harassment of Baxley during the course of its investigation of the original charges, and there was both a reasonable cause determination and conciliation attempt.[12]

This principle of law is further confirmed by the fact that *even private plaintiffs* are not required to demonstrate any nexus between the claims they identified in a charge and claims they did not allege in a charge but that have been asserted in subsequent litigation *when EEOC actually uncovered and investigated the non-charged claim* during the administrative process, even if the type of discrimination alleged is different from the charge allegations. *See, e.g., Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998) ("When the EEOC investigation of one charge *in fact* reveals evidence of a different type of discrimination against the plaintiff, a lawsuit based on the newly understood claim will not be barred.") (emphasis in original); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970) (allowing suit to go forward on national origin discrimination claim when charge only alleged sex discrimination, but EEOC investigation revealed national origin as the true basis of discrimination). When circumstances show that the non-charged form of discrimination was, in fact, a subject of the EEOC administrative process, the question of reasonable nexus to the charge falls away because the statutory goal of exhaustion has been satisfied, and the non-charged form of discrimination is therefore actionable in litigation notwithstanding that it was not identified in the charge.

Thus, even if, hypothetically, the private party exhaustion standard applied to this case, EEOC would be authorized to litigate its claims because there was an *actual* investigation that unearthed the harassment of Baxley. Here, the assigned EEOC investigator uncovered the

[12] Note also that the term "reasonable" in *Kronos* does not refer to the adequacy of EEOC's investigation or sufficiency of the evidence supporting a reasonable cause finding. Those matters are committed to the sole discretion of the agency and are non-reviewable. *See EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96, 101 (2d Cir. 2015); *Caterpillar*, 409 F.3d at 832-33.

harassment of Baxley while contacting potential witnesses to the harassment alleged by the female charging parties. *See* Exhibit 2, Declaration of Victoria A. Rodia, ¶¶4-5. The investigator first obtained *from Defendant* a list of all of the employees who worked in the telemarketing department between September 1, 2012, and September 30, 2013, which would have included anyone who worked with the charging parties during the time that they alleged they were harassed. *Id.* at ¶4. The list included Baxley. *Id.* The investigator made attempts to contact all of the people listed, and Baxley was one of the individuals she was able to interview. *Id.* at ¶¶4-5. During her interview of him, Baxley described how McClendon had harassed him because of his sex. *Id.* at ¶5. The investigator was not required to ignore patent violations of Title VII simply because they were not referenced in the original charges. *Kronos*, 620 F.3d at 297.

Furthermore, the assigned EEOC investigator requested Baxley's personnel file, and also interviewed the Chief Executive Officer, Gary Hieronimus, and specifically asked him about Baxley's complaints (which he denied knowing anything about). *Id.* at ¶¶6-8. The reasonable cause finding, then, that Defendant also violated Title VII with respect to the harassment of Baxley, was supported by an *actual* investigation that uncovered the violation by following the natural course of the evidence as it developed. *See Davis*, 157 F.3d at 463 (suit may proceed where investigation finds a different type of discrimination not articulated in the charge).

3. *The decisions that Defendant cites are inapposite or support EEOC*

Defendant cites to *EEOC v. Kronos, Inc.,* 620 F.3d 287 (3d Cir. 2010), as support for its position that EEOC cannot sue on behalf of Baxley, but *Kronos* actually *confirms* EEOC authority to pursue its claims regarding Defendant's sex discrimination against Baxley.

First, *Kronos* confirms the applicability of the reasonable investigation standard to this case, not the private exhaustion of administrative remedies test invoked by Defendant. The Third

Circuit held that the EEOC has the "power to investigate a 'broader picture of discrimination which unfolds in the course of a reasonable investigation of specific charge'" and applied the reasonable investigation standard. *Id.* at 297 (quoting *EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979). Consequently, notwithstanding the fact the original charge that triggered the investigation at issue in *Kronos* involved a single deaf job applicant denied a single job in a Clarksburg, WV grocery store, the Third Circuit fully enforced EEOC's investigative subpoena in *Kronos* for nationwide information relating to discrimination over a multi-year period against disabled job applicants across all job categories, all facilities and, notably, every type of disability regardless of similarity or dissimilarity to the disability or circumstances of the deaf job applicant who filed the charge. *See id.* at 292, 297-300.

Thus, *Kronos* illustrates that Defendant's purported distinction between the discrimination against Baxley and that leveled against the five women who filed charges – that Baxley is a male and was subjected to sex discrimination that flowed from his supervisor McClendon's sexual orientation bias rather than sexual desire – is legally immaterial. Analogous to the disability issue in *Kronos*, in this instance EEOC's reasonable investigation began with a set of charges that raised sex harassment, and following the course of the evidence as it developed, EEOC's investigation ended with a finding of sex harassment in two different forms. The same perpetrator committed both forms of sex discrimination in the same workplace, concerning workers in the same jobs, and during the same general timeframe. As in *Kronos*, EEOC's claims invoke the same statutorily protected trait (here, sex; in *Kronos*, disability). In fact, given that *Kronos* affirmed EEOC's authority to pursue discrimination against *any disabilities in any job category*, which are highly individualized circumstances that vary widely and would tend to involve highly dissimilar physical or mental conditions, *Kronos* fully supports

EEOC's authority in this case.

Contrary to Defendant's suggestion, the fact that the *Kronos* court declined to enforce the portion of EEOC administrative subpoena seeking potential race discrimination evidence is immaterial for three reasons. First, *Kronos* decided whether the Court would aid in EEOC's compulsory process by enforcing a subpoena seeking evidence of potential discrimination that EEOC did not possess; it did not purport to decide whether EEOC could issue a reasonable cause determination and litigate the race discrimination issue if EEOC had already uncovered sufficient evidence of race discrimination to warrant such action without use of compulsory process. Here, EEOC obtained the evidence of sex discrimination against Baxley during the natural course of its investigation of the charge allegations and without use of compulsory process. EEOC was not required to ignore that evidence and was duty-bound to seek redress for the violation uncovered.

Second, central to the Third Circuit's determination that it would not enforce the race discrimination portions of the subpoena was its finding that there was no record evidence to support expansion into an investigation of possible race discrimination. *Id.* at 301-02. In other words, the expansion to include possible race discrimination was not a "reasonable investigation" in that instance because the Third Circuit found there was no record evidence of any articulable facts uncovered in the investigation that gave rise to a suspicion of race discrimination. For purposes of enforcement of an administrative subpoena seeking evidence of potential non-charged violations, that is the test for whether EEOC reasonably expanded its investigation to explore matters unrelated to the original charge, i.e., whether EEOC is following the path of the evidence it happened to uncover while investigating the charge allegations and can point to articulable facts now giving rise to a suspicion of unrelated violations, or whether, instead, EEOC lacks a non-arbitrary factual basis for looking at unrelated issues and is engaged

in a pure "fishing expedition." *Id.* at 301-02 (examining EEOC's articulated basis for expansion from disability to race and rejecting "EEOC's attempt to rely on an article in the public domain and purported charges of race discrimination in its database that are not part of this record . . . ."). So even if this case were presented to the Court as an administrative subpoena enforcement matter rather than a lawsuit for a violation that has already been subject to full administrative proceedings, the standard for enforcement would have been satisfied.

Finally, as noted above, the disposition of the race discrimination issue in *Kronos* is plainly distinguishable because in this instance, EEOC has not asserted a protected trait different from that alleged in the charge. In this case, the administrative charges asserted sex discrimination. Regarding Baxley, EEOC found sex discrimination and has asserted those claims in this litigation, making this case far more analogous to the *Kronos'* court's treatment of the disability discrimination issue. In this regard, Defendant's argument is based on a flawed legal premise, i.e., that sex discrimination and sexual orientation discrimination are distinct. But as demonstrated above, sexual orientation discrimination *is* sex discrimination. So even if this case were brought by a private plaintiff, the exhaustion question would merge analytically with the disputed issue of Title VII coverage for sexual orientation discrimination and would require resolution of that issue.

The other cases cited by Defendant also do not support its argument. First, many of those cases were brought by private litigants, and therefore did not apply the reasonable investigation standard. *See* ECF No. 12 at p. 6 (citing *Ostapowicz*); p. 8 (citing *Browm v. Envoy Air, Inc.*, Case No. 14-383, 2014 WL 6682540 (W.D. Pa. Nov. 25, 2014). Since those cases applied the standard applicable to private litigant cases to determine whether there was exhaustion of administrative remedies, they are inapplicable here.

Second, Defendant relies heavily on *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), attempting to shoehorn that case into its discussion of *Kronos* and ignoring the fact that *Kronos* fails to cite *Bailey* for any proposition. As a Sixth Circuit case, *Bailey* is not controlling. Moreover, the *Bailey* decision, which applied the more stringent exhaustion standard applicable to private litigants, was issued several years before the Supreme Court's decision in *General Telephone Co. of the Northwest v. EEOC*, which established the reasonable investigation standard as the appropriate standard to apply to EEOC litigation. *See Gen. Tel.*, 446 U.S. at 331.

Under the reasonable investigation standard, EEOC may file suit for any alleged discrimination it uncovers at the administrative phase. Thus, EEOC can seek relief for Defendant's sex harassment against Baxley even though the charges of harassment were filed by females. Moreover, EEOC's allegations in the complaint and the allegations in the charges of discrimination involve parallel facts: the same protected category (sex), the same issue (harassment), the same location, the same perpetrator, and the same time frame (several months in 2013). The violations set forth in the reasonable cause determinations also emanated from intertwined sex norms that posit that women are objects for male sexual gratification, and men should only feel sexually gratified by women. Defendant's Motion should be denied.

B. EEOC's Complaint Is Timely, And The Reasonable Cause Determination Gave Defendant Notice Of The Claims Involved.

Defendant also contends that EEOC may not sue on Baxley's behalf because EEOC purportedly failed to "act on a charge" within 300 days of the allegedly discriminatory act. While Defendant appears to concede that EEOC may pursue discrimination not identified in an administrative charge of discrimination, Defendant essentially argues that EEOC must discover any non-charged discrimination and notify the employer it has uncovered such non-charged discrimination within 300 days of the discrimination occurring or the claim is time-barred.

Defendant does not cite to any authority to support this proposition, because there is none. Defendant's invitation to this Court to create an extra-statutory limitations period is contrary to the plain language of Title VII. Any individual acts of discrimination uncovered in the course of EEOC's investigation that occurred within 300 days of the original charge filing are actionable.

Under Title VII, an administrative charge of discrimination must be filed within 300 days of the allegedly discriminatory action. 42 U.S.C. §2000e-5(e)(1). The express language of the statute identifies only one temporal benchmark for measuring the timeliness of a discrimination claim – the filing of the charge. *See id.* It is *the charge filing date* that serves as the end date for the 300-day period, not some other date. With the exception of providing notice of the filing of a charge within ten days, nothing in the text of Title VII requires that the agency take any particular action on a charge, such as discovering non-charged discrimination or issuing a reasonable cause determination, within a discrete period of time. *See Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1202-03 (9th Cir. 2016) (plain text of Title VII requires that a "charge" be filed within 300 days of the alleged unlawful employment action, not that a reasonable cause determination must be issued within the 300 day period).

Defendant's argument has been repeatedly rejected by other federal courts. Recently, in *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2016), the Ninth Circuit reversed a district court decision holding that EEOC could only seek relief for non-charging party class members who were allegedly subjected to unlawful discrimination within 300 days of the issuance of EEOC's reasonable cause determination. *Id.* In doing so, the court observed that the district court may have been concerned that the employer had not received sufficient notice of the potential class claims in the initial charge, but the court dismissed those concerns because the district court failed to distinguish between Title VII's time frame for filing a charge with the

EEOC's responsibility to notify an employer of the *results* of its investigation. *Id.* at 1203.

Other federal courts, including this Court, have similarly held that it is the charge-filing date that is used to measure the timeliness of non-charged acts of discrimination. *See EEOC v. U.S. Steel Corp.*, Case No. 10-1284, 2012 WL 3017869, *5-6 (W.D. Pa. Jul. 23, 2012) (collecting district court cases around the country which either declined to apply the 300 day rule at all to EEOC class suits, or applying the 300 days from the date the relevant charge was filed, and holding that EEOC could seek relief for then-unidentified victims who were subject to the allegedly illegal alcohol breath tests within 300 days of the date the original charge was filed); *EEOC v. Bare Feet Shoes of PA, Inc.*, Case No. 04-3788, 2006 WL 328355, *3 n.4 (E.D. Pa. Feb. 10, 2006) (holding EEOC Title VII claim for non-charge filing person uncovered in course of investigation was timely because discrimination took place within 300 days of charge that triggered the investigation; noting "[t]he Courts of Appeals have not expressly placed time limits on the EEOC's authority to bring claims on behalf of non-charging individuals.").

Here, the EEOC has alleged that Baxley was harassed and constructively discharged in July and August of 2013. The first charges of discrimination filed against Defendant were filed on August 26, 2013, a matter of days after Baxley was constructively discharged. *See e.g.*, ECF No. 12-1 at p. 2 (Charge No. 533-2013-01350). The charges of discrimination allege harassment beginning in May 2013, and since they were filed in August 2013, there is no question that they were timely filed. EEOC has alleged that the harassment of Baxley began in mid-July 2013, ending on August 19, 2013, with his constructive discharge. ECF No. 1 at ¶11(d)-(g). Therefore, the discrimination that Baxley suffered occurred within 300 days of the charges that triggered the investigation. Accordingly, EEOC's claims concerning Baxley are timely.

Defendant suggests that purported due process rights of unspecified origin were violated

because it claims it did not learn of the allegations relating to Baxley until the reasonable cause determination issued. In making this argument, Defendant betrays its fundamental misunderstanding of the purpose of the Title VII administrative process. First, the administrative procedures laid out in Title VII do not implicate due process rights. That is because those procedures are purely non-binding and non-adversarial – there is no trial and EEOC cannot mandate relief concerning a private sector employer. EEOC investigations of private employers are not adjudications that alter legal rights, and therefore no cognizable liberty or property interest is implicated. *See, e.g., Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979) (holding that EEOC's reasonable cause determination is not subject to review by a court as a final agency action, stating that the determination, standing alone, "is lifeless, and can fix no obligation nor impose any liability on the [employer]. It is merely preparatory to further proceedings. If and when the EEOC or the charging party files suit in district court, the issue of discrimination will come to life, and the [employer] will have the opportunity to refute the charges."). As this Court has previously stated:

> Where an agency does not adjudicate or make binding determinations which directly affect the legal rights of individuals, the due process considerations of the Fifth Amendment do not attach. The EEOC's function is investigative, and thus the EEOC does not make determinations affecting the legal rights of individuals because those individuals retain the right to a *de novo* review of their charges of discrimination in a court of law.

Forbes v. Reno, 893 F. Supp. 476, 483 (W.D. Pa. 1995), *aff'd*, 91 F.3d 123 (3d Cir. 1996) (citations omitted). If a charge is not resolved during the administrative process, the remedy is more process, in the form of litigation, where federal district courts exercise de novo review of the discrimination allegations stated in the Commission's suit. *See, e.g., General Elec.,* 532 F.2d at 370; *EEOC v. E. I. DuPont de Nemours and Co.*, 373 F. Supp. 1321, 1338 (D. Del. 1974).

Second, notification to Defendant in the letter setting out EEOC's reasonable cause

determination, as well as the investigator's request for Baxley's file and specific questions to Defendant's chief operating officer about Baxley's complaints, was sufficient to place Defendant on notice that it could be held liable for violations of Title VII with respect to Dale Baxley. Under Title VII, it is well settled that a reasonable cause determination serves as both necessary and sufficient pre-suit notice of non-charged discrimination uncovered by EEOC. *See, e.g., General Elec. Co.* 532 F.2d at 370 (holding EEOC not required to afford employer opportunity to comment on non-charged discrimination allegation before reasonable cause finding and, alternatively, reasonable cause finding gave employer sufficient opportunity to present its position during conciliation); *EEOC v. St. Anne's Hosp. of Chicago, Inc.*, 664 F.2d 128, 131 (7th Cir. 1981) ("'Prompt notice of reasonable-cause determination also serves to cure any deficiencies in the 10-day notice that may result from EEOC amendment of the claimed violation after investigation.'") (*quoting Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 n.32 (1977)); *EEOC v. JP Morgan Chase Bank, N.A.*, No. 2:09-CV-864, 2011 WL 3328737, at *10 (S.D. Ohio Jul. 6, 2011) (letter of determination, coupled with requests for information during the course of the investigation, was enough to place defendant on notice of the scope of claims brought by EEOC in litigation); *see also EEOC v. Bloomberg, LP*, 751 F. Supp. 2d 628, 634 (S.D.N.Y. 2010) (charges, requests for information during the investigation, and reasonable cause determination enough to place employer on notice of the claims that would be conciliated). Title VII's administrative scheme does not require, much less contemplate, that a defendant employer will be notified of *all* potential violations within ten days of a charge being filed.[13]

[13] While Defendant asserts that it was denied the opportunity to present its own views to EEOC before the investigation was completed, as discussed, there is no constitutionally guaranteed right to do so in a non-adversarial, non-binding investigation. Moreover, as the Fourth Circuit has observed, the employer is always free to present its position in response to a reasonable cause determination and in conciliation discussions. *See General Elec. Co.* 532 F.2d at 371. Since a

Nor does it make sense to apply the rule Defendant proposes, because to do so would eviscerate the reasonable investigation standard, thereby eroding EEOC statutory authority. Under that standard, "the original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge, provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act." *General Elec.,* 532 F.2d at 366. If EEOC is permitted to sue for any violations discovered in the course of a reasonable investigation, the 300 days *must*, at the very least, date from the filing of the original charge. Otherwise, EEOC's ability to redress discrimination for victims other than charging parties would be severely limited, especially in cases where a more extensive investigation was required. This is because the EEOC's statutory authority to redress non-charged discrimination would be made to turn on the uncertain timing of when non-charged discrimination happened to be uncovered during the investigation – a date that can be greatly influenced by an employer's own recalcitrance, administrative charge backlog and competing workload, and simple luck in the timing and order of witness selection by EEOC investigators – rather than the certain, statutory charge filing date.

Notably, Defendant does not argue that it *never* received notice of the claims relating to Baxley before EEOC filed suit. Rather, Defendant contends that it was "blind-sided" because it was allegedly unaware that the EEOC was investigating harassment of Baxley before EEOC issued its reasonable cause determination. Whether true or not, that is not a basis for dismissing EEOC's suit because the claims relating to Baxley were uncovered during a reasonable investigation. EEOC is permitted to litigate those claims so long as they were included in the

---

reasonable cause determination is non-binding, the timing of the employer's presentation – whether before or after the determination – is legally irrelevant.

reasonable cause determination, which gave notice to the Defendant and an opportunity to conciliate those claims. That is exactly what occurred here, as Defendant has conceded in its briefing. Defendant's motion to dismiss on this ground should be rejected.

CONCLUSION

Sexual orientation discrimination is discrimination "because of sex." EEOC's complaint alleges facts that state a claim on behalf of Dale Baxley for sex discrimination in violation of Title VII, under any or all of three lines of analysis EEOC has identified. EEOC has also satisfied all conditions precedent to suit, and there are no other procedural reasons to justify dismissal. Therefore, Defendant's motion to dismiss should be denied.

Respectfully submitted,

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DEBRA M. LAWRENCE
Regional Attorney
Baltimore, Maryland

/s/ *Ronald L. Phillips*
RONALD L. PHILLIPS
Supervisory Trial Attorney
Ohio I.D. No. 0070263
EEOC, Baltimore Field Office
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201
410-209-2737
ronald.phillips@eeoc.gov

/s/ *Deborah A. Kane*
DEBORAH A. KANE
Senior Trial Attorney
Pa. I.D. No. 92531
EEOC, Pittsburgh Area Office
1000 Liberty Avenue, Suite 1112
Pittsburgh, PA 15222
412-395-5866
deborah.kane@eeoc.gov

EXHIBIT 1

Exhibit 1

2001 WL 34117874 (C.A.3) (Appellate Brief)
United States Court of Appeals,
Third Circuit.

John J. BIBBY, Appellant,
v.
PHILADELPHIA COCA-COLA BOTTLING COMPANY, Appellee.

No. 00-1261.
January 16, 2001.

On Appeal from the Order Dated March 2, 2000, by the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 98-cv-00287

Brief for Appellant (Appendix Volume I, Pages A1-A44)

Jonathan J. James, Esq., Arthur B. Jarrett, Esq., James & Jarrett, P.C., Attorneys for Appellant, Stephen Girard Building - 7th Floor, 21 South 12th Street, Philadelphia, Pa. 19107, 215-751-9865.

***2** *TABLE OF CONTENTS*

***3** *TABLE OF AUTHORITIES*

CASES

STATUTES

5 *STATEMENT OF RELATED CASES AND PROCEEDINGS

1. No appeal in or from the same civil action or proceeding in the District Court was previously before this or any other Appellate Court.

2. Plaintiff-Appellant, John J. Bibby, knows of no other case pending in this or any other court that will directly affect or be directly affected by the Court's decision in this appeal.

STATEMENT OF SUBJECT MATTER *AND APPELLATE JURISDICTION*

1. The District Court's jurisdiction was based upon 28 U.S.C. §§ 1331, 1343 and 1367.

2. This appeal is properly before the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1291. On March 2, 2000, the district court, Hon. Jan E. Dubois, granted defendants' motion for summary judgment, thus creating a final appealable order which disposed of all claims with respect to the parties. Al (Memorandum and Order).

3. This appeal was timely filed pursuant to Fed. R. App. P. 4(a) on March 28, 2000. A21 (Notice of Appeal).

***6** STATEMENT OF THE ISSUES PRESENTED *AND STANDARD FOR REVIEW*

1. Did the District court err in granting defendant, Philadelphia Coca Bottling Company's Motion for Summary Judgment on Plaintiff's claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. s. 2000e et seq. Al (Memorandum and Order); and in the granting of said motion, did the Court place an additional burden on an otherwise worthy Title VII plaintiff, of proving that the discrimination that Title VII sought to eliminate in the workplace, as a threshold matter, occurred for reasons other then his sexual orientation.

The standard of review this Court exercises is plenary review over a district court's granting of summary judgment, and the facts are reviewed in the light most favorable to the party against whom summary judgment was entered. *Coolspring Stone Supply, Inc. v. American States Life Ins. Co.,* 10 F.3d 144, 146 (3d Cir. 1993).

***7** *STATEMENT OF THE CASE*

A. Nature Of The Case, Course of The Proceedings, And Disposition In the Court Below

The present matter came before the lower Court on an Amended Complaint filed on behalf of the plaintiff, John J. Bibby, after Plaintiff filed a pro se Complaint. A22 (Complaint). The complaint was brought pursuant to federal and state claims, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. s. 2000e et seq, alleging that co-workers and supervisors of Plaintiff at the Philadelphia Coca Cola Bottling Company, acted in a manner to cause plaintiff to suffer from same sex harassment, resulting in physical, emotional and financial harm by creating a hostile work environment which materially altered his work place, thus depriving him of his constitutional rights, as alleged throughout plaintiffs amended complaint. A22 (Complaint).

Defendant, Philadelphia Coca Cola Bottling Company filed a motion for summary judgment on June 24, 1999. The district court, Hon. Jan E. Dubois, decided defendant, Philadelphia Coca Cola Bottling Company.'s summary judgment motion in favor of defendant, Coca Cola. Al (Memorandum and Order).

B. Statement Of The Facts Pertinent To The Issues Presented For Review

1. Plaintiff Protected under Title VII

In June, 1978, just three days after having graduated from Cardinal Dougherty High School, Plaintiff began working for defendant, Philadelphia Coca ***8** Cola Bottling Company. [hereinafter: "Coca-Cola"]. A61 (Deposition). Plaintiff's employment went without incident for about twelve (12) years. Then in 1989-90, Plaintiff was suspended for taking photographs of a dangerous condition at the work cite, after injuring himself. Plaintiff, concerned for his fellow workers, intended on using the photographs before the safety committee. A62 (Deposition). Other then the suspension for taking photographs, Plaintiff's record was unblemished until 1993, fifteen (15) years after being hired from high school.

Then in 1993, Defendant acted in a manner to show they perceived Plaintiff to be infected with the AIDS virus. This fear was generated when Plaintiff became ill, lost weight and threw up blood. A67 (Deposition). In fact, it was during Plaintiff's illness in 1993, that he felt compelled to disclose his alternative male lifestyle to defendant, Coca Cola. A48-49 (Deposition). During this disclosure, Cathy Wilson, Director of Human Resources at Coca Cola, informed Plaintiff he was being suspended for going to the hospital. A50 (Deposition).

On August 12, 1993, Plaintiff was experiencing chest pains, stomach pains, uncontrollable crying and upset. Plaintiff was bent over holding his stomach and chest in pain. At that point, Cliff Risell, Director of Operations approached Plaintiff, and began yelling at him. Plaintiff explained his predicament, and ***9** requested to go to the hospital, at which point, Mr. Risell stated "so go." A58 (Deposition). Plaintiff went to the hospital and was suspended by Mr. Risell for walking off the job. A58 (Deposition).

Risell characterized Plaintiff's behavior, warranting termination, as "sleeping on the job." 'A72 (Deposition). When questioned about whether Plaintiff indicated he was sick, Risell stated he never said anything and never gave any excuse, justification or basis for his behavior. A82 (Deposition). However, when questioned later on about a memorandum he wrote discussing that incident, he acknowledged writing "John jumped up, grabbed his chest and said he was experiencing severe chest pains," A92 (Deposition), thereby confirming what other employees' stated they observed.

It was clear to other employees that Plaintiff looked ill. Louis Zaccagni, another Coca Cola co-worker, testified that he saw Plaintiff on his way out from the locker room and told him he didn't look good. Plaintiff responded that he wasn't feeling well. A100 (Deposition). Zaccagni then stated that Plaintiff looked "pale and a little unkempt and his shirt was open." He looked like "... someone who may have had the flu or something, that kind of rundown look." A99 (Deposition). During Plaintiff's suspension, he was offered $5,000.00 with ***10** six months' benefits and six months' unemployment by Mr. Risell and Mr. Kolb, director of Human Resources, if he would resign, otherwise he would be terminated. A60 (Deposition). Plaintiff, having done nothing wrong, decided to fight his suspension, at which point he was terminated.

On December 17, 1993, after a full hearing, an arbitration panel ruled against Coca-Cola, in favor of Plaintiff, finding that the employer had attempted an improper discharge of Plaintiff. Plaintiff was reinstated with full back pay and all benefits. A61 (Deposition).

Thereafter, the work environment in which Plaintiff was immersed, increased in tension for Plaintiff. On December 23, 1993,

an employee of Coca Cola, Frank Bertchsci, attempted an assault against Plaintiff in front of co-workers, Mike Murray and Mike Wall, while in the employee locker room. A47 (Deposition). Bertchsci got up, made a fist and told Plaintiff to leave. Bertchsci put his clenched fist directly in Plaintiff's face. Bertchsci grabbed Plaintiff and threw him against the lockers and screamed that he would beat him badly. While Plaintiff reported the incident to company officials, no substantive action was ever taken by Coca-Cola to ameliorate the situation. A51, 57 (Deposition).

***11** Bertchsci, thereafter, regularly engaged in harassment of a sexual nature with violent features against Plaintiff. Defendant, Coca-Cola, Inc. did not adequately prevent or attempt to intervene to stop this situation.

On January 22, 1995, Frank Bertchsci, again, threatened to physically harm Plaintiff. Bertchsci, while controlling a forklift, slammed a stack of pallets under the steps where Plaintiff was working, thereby blocking him. Bertchsci had refused to complete his work assignment and damaged company property. He was protesting having to work near Plaintiff. He yelled to Plaintiff that "everyone knows you're a faggot" three times, and then "everyone knows you are as gay as a three dollar bill," and "everyone knows you take it up the ass" three times. A51-56 (Deposition). Plaintiff reported these latest events to Fran Smith (production. manager supervisor). Bertchsci who intimated that through his relationship with Cliff Risell, he could have the supervisors fired if they attempted to help Plaintiff. A55 (Deposition).

Throughout all of these events, Plaintiff was having severe emotional and physical problems as a result of the abuse at his job site. Plaintiff was suffering from depression and intense gastrointestinal problems. A59,63-64 (Deposition).

***12** From October to December of 1995, Plaintiff was always being reported or reprimanded by defendants. Plaintiff was turned down for promotions that he was entitled to and when he grieved the process and won, the position was eliminated from his department. Al 15 (Deposition).

Throughout the Plaintiff's employment, he endured humiliation from his co-workers, including attacks, both physical and verbal. He was called a "sissy" A66 (Deposition), by Frank Berthcsi, which caused great humiliation. A132 (Deposition).

Other supervisors working for Coca Cola would also humiliate Plaintiff. In one instance, Gene Keller, warehouse supervisor, was walking along side the scrubber continually yelling and screaming at Plaintiff. Plaintiff told Keller he could not concentrate with all that yelling, which eventually resulted in Plaintiff tapping a skid of cans. This incident resulted in Plaintiff going to the hospital due to a nervous breakdown, having experienced quick breathing, headache, chest pain and crying. A132 (Deposition).

Plaintiff was constantly being screamed at by Cliff Risell. In one instance, Plaintiff was told by Fan Smith to go to the office and get gloves. Plaintiff ***13** complied. While in the office, he was confronted by Cliff Risell who immediately began screaming at Plaintiff, asking "what are you doing in here." Plaintiff told him, at which point, rather then believe Plaintiff, Risell called Fran Smith to verify that he, indeed, sent Plaintiff A123 (Deposition).

Cliff Risell would single out Plaintiff by writing him up for being out of uniform, even if the infraction was two buttons unbuttoned on his shirt. A127 (Deposition).

In April of 1996 Plaintiff had an accident on a forklift. Cliff Risell pushed the matter in an expedited fashion before the safety board within one week. This process usually took months. A134 (Deposition). Coca-Cola claimed that Plaintiff caused five thousand dollars in damage to the forklift. The amount of $5,000.00, coincidentally, was the minimum amount required for points to be assessed against Plaintiff in an accident, to his detriment. A95 (Deposition). Plaintiff believed that Risell wanted the board to find against Plaintiff because the labor contract says that any person can be terminated for two or more accidents charged against them. A93 (Deposition). The habit and custom on the job was not to report accidents and damage to forklifts. A policy of enforcement was applied to Plaintiff but not his coworkers. A 138 (Deposition).

***14** In other instances, Plaintiff reported to Fran Smith, that there was grease on bottles that were going into the machine, A137 (Deposition), and no action was taken. Plaintiff, through the course of his employment, kept date books, documenting all instances of relevance at the company. Plaintiff testified that the boom on the forklift broke four times and nothing was said, skids smashed daily, nothing done. Plaintiff felt harassed and singled out. Other poles were damaged and a blade was bent, but nothing was ever done. A128 (Deposition).

It was not just Plaintiff's perception that he was being singled out and treated differently then other employees. Dennis Anderson, an employee at Coca Cola since 1969, felt that Plaintiff was singled out. A107 (Deposition). Mr. Anderson noted that after Plaintiff's arbitration and reinstatement at Coca Cola, Mr. Gene Keller, (Director of Warehousing) approached him and told him to tell Plaintiff to remove a blue liner he was wearing because "I don't want to get involved in what's going on between him and Cliff." A108 (Deposition).

Mr. Anderson testified to other instances where Plaintiff was treated unfairly by Cliff Risell. One instance was when Cliff Risell would stand with John Alamey and just watch Plaintiff work. While this act of "supervision" would be part of what management does, Mr. Anderson stated that it was "not [done] like ***15** that" with other employees. A109 (Deposition).

Mr. Anderson testified that Plaintiff was singled out by Cliff Risell for violating the dress code. He was "told about hat, T-shirt, shorts, wearing shorts, sneakers, and there would be others who wear some of those things and still today wear those things and nothing is done or said to them." A110 (Deposition). There were times, however, when Cliff Risell would talk to employees on the work floor, including Tommy Adams, Buddy Roxanne and Frank Berthcsi. Each of these employees were out of uniform and nothing was said or done to them. Al 12 (Deposition). During the time when Plaintiff was terminated for allegedly violating company policy, Louis Zaccagni was playing a radio while at work, in violation of company policy. Cliff Risell heard this and did nothing to him. A112 (Deposition).

In fact, Louis Zaccagni testified that "the policy against reading papers and carrying the personal possessions, lunches, bringing radios was not enforced... it was a policy that had grown lax." "...there was quite a few papers on the floor and people would bring lunches." ... "I myself carried a radio out to my place..." When asked whether management reprimanded him for what he did, Zaccagni stated "No." When asked whether Risell ever saw Zaccagni with the radio, he ***16** stated "I believe that Cliff saw the radio, yes."

Finally, Louis Zaccagni gave a statement to Plaintiff's prior counsel saying "I have seen others wear non safety shoes who were not disciplined."

Other times, management would harass Plaintiff by following him around, whether it was to the bathroom, from one job to another, or by just standing and watching him. A109 (Deposition).

Other evidence of harassment of Plaintiff occurred regarding the filing of grievances. Mr. Anderson was told by Fran Smith, production manager, that he was instructed by Cliff Risell that all grievances that were filed by Plaintiff had to go directly to Cliff Risell. Cliff Risell wanted to handle them personally. Other employee's grievances first went to Fran Smith then to John Kolb, Jr,. A113 (Deposition).

Mr. Anderson believed that Plaintiff was being harassed by Cliff Risell because of his sex, male. A109 (Deposition).

Other forms of harassment against Plaintiff were evidenced in the ***17** company's lax attitude towards graffiti. Graffiti was allowed to remain in the men's room for over eleven months, if it related to sexually explicit material, especially related to Plaintiff. Plaintiff complained to Larry Norvell, Vice President of Human Resources, who told him it would be removed. It was never removed, and Plaintiff was forced to file a grievance. This graffiti included lewd words and drawings with Plaintiff's name affixed to the sexual slurs. The company generally removed any kind of racial or other prejudiced writings in the bathrooms. In fact, Gene Keller stated that anyone caught writing on the walls using the "N" word would be fired on the spot. Only material targeting Plaintiff was allowed to remain on the bathroom walls. A 14.1-143 (Deposition).

The hostility towards Plaintiff was so prevalent throughout the company, that other employees felt they would be retaliated against for standing up for Plaintiff. In one instance, Dennis Anderson, a thirty year employee, was asked by Plaintiff to give a statement on Plaintiff's behalf, regarding the incident on January 23, 1995 with Berthcsi. Mr. Anderson declined stating "I was fearful of retaliation ...by the company." A104 (Deposition). He further believed that Coca Cola was now out to get him for helping Plaintiff at the arbitration. A110-112 (Deposition).

***18** Mr. Anderson was told by Joe Brock, Sr, the head of the Union that Cliff Risell felt he was going to lose the arbitration and was ""pretty pissed off about it" and that there would be "repercussions" that would come from losing the arbitration.

A104 (Deposition).

Mr. Anderson did testify at Plaintiff's arbitration. As predicted, Mr. Anderson was retaliated against for testifying on behalf of Plaintiff. He was written up several times, for being out of uniform, for using the air phone and for mixing bad product. In addition, he was given verbal warnings. A104-106 (Deposition).

***19** *SUMMARY OF ARGUMENT*

Is an otherwise worthy Plaintiff suing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, who has suffered from same sex harassment, which materially altered his work place and created a hostile work environment, required to first prove that the egregious behavior was not predicated upon his sexual orientation?

ARGUMENT

I. DID THE DISTRICT COURT JUDGE ERR IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, BY REQUIRING AN OTHERWISE FACTUALLY WORTHY TITLE VII PLAINTIFF, AS A THRESHOLD MATTER, DISPROVE SEXUAL ORIENTATION AS. THE MOTIVATING FACTOR FOR THE SEXUALLY HOSTILE WORK ENVIRONMENT WHEREAS A HETEROSEXUAL PLAINTIFF NEED NOT OVERCOME THE SAME THRESHOLD INQUIRY?

The United States District Court Judge, Jan E. Dubois ruled in favor of defendant, Coca-Cola's, motion for summary judgment. The District Court Judge held that the case presented by Plaintiff was not cognizable under current Title VII jurisprudence. Plaintiff replied to Coca-Cola's motion for summary judgment and argued that he should be allowed to proceed onto for trial on the factual merits present.

By ruling against John Bibby, at the summary judgment level, the District ***20** Court effectively eliminated Plaintiff's ability to have his case decided on the merits. The District Court's decision ignored the public policy, which is the bedrock of anti-discriminatory statutes like Title VII.

Title VII's broad social policy is nothing less than the eradication of discriminatory animus and hostile behavior in the workplace. The District Court reasoned that sexual orientation is not recognized as a protected class of people under Title VII. Plaintiff's complaint and resulting discovery process detailed numerous egregious instances of sexual harassment and hostile work environment. Plaintiff argued that the policy behind Title VII is society's desire to prevent the trauma and harm that often followed sexually harassing conduct in the workplace.

John Bibby is a current two-decade loyal employee of defendant Coca-Cola Bottling Company [hereinafter "Coke"]. Over time Plaintiff's work environment became extremely hostile and tainted due to the repeated acts of sexual harassment targeted against him, by his coworkers.

It is alleged by Plaintiff that the defendants acted in a intentional manner to cause him physical, emotional and financial harm, thus depriving him of his rights, as alleged throughout plaintiffs amended complaint. Plaintiff sought to ***21** redress the deprivation of his rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq.

Plaintiff's complaint alleged that the defendants acted in a manner to cause plaintiff physical, emotional and financial harm, thus depriving him of his constitutional liberty rights.

Coke's summary judgment motion primarily raised one issue relevant to plaintiffs concern on appeal: Whether Plaintiff, a gay male, could not establish that Defendant violated Title VII as a matter of law, as sexual orientation is not a protected class.

Throughout the Plaintiff's employment, as noted in the Statement of Facts, he endured humiliation from his co-workers,

including attacks, both physical and verbal. These acts against Plaintiff ranged from disgustingly graphic sexualized graffiti and name calling to more dangerous physical acting-out with threat of harm or machinery accident.

Also noted in the Statement of Facts above, several supervisors, working for Coca Cola, would also engage in sexually harassing improper conduct directed at Plaintiff. Humiliation and victimization by Coke employees, in a sexually charged manner, is sexual harassment.

***22** As indicated in the Statement of Facts, Coke engaged in selective application of company policy and rules, as well as their enforcement was directed to Plaintiff, but not his coworkers. It was not just Plaintiff's perception that he was being singled out, and selectively treated differently then other employees.

The hostility towards Plaintiff was so prevalent throughout the company, that other employees, such as Dennis Anderson, felt they would be retaliated against for standing up for Plaintiff. In one instance, Dennis Anderson, a thirty-year employee, was asked by Plaintiff to give a statement on Plaintiff's behalf, regarding an incident at work. Mr. Anderson declined stating "I was fearful of retaliation ...by the company." A104 (Deposition). He further believed that Coca Cola was now out to get him for helping Plaintiff at the arbitration. A 10-112 (Deposition).

Mr. Anderson did testify at Plaintiff's arbitration. As predicted, Mr. Anderson was retaliated against for testifying on behalf of Plaintiff. He was written up several times, for being out of uniform, for using the air phone and for mixing bad product. In addition, he was given verbal warnings. A104-106 (Deposition).

***23** Plaintiff was seen and psychologically evaluated by a plaintiffs expert, Edward J. Dougherty, Ed.D., BCFE on September 2, 1998. As a result of the clinical interview lasting approximately four (4) hours, including psychological tests including the Kaufman Short Neuropsychological Assessment Procedure, the Personality Assessment Inventory, Kaufman Brief Intelligence Test and Bender Gestalt Test, as well as a review of various documents, Dr. Dougherty concluded "to a reasonable degree of psychological certainty that Plaintiff suffers from post traumatic stress disorder that is directly related to his experience of harassment and physical confrontation while an employee at the Coca Cola Bottling Company." A145 (Deposition). Dr. Dougherty further opined that Plaintiff is in need of "continued psychiatric and psychological care. His medication should be closely monitored and he should be involved in individual therapy at least twice a week to help him deal with the noted stress." A146 (Deposition).

As a result of the all of the above, Plaintiff suffered, and continues to suffer from depression, stomach and unidentified intestinal disorders. Plaintiff also needs to receive constant medical care and medication for the stress and hostility regularly visited upon him by the defendants.

***24** When one considers the amount of evidence raising the question of Title VII violation in this matter, Plaintiff has met the evidentiary hurdle necessary to have a jury decide the case on its merits as oppose to summary judgment.

The District Court engaged in an impermissible determination which sought to ignore the quality and nature of the sexually harassing acts and focus only on whether the events occurred because Plaintiff is gay (not permitted) or male (permitted). The District Court was satisfied that Plaintiff could not overcome a hurdle which basically states: If you are gay and have been sexually harassed in the work place, This District Court now imposes an extra burden to disprove your sexuality as cause of the harassment.

The dangerousness of that manner of decision is apparent as soon as one argues the opposite. Do our courts require heterosexual plaintiffs in Title VII *quid pro quo* sexual harassment to first disprove their own *heterosexuality* as the possible underlying cause of the complained of acts of discrimination that the (for example).

Plaintiff cannot locate any precedent where an otherwise factually sound heterosexual Title VII plaintiff had to first disproof his sexual identity as the cause ***25** of the Title VII sexually harassing acts. However, Plaintiff, in the matter currently on appeal was required to do just that: first disprove his sexual orientation as a possible explanation for the Title VII worthy sexually harassing acts. Instead, the District Court should leave that burden of proof to the jury. Moreover, the broad social policies behind the anti-discrimination Title VII statute address the creation of hostile work environments, which are the result of a contamination in the work place by (in this matter) sexually aggressive and demeaning harassment.

The District Court should not be permitted to interpose a threshold inquiry into homosexuality identity of an otherwise worthy Title VII plaintiff as the possible predicate cause of the sexual harassment. The Courts have not required heterosexual plaintiffs to do that same threshold inspection concerning whether their sexual orientation affected the underlying sexual harassing conduct complained of in their cause of action.

In this regard otherwise worthy Title VII plaintiffs should not have threshold identity questions to answer when the complained of sexually harassing acts, themselves, are in dire need of amelioration under Title VII.

***26** The United States Supreme Court's recent decision in *Oncale v. Sundowner Offshore Services,* 118 S.Ct. 998 (1998), has set a bright line rule, that discrimination based upon same sex harassment is cognizable under Title VII.

After the Supreme Court decision of *Oncale,* Title VII now afforded federal civil rights employment protection to gay and lesbian employees whose rights were violated under Title VII's prohibition against same sex harassment.

The *Oncale* Court stated, " ... discriminatory intimidation, ridicule and insult ... sufficiently severe or pervasive to alter the conditions of the [Plaintiff's] employment [thus] creat[ing] an abusive working environment ..." which violates Title VII. *Harris v. Forklift Systems Inc.,* 510 U.S. 17, 21.

Plaintiff had developed a factually significant post discovery pretrial thorough and thoughtful same sex harassment civil rights employment suit comprised of causes of action, which find as their primary anchor, lynchpin and hold, the lessons of *Oncale.*

The Supreme Court has spoken clearly and unambiguously, in *Oncale* concerning the statutory prohibition against discriminatory practice in the work ***27** environment. Under *Oncale,* the Supreme Court will not tolerate discrimination wherein members of one definable group will discriminate against other members of that very group. *Oncale,* 118 S.Ct. at 1001.

Further, the Supreme Court makes clear that the bigotry affronting Plaintiff need not have an etiology or motivation born of "... sexual desire for discrimination to occur." *Id.* at 1002.

The Supreme Court's decision on *Oncale,* evinces a less tolerant view of employers that allow the discriminatory animus attending same sex harassment. The *Oncale* decision gives the anti-discrimination purpose of Title VII a wider and broader application. Indeed, anti-discrimination statutes, like other civil rights issues, are to be painted with a broad brush when possible to impart the closest legal meaning and enforcement to that statute. Anti-discrimination statutes, which have as their aim or purpose, the equal protection of all citizenry, have social policy reasons for their need to be broadly interpreted.

However, a broad interpretation for protection under Title VII still requires, as a point of warning, the understanding that courts have also made plain that occasional, rude, crude and distasteful comments in our society will not lead to a ***28** violation under Title VII. *See Hopkins v. Baltimore Gas and Electric, et al.,* 77 F.3d 745 (4th Cir. 1996); *and see Williamson v. A.G. Edwards and Sons, Inc.,* 876 F.2d 69 (8th Cir. 1989) *cert. Denied* 493 U.S. 1089 (1990) *and Klein v. McGowan,* 36 F. Supp. 2d. 885 (D.C. Minn. 1999).

The line separating the worlds of mere vulgarity from actionable behavior under Title VII, is a fact intensive inquiry for the jury sitting as fact-finder and not for summary judgment. "Actionable behavior" under Title VII has been defined as conduct, which is so severe, or pervasive, as to alter the conditions of Plaintiff's employment and transform the environment into one perceived as extremely hostile. *See Bedford v. S.E.P.T.A. et al.,* 867 F.Supp. 288 (E.D. Pa, 1994).

In fact, one incident, in and of itself, may be so severe as to be said to genuinely characterize a "... hostile work environment claim if it is of such a nature and in such circumstances that it may reasonably be said to characterize the atmosphere in which the plaintiff must work." *Id.* at 297.

The issue before the Court becomes whether Plaintiff's history at defendant's workplace, on its face, presents enough factual allegations to evince same sex discrimination through a hostile work environment. Plaintiff clearly has ***29** endured more

than enough indignities, discrimination and hostility to warrant a full hearing on the merits of each allegation.

The Third Circuit has set guidelines for determining if there exists a cause of action for same sex discrimination and a hostile work environment. In analyzing whether a work environment is hostile, the Plaintiff must show that: 1) he is a member of a protected class 2) he was subjected to unwelcome harassment 3) the harassment was based on sex or gender 4) the harassment was so severe that it altered work conditions for the Plaintiff and 5) the defendant was liable for the preceding four criteria (respondeat superior liability). *See Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 (3rd. Cir. 1990) *See also Higgins v. New Balance Athletic Shoe, Inc.,* 21 F. Supp. 2d 66 (D.C. Minn. 1998).

Furthermore, in making a determination as to the criteria stated above, courts have been instructed to use a "Totality of the Circumstances" test as set forth in *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993). The "totality' ascribed to in this test, is one which embraces all of the complained of conduct, measuring its frequency, severity, and its ability to alter the worker's workplace. *Id.*

***30** The five-part test must have a subjective and objective analysis. *McGraw v. Wyeth-Ayerst Laboratories, Inc.,* E.D. PA Memorandum, 1997). While the plaintiffs experiences are subjective concerning the offensive conduct complained of, a reasonable person test would act as a barometer or construct and act as a balanced backdrop to those subjective viewpoints and experiences.

It is Plaintiff's argument that more than enough of a claim has been stated, on its face, and without further discovery, to warrant a full and fair hearing on the merits of this case. Summary judgment is an inappropriate device when there is a factual basis for each Constitutional claim. Fundamental fairness requires nothing less then allowing a fact finder to determine if the various thresholds in the tests described herein are met.

Plaintiff is male. His sex and gender are male. He is a member of a protected class of persons. If he is subjected to discriminatory behaviors and actions due to his sex and gender, then Title VII has been violated. This is true even if the alleged discriminatory conduct has its origins within the majority population. There is no such restriction that the complained of behaviors in cases, such as *Oncale,* be limited only to those individuals who make up the minority population in the workplace. Plaintiff has been tormented through the years ***31** based upon his gender, and the expression of the immutable characteristics related to his gender or sex. Plaintiff has meets all of the criteria set forth in the 3rd Circuit's five part test for same sex discrimination/hostile work environment.

Males, merely because they may be in the majority, may still treat other males in an unwelcome and discriminatory fashion. The same is true in both sexes. This is the foundation of a "same-sex" *Oncale* claim. Plaintiff's claim is not diluted or weakened because the root cause of the discriminatory acts are other men.

Plaintiff has described, through deposition, and through constant grievances in the work place to his union, of a systematic discriminatory pattern of treatment by his coworkers who are male.

Initially, Defendants had acted as though Plaintiff was a disease carrier and was, therefore a threat to the coworker workforce (merely due to his flu like symptoms). Plaintiff has historically suffered tangible job actions through defendants' bad faith.

***32** In 1993, Plaintiff was fired for bringing safety issues to management's attention. A60, 110 (Deposition). Again in 1993, and regularly thereafter, Plaintiff was physically or emotionally attacked by coworkers, including Frank Bertchsci. They assaulted Plaintiff, physically, merely due to the fact that his physical presence, and physical expression, as a male was upsetting other males who felt that Plaintiff was not "manly" enough for them. Certainly, these workers never subjected any person of any other sex to such brutish behavior. Their attacks against Plaintiff were gender specific.

In 1995, co-worker, Frank Bertchsci, attempted to harm Plaintiff with his forklift near the palletizer station. His sole purpose for doing so was to prove to his coworkers that he was never going to work with "faggots", or people who were "gay", and therefore, "take it up the ass". A56 (Deposition). Again, no person of any gender, other than Plaintiff's, was subjected to this behavior.

Throughout the years, of Plaintiff's employment with defendant Coke, supervisors were alerted directly by Plaintiff to every

detail of aberrant behavior committed against Plaintiff. These supervisors chose to do nothing to stop Plaintiff's workplace nightmare. Moreover, the wrongful behaviors of Plaintiff's Title VII discriminating coworkers, were without intervention and control, in any ***33** sense, by management which could have possibly brought peace and calm to Plaintiff's workplace. Additionally, the defendants cared little about how they chose to sabotage Plaintiff's opportunities for employment advancement at Coke.

Plaintiff was, and is, a loyal and dedicated Coke employee. Despite his employment excellence, he was never promoted and was never honored. Cliff Risell, Vice President of Operations, had selectively violated and disciplined Plaintiff for various clothing and work rule infractions. He would focus on Plaintiff concerning these trivial issues, but would easily, and readily, excuse other employees from discipline for similar conduct.

The many acts of sexual harassment directed at Plaintiff, is more than sufficient to jump the threshold requirement necessary to move from "rude" people to discriminating conduct under Title VII.

The resulting hostile work environment sufficiently tainted the entire workplace so as to affect any other worker who would be possible targets of discrimination. Therefore, the individual harm caused Plaintiff has a negative social rippling effect in the workplace, such that other employees like Plaintiff would be instructed in the reality of Title VII discrimination.

***34** Therefore, when a party discusses the possible creation of a hostile work environment, caused by a defendant's conduct; the issue really is, what are the social policy concerns over the wider affects of that rippling behavior. As an attempted solution to their problem, management made Plaintiff's workplace a living hell. Plaintiff did not buckle under and has not, to this day, quit his job. Plaintiff resorted to the proper filing of grievances. These filings reached almost daily proportions due to the attempts by some coworkers, with the explicit support of management, to drive Plaintiff from his employment at Coca-Cola.

Plaintiff has complained about ongoing harassment of self, which he personally reported to supervisors, directly for years, without any ameliorative steps from management. The unrelenting same sex harassment, and resultant hostile work environment, targeted against Plaintiff, is one of the factors in developing Plaintiff's mental health syndrome known as Post-Traumatic Stress Disorder. A147-148 (Deposition).

Plaintiff's presentation as a male, with workers and supervisors, who saw this presentation as an opportunity to ridicule and terrorize him, certainly propelled Plaintiff through the necessary threshold of evidence required to prove for hostile work environment and same sex discrimination. *See Faragher v. City of Boca* ***35** *Raton,* -- S.Ct. --, 1998 WL 336322 (U.S.). Plaintiff has, in fact, suffered job promotion discrimination and mental and physical health debilitation.

Coca-Cola management supported the actions the problem coworkers through their explicit inaction to halt their conduct. Instead Coke would try to always affix any blame on Plaintiff. Their support of the behavior through their actions and inaction's. See *Burlington Industries, Inc. v. Ellerth,* -- S.Ct.--, 1998 WL 336326 (U.S.).

Plaintiff, as a male, was regularly discriminated against and suffered emotional and physical damage from such behavior. Plaintiff has been kept back and not promoted through the workforce due to the invidious discriminatory environment created by employee and management alike. No reasonable person in Plaintiff's position could view defendants' behavior and treatment as any thing other than discrimination strictly prohibited by Title VII.

This case is inextricably intertwined with discrimination in each level of Coca-Cola employment - labor and management. In fact, there is absolutely no dispute between the workforce and the management with respect to the treatment of Plaintiff. Each exacted their toll on Plaintiff - not to further the collective ***36** bargaining agreement, but simply as a base reflection of their hatred and bigotry.

There is no judicial preference for collective bargaining agreements over the statutory protections afforded the citizenry by its legislature. To bargain away basic human rights through administrative law, undermines the social purposes, and the very need for, such laws as Title VII, the Civil Rights Act and the Americans with Disabilities Act.

Title VII claims are not lost, subrogated or diminished in any fashion due to the existence of a collective bargaining

agreement. As to basic human rights and employee freedoms, employers cannot bargain away the securities afforded by the legislatures through the passage of Acts such as Title VII and the Americans with Disability Act.

In *Blakely v. US AIRWAYS, Inc.,* 23 F. Supp. 2d 560 (W.D. PA 1998), the Court opined that:
In enacting Title VII, Congress had granted individual employees a nonwaivable, public law right to equal employment opportunities which were separate ***37** and distinct from the rights created through the "majoritarian processes" of collective bargaining. The Court observed that in submitting a grievance to arbitration, an employee asserts independent statutory rights accorded by Congress. "The distinctly separate nature of these contractual and statutory rights accorded by Congress. "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." (*citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 50)*

Blakely, 23 F. Supp. 2d at 566.

The Courts have continued to hold the view that Title VII stands alone as a beacon in the night for those employees who have been discriminated against in the dark recesses of discriminatory employer behavior. Congress, as well as the Courts, refuses to limit employee remedies to those stated in Collective ***38** Bargaining Agreements and other tools of the employer.

Title VII cannot follow, nor be slave to administrative law. The Labor Management Relations Act does not preempt Title VII. *See Pelech v. Klaff-Joss, LP,* 828 F. Supp. 525 (N.D. ILL. 1993); *See also LaChance v. Northeast Publishing, Inc. d/b/a Fall River Herald,* 965 F.Supp. 177 (D.MA 1997). Plaintiff should be allowed to proceed to trial and have a full and fair hearing on the merits of this matter - something the defendants have now argued administrative law in order to avoid.

Oncale v. Sundowner Offshore Services, Inc., 118 S. CT. 998 (1998) is not a "fluke" decision by the Supreme Court. Despite defendants' attempts to limit and discredit the meaning and applicability of *Oncale,* Plaintiff has met each and every hurdle referenced in *Oncale.* This is not new information. It was Plaintiff meets the criteria of *Oncale:*
1) he is a member of a protected class - gender male;

2) this class is protected by statute and factually, due to his treatment because of his "presentation" as a male differing from the other males on the plant floor.

***39** 3) The conduct was so severe that Plaintiff suffered physical illness and other medical manifestations as a result. Plaintiff's uneven treatment that led to a different standard of treatment created a hostile work environment. See *Doe by Doe v. City of Bellville, Ill.,* 119 F3d. 563 (7th Cir. 1997).

To allow the defendants to decide what is "severe" and what is "pervasive", with respect to a hostile work environment, usurps the essential function of the jury's role as fact finder. The jury should be able to decide if a supervisor whose wish is to run the company as the Nazis would, when discussing his disgust with Plaintiff, helped to create a severe work environment.

The United States District Court Judge Robreno, decided the matter of in *Kent v. Henderson,* 77 F. Supp. 2d 628, 1999 WL 1111014 (E.D. Pa. 1999). This opinion is a memorandum opinion focused on a unique and narrow fact pattern that offers no guidance to the matter currently on appeal - but the defendants had presented it previously to the District Court as relevant.

Defendats, Coke, previously argued the case of *Kent* as controlling of Plaintiff's issues. In reality, *Kent* highlights a unique fact pattern that is fully distinguishable from Plaintiff's case.

***40** In *Kent,* a female mail carrier was harassed and intimidated by a co-worker working at the same Pennsylvania United States Postal Office. That Plaintiff was subjected to propositions, touching, advances and gifts from this co-worker. The plaintiff in *Kent* reported the problems to her supervisors. They acted immediately and suspended the co-worker. This co-worker was processed criminally as well. After the co-worker was suspended, others would make faces or angry gestures at Plaintiff. She requested and received a new work schedule so she would not see this co-worker. Finally, she had to be

transferred to another office to avoid that employee. At that new office she felt ostracized for her having reported the offending co-worker.

Judge Robreno granted summary judgment on behalf of the defendants holding that, while Plaintiff had been harassed previous to the suspension of the co-worker, she failed to prove that any "post-suspension conduct" resulted from the same animus, as the original acting-out behavior of the co-worker. Further, the Court stated that the employer took swift tangible action to stop the harassment and took steps to prevent it from occurring in the future. Plaintiff was unable to link the "cold" reception at her new place of assignment with the previous wrongful behavior of the co-worker. That attenuated and weak connection could not withstand the defendants' motion for summary judgment.

***41** The major differences between *Kent* and the present matter, on appeal, is the fact that the current Plaintif, John Bibby, has had an unrelenting history of being subjected to a hostile work environment. The work environment has been, and is, hostile and tainted by the same individuals throughout the past decade of Plaintiff's employment. Plaintiff had continuously complained through appropriate channels about his mistreatment including, but not limited to, supervisors, human resource personnel, upper level management and union officials.

Plaintiff suffered from tangible job actions throughout the tenure of his employment. The management would selectively single Plaintiff out for discipline over many issues no matter how minor (e.g. lunch, radio, or clothing), that no other worker experienced despite similar behavior.

Moreover, the behavior against Plaintiff never abated, and in fact, was fueled by the supervisors and administration at Coke to the point that one worker, Dennis Anderson (an employee of Coke for 31 years), testified how Plaintiff would be singled out for special negative treatment. Plaintiff was passed over for promotions due to defendant's dislike of Plaintiff as a male. Mr. Anderson ***42** testified that defendant, Coke, was out to harm him, professionally, for truthfully reporting how they treated Plaintiff.

If Plaintiff felt like an outcast it was due to actual ongoing hostile behavior from management at Coke. However, the defendant's attitude and behavior toward Plaintiff was more than just derogatory sexual slurs written on the men's room walls. Plaintiff, as indicated in the complaint and previous response to defendant's formal Summary Judgment motion, was the target of physical attacks, threats, verbal assaults, wrongful disciplinary actions and failed promotions from both co-worker and administration. Plaintiff has suffered great emotional and physical harm from the ongoing hostile work environment. To his credit, Plaintiff has refused to "buckle under" and has fought adversity and isolation to bring to light the wrongful and discriminatory actions at Coke.

The defendants aimed their animus behavior at Plaintiff 's sex. While defendants argue that they would have to be homosexual to attack Plaintiff sexually, they ignore the directive of *Oncale v. Sundowner Offshore Services,* 118 S.Ct. 998 (1998) that the employer cannot discriminate against an employee because of his sex. If Plaintiff were a woman, he would not have been subjected to the torment, which has become his daily routine at Coke. He has been targeted ***43** because he is not female - his sex is the lynchpin for the invidious discriminatory action of his employer. A jury could reasonably conclude that Plaintiff was subjected to inappropriate, damaging and offensive behavior sufficiently, and objectively severe to materially alter his work environment. See *Id.* and see *Pyne v. Procacci Brothers Sales Corp. et al.,* 1998 WL 386118 (E.D. Pa. 1998) and see *Wiley v. Burger King,* 1996 WL 648455 (E.D. Pa. 1996).

The *Kent* plaintiff worked under a management system that responded to her needs by disciplining the co-worker to insure her safety and appropriate work environment. They also re-assigned her to another shift, then another office; to make certain that she would not have incidental contact with the offending co-worker. Further, the *Kent* plaintiff suffered no tangible job action as a result of her reports about her co-worker's behavior. Finally, if the *Kent* plaintiff felt like an outcast, it could only be traced to her over-sensitivity at having reported a colleague. The *Kent* plaintiff could not complain of any tangible job action. She could not allege that management was unresponsive to her issues either. The only behavior showing a hostile work environment after the *Kent* plaintiff was transferred was the attenuated link of "an angry face" or a "shaken fist".

***44** In every instance, the reactions of the employer in Kent is the very behavior that the Supreme Court meant to support in its pair of decisions: *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998). Those cases stressed that both plaintiff and defendant had to act in a responsible manner with regard to their

position and allegations. In *Kent* the plaintiff went to her employer seeking help instead of allowing the behavior to continue. In return, the employer acted immediately to aid the employee plaintiff. Neither party was culpable in allowing a hostile work environment to be tolerated. Judge Robreno was correct in ruling that the minimal post-transfer behaviors of other co-workers could not be bootstrapped into a Title VII cause of action. Those post transfer behaviors were not sufficiently linked to an ongoing course of conduct that could be termed as materially altering her employment into a hostile work environment. Her employer acted to stop the egregious conduct by the offending co-worker before it could grow into a chronic workplace condition.

In the current matter, Plaintiff's facts present a portrait of a chronic ongoing hostile work environment that has been, and is, supported by the administration (managers, supervisors and HR staff) as well as co-workers. Plaintiff's conscientious timely complaints as to their behavior and tangible job actions have been met with anger, hostility and retaliation. The employer in this case and the ***45** employer in *Kent* could not be more dissimilar. While correctly decided, *Kent v. Henderson,* 77 F. Supp. 2d 628, 1999 WL 1111014 (E.D. Pa. 1999) is distinguishable from the present case.

****46 CONCLUSION AND STATEMENT OF RELIEF SOUGHT***

For the foregoing reasons, Appellant, John J. Bibby requests this Honorable Court reverse the finding of the district court, and enter an Order denying defendant, Philadelphia Coca Cola Bottling Company's motion for summary judgment, and remand this matter to the district court for trial.

Appendix not available.

End of Document

EXHIBIT 2

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	**Civil Action No. 2:16-cv-00225**
v.	)	
SCOTT MEDICAL HEALTH CENTER, P.C.,	)	
Defendant.	)	

DECLARATION OF VICTORIA A. RODIA IN SUPPORT OF PLAINTIFF EEOC'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I, Victoria A. Rodia, declare as follows:

1. I am over the age of 18 and make this declaration based on my personal knowledge of the events described below.

2. I am employed as an Investigator with the U.S. Equal Employment Opportunity Commission, Pittsburgh Area Office.

3. On November 14, 2013, I was assigned to investigate charges of discrimination filed by Allyssa Griffie (Charge No. 533-2013-01344), Brittany Fullard (Charge No. 533-2013-01350), Donna Mackie (Charge No. 533-2013-01346), and Kaitlyn Wieczorek (Charge No. 533-2013-01349). On August 4, 2014, I was assigned to investigate the charge filed by Libby Eber (533-2013-00904).

4. On February 14, 2014, I emailed Scott Medical Health Center's then counsel, and asked for a list of all of the telemarketing employees who were employed with Defendant from September 1, 2012 through September 30, 2013. The list contained a total of 44 employees or former employees, and I attempted to contact each one in order to find out whether any of them

had witnessed any harassment of the type alleged in the charges, or had been harassed themselves. One of the names on the list was Dale Baxley.

5. I was able to interview several employees and former employees. On July 2, 2014, I interviewed Mr. Baxley by telephone. During the course of asking Mr. Baxley about the harassment alleged by the charging parties, he told me that McClendon had harassed him. Mr. Baxley told me about the incidents of harassment by McClendon that related to his sexual orientation/sex.

6. By letter dated January 16, 2015, I requested the personnel files for several employees, including the charging parties and individuals who may also have been harassed by McClendon, such as Mr. Baxley. Defendant provided the personnel files without objection.

7. In addition to reviewing the personnel files and interviewing potential witnesses, I also interviewed Debra Leonard, the office manager, and Gary Hieronimus, D.C., the chief executive officer of Defendant. The interviews took place on January 15, 2015, at the offices of Defendant's attorney, Charles Saul, who was also present.

8. During my interview of Dr. Hieronimus, I asked him about the allegations made by the charging parties. I also specifically asked him about Dale Baxley, including whether Mr. Baxley had ever contacted Dr. Hieronimus to complain about harassment from McClendon. Dr. Hieronimus denied ever getting a complaint from Baxley, or knowing anything about Baxley being harassed by McClendon.

9. On or about July 21, 2015, I contacted attorney Saul by telephone, to inform him that it was my intent to recommend a reasonable cause finding that all five of the charging parties had been subjected to illegal sexual harassment in violation of Title VII. I also informed him that my investigation had uncovered four additional victims (Mr. Baxley and three females),

and I provided Mr. Saul with their names. I specifically informed Mr. Saul that I was recommending that the cause finding include harassment of Mr. Baxley because of his sex in violation of Title VII.

Executed on May 27, 2016

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Victoria A. Rodia

Victoria A. Rodia