

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA**

JAMEKA K. EVANS,

Plaintiff,

v.

Case No. CV415-103

GEORGIA REGIONAL HOSPITAL, et al.,

Defendants.

**PROPOSED *AMICUS CURIAE* LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.'S MOTION FOR LEAVE TO FILE BRIEF IN
SUPPORT OF PLAINTIFF'S OBJECTIONS TO MAGISTRATE'S
REPORT AND RECOMMENDATION**

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Proposed *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal" or "*Amicus*") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and people living with HIV through

impact litigation, education and policy advocacy. Because of its mission, Lambda Legal is concerned about the conclusions in the Report and Recommendation (“Report”) [docket 4] and seeks to assist this Court in avoiding issuance of a ruling that conflicts with controlling case law and proper legal analysis.

Lambda Legal has extensive experience, as counsel of record or *amicus*, in cutting-edge litigation regarding coverage of discrimination against LGBT individuals under federal law. *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel) (discrimination against transgender employee is sex discrimination proscribed by the Equal Protection Clause, relying heavily on Title VII caselaw); *Hively v. Ivy Tech. Cmty. Coll.*, 7th Cir. Case No. 15-1720, case submitted Sept. 30, 2015 (counsel) (appeal of dismissal of *pro se* plaintiff’s Title VII claim based on her sexual orientation); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 U.S. Dist. LEXIS 132878, *9 (W.D. Wash. Sept. 22, 2014) (*amicus*) (holding that “Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males.”); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (*amicus*)

(refusing to dismiss plaintiff's Title VII sex discrimination and religion discrimination claims based on his sexual orientation).

Lambda Legal (whose counsel's application to appear *pro hac vice* was granted by this Court on September 23, 2015) seeks to file this brief to provide the Court with analysis and case law not considered by the Magistrate, who undertook a *sua sponte* assessment of the sufficiency of a *pro se* complaint. Lambda Legal believes that acceptance of the proposed brief will be of material assistance to the Court and is especially appropriate in this case because Ms. Evans requested the appointment of counsel, which was denied, thereby depriving the Magistrate of complete briefing on the issues the Magistrate considered.

For each major area of the Report concerning the reach of Title VII, key legal precedents were not considered.¹ Consideration of the claim of discrimination

¹ Indeed, the perils of judicial determinations without the benefit of submissions by counsel is illustrated by the case of *Cunningham v. City of Arvada*, No. 12-cv-00304, 2012 U.S. Dist. LEXIS 116769 (D. Colo. Aug. 19, 2012), cited in the Report, which also involved an unrepresented plaintiff. In the passage cited in the Report, the *Cunningham* court stated "this Court is aware of no authority adopting this proposition" that "the employee's mistaken belief as to the reach of Title VII [as covering antigay discrimination] was reasonable." See Report at 10-11 (citing *Cunningham*, 2012 U.S. Dist. LEXIS 116769 at *3). To the contrary, however, by the time *Cunningham* was decided, there already were four courts that had held such beliefs to be reasonable, notwithstanding appellate precedent in those circuits

because of failure to conform to gender norms should include *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Glenn*, 663 F.3d 1312. Consideration of Ms. Evans' claim that she was discriminated against as a lesbian should include the thorough analysis and supporting authority in the recent ruling of the Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, that "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Dep't of Transp.*, No. 2012-24738-FAA-03, 2015 EEOPUB LEXIS 1905 *13 (E.E.O.C. July 16, 2015). And consideration of Ms. Evans' retaliation claim should include the liberal standard defining "protected activity" as opposition to what the employee reasonably believes is unlawful discrimination, how that generous standard serves the public interest, and how that standard has been met even by plaintiffs in circuits with clear precedent against Title VII coverage of sexual orientation discrimination—unlike the situation in the Eleventh Circuit, which has no such binding rulings.

holding that Title VII did not cover sexual orientation discrimination. *See* Proposed Brief, Objection 4.

WHEREFORE, proposed *amicus curiae* Lambda Legal respectfully requests that this Court grant leave to file the proposed *amicus* brief accompanying this motion.

Respectfully submitted,

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ATTORNEYS FOR AMICUS CURIAE
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CERTIFICATION OF SERVICE

I hereby certify that on October 23, 2015, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing to all counsel of record. I also mailed the foregoing document to the plaintiff via United States Postal Mail at:

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So certified this 23rd day of October, 2015.

LAMBDA LEGAL DEFENSE AND
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