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* BRIEF OF LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC. IN SUPPORT OF PLAINTIFF'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

Proposed *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal" or "*Amicus*") hereby submits this proposed brief in support of Plaintiff Jameka K. Evans' Objections to the Report and Recommendation of the Magistrate [4] (hereinafter "Report"). A motion for leave to file this brief is being filed concurrently.

OBJECTION 1. Any employee – including an employee who is lesbian, gay, bisexual or transgender ("LGBT") – who is discriminated against due to nonconformity with gender norms has a sex discrimination claim under Title VII.

Portion of Report objected to:

> "Finally, to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation. To inflict an adverse employment action (unfair discipline, denied promotion, etc.) because a male is too effeminate or a female too masculine is to discriminate based on sexual orientation ('gender nonconformity'), which is reflected in the gender image one presents to others -- that of a male, even if one is biologically a female. Hence, Evans' allegations about discrimination in response to maintaining a male visage also do not place her within Title VII's protection zone, even if labeled a 'gender conformity' claim, because it rests on her sexual orientation no matter how it is otherwise characterized."

Report at 6-7.

The Report's holding that Ms. Evans cannot claim discrimination based on gender nonconformity is erroneous. It ignores the controlling authority of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the Supreme Court ruled that, "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched

the stereotype associated with their group." *Id.* at 251. As the Eleventh Circuit itself has explained, *Price Waterhouse* clarifies that "discrimination on the basis of gender stereotype is sex-based discrimination." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

Indeed, the holding of the Report – that somehow protections against discrimination based on gender-nonconformity are not available to the LGBT community – was flatly rejected by the Eleventh Circuit in *Glenn*. *Id.* at 1318-19 ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . Because these protections are afforded to everyone, they cannot be denied to a transgender individual."); *see also Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3rd Cir. 2008) ("There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not.") (emphasis in original). The Court should reject the notion in the Report that the complaint's allegations of discrimination based on sexual orientation and its allegations of discrimination based on gender nonconformity are synonymous. *See* Report at 7 (plaintiff's "'gender conformity' claim . . . rests on her sexual orientation no matter how it is otherwise characterized."). Even courts hostile to

the position advanced in Objection No. 2, below, recognize that gender stereotyping claims by LGBT employees can proceed. *See Simonton v. Runyon*, 232 F.3d 33, 38 (2nd Cir. 2000) ("not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.").

The cases that the Report does cite actually support Ms. Evans' ability to bring a claim for gender stereotyping discrimination. The court in *Thomas v. Osegueda*, No. 2:15-CV-0042, 2015 U.S. Dist. LEXIS 77627, at *11 (N.D. Ala. June 16, 2015), declared that HUD acted permissibly in construing "sex" in the Fair Housing Act to allow the agency to take action against sexual orientation discrimination based on gender stereotyping. Indeed, an example the court cited favorably is rather similar to an allegation made by Ms. Evans. *Compare Id.* at *10-11 (citing the specific example of "discrimination . . . [against] a lesbian woman dressing in masculine clothes.") (citation omitted) *with* Complaint [1] at p.3 (Ms. Evans "was targeted by Mr. Moss for termination due to the fact that I do not carry myself in a traditional woman manner"); *id*. (" . . . it is evident I identify with the male gender because I presented myself visually (male uniform, low male haircut, shoes, etc.)."). The *Thomas* court did reject a sex discrimination claim

brought by a gender-conforming, heterosexual man, but that scenario is virtually the opposite of the facts alleged here.

It is unclear why the Report claims support for dismissal in *Harder v. New York*, No. 1:13-CV-565, 2015 U.S. Dist. LEXIS 100723 (N.D.N.Y. Aug. 3, 2015). That court held that a plaintiff did not state a claim for discrimination based on a "mis-perception" that he was gay. *Id*. at *13. That is *not* the claim presented by Ms. Evans, a self-described "gay female." Complaint [1] at p.3. Moreover, the *Harder* court specifically said that Title VII "to be sure" protects "individuals who fail or refuse to comply with socially accepted gender roles," *id*. at *14 n.7 – and that *is* what Ms. Evans is claiming.

The Report acknowledges that *Arnold v. Heartland Dental, LLC*, No. 3:14-cv-530, 2015 U.S. Dist. LEXIS 40340 (M.D. Fla. Mar. 30, 2015), allowed a claim for sex discrimination by a lesbian claiming gender stereotyping discrimination, but distinguishes that case as brought under the Florida Civil Rights Act ("FCRA"), and not Title VII. *See* Report at 5 n.5. However, that difference was not one relied upon by *Arnold*, which cited not only several Title VII cases in analyzing the FCRA claim, but also several cases holding that resort to Title VII law is appropriate in FCRA cases. *Arnold* at *9-15.

In sum, Ms. Evans' claim of gender stereotyping discrimination should not have been dismissed.

OBJECTION 2. Because Title VII covers all discrimination "because of [an] individual's . . . sex," it includes discrimination against women attracted to women if men attracted to women are not mistreated.

Portions of Report objected to:

> "every court that has done so [addressed the issue] has found that Title VII . . . was not intended to cover discrimination against homosexuals." Report at 4-5.
>
> "Title VII discrimination claims based upon the plaintiff's sexual orientation or perceived sexual orientation are not [actionable]." Report at 6.
>
> "As noted above, it is simply not unlawful under Title VII to discriminate against homosexuals or based on sexual orientation." Report at 9.
>
> "Again, plaintiff was complaining about an employment practice (homosexual or sexual orientation discrimination) that is not unlawful under Title VII." Report at 10.

After describing Ms. Evans' claims, the Report cites this sentence from *Arnold*: "Although the Eleventh Circuit has not addressed this issue, every court that has done so has found that Title VII . . . was not intended to cover discrimination against homosexuals." Report at 4-5 (quoting *Arnold*, 2015 U.S. Dist. LEXIS 40340, at *12-13). The assertion about the absence of Eleventh

Circuit law regarding Title VII's applicability to sexual orientation discrimination is correct. The suggestion that every court to consider the issue has ruled against Title VII coverage is plainly wrong, however. There were already six contrary cases when *Arnold* was decided;[1] all of them, plus a decision in May 2015[2] were cited in the July 2015 decision of the Equal Employment Opportunity Commission, holding 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).

Baldwin begins by emphasizing the Supreme Court's holding in *Price Waterhouse* that Title VII forbids "sex-based considerations" and "tak[ing] gender into account" in employment decisions. *Baldwin*, 2015 EEOPUB LEXIS 1905, at

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[1] *Boutillier v. Hartford Pub. Sch.,* No. 3:13cv1303, 2004 U.S. Dist. LEXIS 134919, *3-4 (D. Conn. Sept. 25, 2014); *Hall v. BNSF Ry. Co*., No. C13-2160, 2014 U.S. Dist. LEXIS 132878, *9 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billingt*on, 34 F. Supp. 3d 100, 115-16 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co*., 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002).

[2] *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348, 2015 U.S. Dist. LEXIS 62019 (D. Colo. May 11, 2015).

*11 (quoting *Price Waterhouse*, 490 U.S. at 239, 244). *Baldwin* then explains the error of many in posing the wrong question of "whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions." *Baldwin*, 2015 EEOPUB LEXIS 1905, at *12. Instead, the proper question is, as it is in "any other Title VII case involving allegations of sex discrimination -- whether the [employer] has 'relied on sex-based considerations' or 'take[n] gender into account.'" *Id.* To answer that, *Baldwin* gives the example of two coworkers, a man and a woman, each displaying a picture on their desk of their respective wives, resulting in only the woman being disciplined. *Id*. at *14. Such a disparity is sex discrimination under a "simple test" articulated by the Supreme Court, *i.e*., "treatment of a person in a manner which but for that person's sex would be different." *Baldwin,* 2015 EEOPUB LEXIS 1905, at *15 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)) (internal quotes and citation omitted).

Baldwin also supported its ruling by analogizing to the unanimous case law holding that Title VII forbids discrimination against those in interracial marriages and relationships, because such bias is taking into account the race of the employee involved (as well as the race of the employee's spouse or friend). *Baldwin*, 2015

EEOPUB LEXIS 1905, at *17-18 and n.7. Notably, *Baldwin* cites the seminal Eleventh Circuit case in this area, *Parr v. Woodmen of the World Life Ins. Co*., 791 F.2d 888 (11th Cir. 1986), for the proposition that "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race. . . ." *Baldwin*, 2015 EEOPUB LEXIS 1905, at *20 (quoting *Parr*, 791 F.2d at 892). The EEOC reasoned that a man fired because he "dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him." *Baldwin*, 2015 EEOPUB LEXIS 1905, at *17.

Baldwin also found support for its holding in *Price Waterhouse*'s proscription against sex stereotyping. The EEOC noted that sexual orientation discrimination is often rooted in "a desire to enforce heterosexually defined gender norms" and "assumptions and stereotypes about 'real' men and 'real' women" *Baldwin,* 2015 EEOPUB LEXIS 1905, at *22 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) and *TerVeer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014). Thus, rather than trying to parse finely sex discrimination claims brought by LGBT employees based on how gender-nonconforming they are

in appearance and demeanor, rather than in their romantic interests, *Baldwin* recognized inferentially what a court noted almost a decade ago: "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." *Vickers v. Fairfield Med. Ctr*., 453 F.3d 757, 764 (6th Cir. 2006).

Baldwin compellingly disposed of arguments about Congressional intent by pointing out that the Supreme Court unanimously rejected the notion that some adverse employment actions or forms of harassment are not covered by Title VII unless Congress "envisioned the application of Title VII to these situations." *Baldwin* at *25 (citing *Oncale v. Sundowner Offshore Servs,* 523 U.S. 75, 78-80 (1998)). [3] In addition, *Baldwin* explained that reliance on Congressional *in*action is foolhardy in any statutory interpretation endeavor, and that that is especially true with regard to Title VII's coverage of sexual orientation discrimination given that

[3] In *Oncale*, the Supreme Court unanimously rejected the contention that same-sex sexual harassment was not cognizable because such conduct was not on the minds of Congress in 1964. As the Court explained, even though " male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII … it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79.

sexual orientation logically is already included by Title VII's ban on discrimination because of sex. *Baldwin*, at *27-29.

OBJECTION 3. Plaintiff need not plead the elements of a prima facie case, including a comparator, to survive dismissal.

Portions of Report objected to:

> "She also must plead a Title VII prima facie case establishing that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) the employment action was causally related to the protected status." Report at 2.
>
> "She does not specify that person's gender or sexual orientation." Report at 3 n.3 (referring to the allegedly less qualified person promoted to be Ms. Evans' supervisor).
>
> "Arnold cited to a comparator, [] while Evans does not." Report at 5 n.5.

In many recent employment cases, the Eleventh Circuit has held that "a plaintiff is not required to plead a prima facie case of discrimination in order to survive dismissal." *McCone v. Pitney Bowes, Inc.*, 582 Fed. Appx. 798, 801 n.4 (11th Cir. 2014); *accord Bowers v. Bd. of Regents of the Univ. Sys. of Ga.*, 509 Fed. Appx. 906, 910 (11th Cir. 2013); *Henderson v. JP Morgan Chase Bank, N.A.*, 436 Fed. Appx. 935, 937 (11th Cir. 2011). This is because the *McDonnell-Douglas* "burden-shifting analysis is an evidentiary standard, not a pleading

requirement, and thus it applies only to summary judgment motions and beyond." *Castillo v. Allegro Resort Mktg.*, 603 Fed. Appx. 913, 917 (11th Cir. 2015).

OBJECTION 4. Because it would have been objectively reasonable for Ms. Evans to believe that Title VII covers the discrimination she alleges, the retaliation claim should not have been dismissed with prejudice.

Portions of Report objected to:

> "As noted above, it is simply not unlawful under Title VII to discriminate against homosexuals or based on sexual orientation. Hence, Evans fails to meet the causation element" [of a retaliation claim]. Report at 9.
>
> "But there evidently was *no* protected activity here. Again, plaintiff was complaining about an employment practice (homosexual or sexual orientation discrimination) that is not unlawful under Title VII." Report at 10.

The Report incorrectly assumes that Ms. Evans did not engage in protected activity if, as the Report holds, the discrimination she alleged she endured because of her sexual orientation and gender nonconformity is "not unlawful." Report at 9, 10. Of course, as set forth in Objections 1 and 2, such discrimination is unlawful. But "[e]ven if an employment practice is not as a matter of fact unlawful, a plaintiff can establish a prima facie case of Title VII retaliation 'if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful

employment practices. . . .'" *Dixon v. Hallmark Cos.,* 627 F.3d 849, 857 (11th Cir. 2010) (*quoting Little v. United Techs., Carrier Transicold Div*., 103 F.3d 956, 960 (11th Cir. 1997)); *Branscomb v. Sec'y of the Navy*, 461 Fed. Appx. 901, 905-06 (11th Cir. 2012) (fact that plaintiff was not a "disabled person" or a "qualified individual" under the disability statutes "was not dispositive of [his] retaliation claim, which required only a reasonable belief that the Navy had violated" those statutes).

The *Cunningham* case relied on in the Report was "aware of no authority" holding reasonable a plaintiff's belief that Title VII covers sexual orientation discrimination, but that court missed several such cases. Despite the fact that the Second and Ninth Circuits had established case law at the time holding that Title VII does not cover sexual orientation discrimination, courts in those circuits ruled in favor of *retaliation* claims by employees who complained of such discrimination. *Dawson v. Entek Int'l*, 630 F.3d 928, 936-37 (9th Cir. 2011); *Birkholz v. City of New York*, No. 10-CV-4719, 2012 U.S. Dist. LEXIS 22445, *22-23 (E.D.N.Y. Feb. 17, 2012); *Swift v. Countrywide Home Loans. Inc.*, 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011); *Martin v. N.Y. State Dep't of Corr. Servs*., 224 F. Supp. 2d 434, 448 (N.D.N.Y 2002). The *Martin* court refused to classify as

unreasonable the employee's belief about Title VII's applicability simply because he was not aware of Second Circuit precedent "since 1986 that sexual orientation is not protected by Title VII." 224 F. Supp. 2d at 448. The court cited the absence of any factual support that Mr. Martin as a non-lawyer "was aware of Second Circuit case law" and the absence of legal support for "imput[ing] to non-lawyers" such knowledge. *Id*.; *see generally Moyo v. Gomez*, 40 F.3d 982, 984, 985 (9th Cir. 1994) (whether the employee's belief "is reasonable" should be "[judged by a standard] that makes due allowance [] for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims."). The *Birkholz* court cited concerns about "a chilling effect on gender stereotyping claims" given that "courts have candidly recognized the analytical difficulties" inherent in distinguishing between "stereotypical notions about how men and women should behave" and "ideas about heterosexuality and homosexuality." 2012 U.S. Dist. LEXIS 22445, at *22-23 (citing *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2nd Cir. 2005).[4]

[4] *Dawson v. Bumble & Bumble* is just one of many cases that *Birkholz* could have cited to support its concerns about employee confusion about the legal status and definitions of gender stereotyping discrimination and sexual orientation discrimination. *See Dawson*, 398 F.3d at 218 ("When utilized by an avowedly

Legally, several factors would support the reasonableness of Ms. Evans' belief in coverage. First and foremost, the Eleventh Circuit has no authority to the contrary. Given that several courts have deemed lay employees' beliefs about coverage reasonable in the face of contrary controlling precedent, Ms. Evans's belief is *a fortiori* reasonable. Moreover, at the time of her opposition to discrimination, there were already three well-reasoned decisions supporting her position (four more would soon follow). *See Centola*, *Heller*, *Koren*, *supra*.

Additionally, the EEOC not only had made it publicly known that it was accepting charges alleging sexual orientation discrimination, it had ruled as early as 2011 through federal sector decisions issued by the Office of Federal

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homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that 'stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.'") (citation omitted). Even the courts that have ruled against Title VII coverage have not disputed the presence of gender stereotyping in sexual orientation discrimination. *E.g.*, *Gilbert v. Country Music Ass'n*, 432 Fed. Appx. 516, 520 (6th Cir. 2011) ("For all we know, Gilbert fits every male 'stereotype' save one—sexual orientation—and that does not suffice to obtain relief under Title VII."); *Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 764 (6th Cir. 2006) ("all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices"); *Kay v. Independence Blue Cross*, 142 F. App'x 48, 51 (3d Cir. 2005) ("The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics.").

Operations, that Title VII covered sexual orientation discrimination. See *Culp v. Dep't of Homeland Security*, No. 0720130012, 2013 WL 2146756 (E.E.O.C. May 7, 2013) (allegation of sexual orientation discrimination was a claim of sex discrimination because supervisor was motivated by his attitudes about sex stereotypes that women should only have relationships with men); *Castello v. Postmaster Gen.*, No. 0120111795, 2011 EEOPUB LEXIS 3966, *5 (E.E.O.C. Dec. 20, 2011) (sex discrimination charge could proceed where lesbian employee alleged that her harasser "was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman"); *Veretto v. Postmaster Gen.*, No. 0120110873, 2011 EEOPUB LEXIS 1973, *8 (E.E.O.C. July 1, 2011) (sex discrimination charge could proceed where harasser of gay man "was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when Complainant did not adhere to this stereotype"). Any employee's reliance on the EEOC's position should be *per se* reasonable, given the EEOC's accurate self-description as "responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including

pregnancy), national origin, age (40 or older), disability or genetic information." http://www.eeoc.gov/eeoc/index.cfm

Harshly holding that an employee's belief about Title VII's coverage was unreasonable would undermine the policy reasons cited by the Supreme Court in favor of a liberal interpretation of anti-retaliation provisions. The Court acknowledged in *Crawford v. Metro. Gov't*, 555 U.S. 271 (2009), that, if an employee who speaks up about discrimination can "be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses" against themselves or against others. *Id.* at 279. "This is no imaginary horrible given the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" *Id.* (quoting Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)). Thus, an unduly restrictive concept of "protected activity" will not merely visit injustice upon the protesting employee who learns post hoc that his good deed will not go unpunished, but will also undermine the entire antidiscrimination enforcement effort by chilling future prospective opponents of discrimination:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.

> "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) (citation omitted); *id.* at 64 ("a limited construction would fail to fully achieve the antiretaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

Because a retaliation claim requires only a reasonable belief by a plaintiff that the conduct she opposed was unlawful, dismissal with prejudice is inappropriate given all the legal support for such a belief and the absence of contrary controlling authority.

OBJECTION 5. Any speculation regarding the timeliness of the filing of the EEOC charge is premature at best.

Portions of Report objected to:

> "Her Complaint asserts she worked there from '8/1/12 - 10/11/13.' Doc. 1 at 3. No untimeliness finding (*i.e.*, that she took too long after any complained-of acts to file her EEOC complaint) is reflected in the EEOC's January 22, 2015, Right to Sue letter. Doc 1-1 at 9." Report at 3 n.2.

> " . . . there may also be some knock-out punches that otherwise drain her case of any vitality (her claims may be untimely . . .)" Report at 12 n.9.

The Report speculates that Evans's EEOC charge may have been untimely. This is an inappropriate basis to dismiss the complaint with prejudice. It should be noted that timeliness of the EEOC charge is not jurisdictional. *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994). But more basically, it appears the EEOC began processing the charge well within 180 days of the end of Ms. Evans's employment. The Report itself acknowledges the EEOC-stamped document bearing the date February 3, 2014, and Ms. Evans' allegation that her employment ended October 11, 2013, considerably less than 180 days earlier. Report at 3 n.2, and at 4 n.4.

OBJECTION 6. Any speculation regarding the consistency between the substance of the EEOC administrative process and the allegations of the Complaint is premature at best.

Portions of Report objected to:

> Significantly, however, none of these materials recount discriminatory acts based on gender, homosexuality, or sexual orientation. And, although Evans does not disclose any details of the EEOC's investigation here, she is reminded of the administrative consistency doctrine. Report at 4 n.4.

> " . . . there may also be some knock-out punches that otherwise drain her case of any vitality (her claims may be untimely, if not defective merely because she failed to raise them before the EEOC . . .)" Report at 12-13 n.9.

The Report speculates as to whether the doctrine of "administrative consistency" might endanger plaintiff's complaint if its allegations do not reflect the substance of the EEOC administrative process. However, the Magistrate duly notes that the doctrine can be satisfied if the substance of the allegations in the complaint are found in any of the following:

> (i) the specific claims alleged in the underlying EEOC charge; (ii) those claims which are like or reasonably related to those alleged in the underlying charge; (iii) the scope of the EEOC investigation that can reasonably be expected to grow out of the charge of discrimination; and (iv) those discriminatory acts which were in fact considered during the EEOC's investigation.

Report at 4 n.4 (quoting *Tillery v. ATSI, Inc.*, No. CV-01-S-2736-NE, 2003 U.S. Dist. LEXIS 7119, at * 1 (N.D. Ala. Apr. 14, 2003)).

The Report candidly acknowledges that the Court does not have available all the details of the EEOC investigation. Report at 4 n.4 (". . . Evans does not disclose any details of the EEOC's investigation here . . ."). Therefore, it seems prudent not to assume, at this juncture, incongruity between the focus of the EEOC investigation and the allegations of the Complaint.

OBJECTION 7. If amendment is deemed necessary, leave should be freely granted.

Portion of Report objected to:

> "In that Evans has pled no actionable claim nor seems likely to, her case should be DISMISSED WITH PREJUDICE with no 'second-chance' amendment option." Report at 12.

The Report's recommendation of dismissal with prejudice appears to be the result solely of its conclusions that Title VII does not cover sexual orientation discrimination or discrimination against a gender-nonconforming lesbian, and that an employee could not reasonably believe it covers such instances. As explained herein, those legal conclusions are erroneous, and thus it cannot be said that any necessary amendment would be futile. As such, the holding of the decision cited in the Report, *Langlois v. Traveler's Ins. Co.*, 401 F. App'x 425 (11th Cir. 2010), with respect to *pro se* litigants is directly applicable here: "[w]here a more carefully drafted complaint might state a claim, a plaintiff *must* be given at least one chance to amend the complaint before the district court dismisses the action with prejudice. *Bank v. Pitt*, 928 F.2d 1108, 112 (11th Cir. 1991) (emphasis added)." *Langlois*, 401 F. App'x at 427.

CONCLUSION

The Report should be rejected by the Court in accordance with the legal principles stated herein.

Respectfully submitted,

LAMBDA LEGAL DEFENSE &
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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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