

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 15-15234

JAMEKA K. EVANS,

Plaintiff/Appellant,

v.

GEORGIA REGIONAL HOSPITAL, et al.,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
HONORABLE J. RANDAL HALL
(4:15-CV-00103-JRG-GRS)

**CORRECTED MOTION OF NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION, GEORGIA CHAPTER AND FLORIDA CHAPTER
FOR LEAVE TO FILE BRIEF AMICI CURIAE**

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C-1

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Amici Curiae, pursuant to FRAP 26.1 and 11th Cir. R. 26.1-1, 26.1-2 and 26.1-3, hereby files their Certificate of Interested Persons and Corporate Disclosure Statement:

1. Lisa Clark (Defendant/Appellee)
2. Gail S. Coleman (Counsel for Amicus curiae EEOC)
3. Jon W. Davidson (Counsel for Plaintiff/Appellant)
4. Equal Employment Opportunity Commission (EEOC) (Amicus Curiae)
5. Jameka K. Evans (Plaintiff/Appellant)
6. Georgia Regional Hospital at Savannah (Defendant/Appellee)
7. Jennifer S. Goldstein (Counsel for Amicus Curiae EEOC)
8. Omar Gonzalez-Pagan (Counsel for Plaintiff/Appellant)
9. Honorable J. Randal Hall (District Court Judge)
10. Richard E. Johnson (Counsel for Amici Curiae NELA, Florida and Georgia Chapters)
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15. National Employment Lawyers Association (NELA), Florida Chapter
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16. National Employment Lawyers Association (NELA), Georgia Chapter
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17. Gregory R. Nevins (Counsel for Plaintiff/Appellant)
18. Courtney C. Poole (Counsel for Defendants/Appellees)
19. Jamekia Powers (Defendant/Appellee)
20. Honorable G.R. Smith (Magistrate Judge)

There are no publically traded corporations involved in this case.

**MOTION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF AMICI
CURIAE IN SUPPORT OF APPELLANT**

Amici curiae represent non-profit organizations of attorneys throughout Georgia and Florida who advocate for the civil rights of workers throughout these states. This case is of deep concern to *amici*. Should the panel decision remain undisturbed, a large number of LGBT employees will be left to question their legal protections based on their sexual orientation. However, discrimination based on sexual orientation is discrimination based on sex and prohibited by Title VII. All LGBT employees should be secure in the knowledge that they should be free from illegal discrimination based on their sexual orientation. Recent Supreme Court precedent demonstrates the acknowledgement in the legal landscape that LGBT individuals should be afforded equal rights; the employment context should be no different.

National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. The **Georgia Chapter (NELA-GA)** has approximately 125 affiliated attorneys. **Florida NELA** was

founded in 1993 and has approximately 200 affiliated attorneys. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA-GA has filed or joined in the filing of *amicus curiae* briefs on a number of employment issues. Florida NELA has filed more than 50 briefs *amicus curiae* in state and federal courts.

Undersigned counsel has consulted with counsel for Plaintiff-Appellant who consents to the filing of this brief; Defendant-Appellee has not made an appearance in this matter as the trial court dismissed the complaint prior to service of the same.

WHEREFORE *Amici Curiae* respectfully move for leave to file the attached *amici curiae* brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with FRAP 32(g)(1) that this brief complies with the type-volume requirements specified in Rule 27(d)(1)(E) and (d)(2)(A); specifically, this motion was prepared using Times New Roman 14-point font and contains 372 words.

/s/ Lisa C. Lambert
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via CMF and U.S. Mail this 14th day of April, 2017 to:

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**BRIEF OF AMICI CURIAE OF NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION, GEORGIA CHAPTER AND FLORIDA CHAPTER
SUPPORTING APPELLANT, FAVORING REHEARING EN BANC AND
REVERSAL**

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There are no publically traded corporations involved in this case.

STATEMENT OF COUNSEL

I, Lisa C. Lambert, express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether discrimination based on sexual orientation constitutes discrimination based on sex under Title VII.
2. Whether recent Supreme Court precedent mandates protections against sexual orientation discrimination under Title VII.

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and Florida Chapter

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IDENTITY AND INTEREST OF AMICI CURIAE¹

Amici curiae represent non-profit organizations of attorneys throughout Georgia and Florida who advocate for the civil rights of workers throughout these states. This case is of deep concern to *amici*. Should the panel decision remain undisturbed, a large number of LGBT employees will be left to question their legal protections based on their sexual orientation. However, discrimination based on sexual orientation is discrimination based on sex and prohibited by Title VII. All LGBT employees should be secure in the knowledge that they should be free from illegal discrimination based on their sexual orientation. Recent Supreme Court precedent demonstrates the acknowledgement in the legal landscape that LGBT individuals should be afforded equal rights; the employment context should be no different.

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¹ Pursuant to FRAP 29(c)(5), counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Plaintiff-Appellant consents to the filing of this brief; Defendants-Appellees have not entered a notice of appearance in this appeal.

have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. **The Georgia Chapter, NELA-GA**, has approximately 125 affiliated attorneys. **The Florida Chapter, Florida NELA**, was founded in 1993 and has approximately 200 affiliated attorneys. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA-GA has filed or joined in the filing of *amicus curiae* briefs on a number of employment issues. Florida NELA has filed more than 50 briefs *amicus curiae* in state and federal courts.

STATEMENT OF THE ISSUES

- I. Whether discrimination based on sexual orientation constitutes discrimination based on sex under Title VII.
- II. Whether Supreme Court precedent mandates protections against sexual orientation discrimination under Title VII.
- III. Whether all LGBT employees should be secure in the knowledge that they are protected from illegal discrimination based on their sexual orientation under Title VII.

SUMMARY OF THE ARGUMENT

Discrimination based on sexual orientation is discrimination based on sex and violates Title VII. This Court previously approved discrimination claims for transgender individuals under a theory of gender nonconformity or stereotyping. But, analyzing sexual orientation discrimination claims under the guise of stereotyping is only a description of the type of sex discrimination – in the end, it is based on sex which Title VII prohibits. Semantics should not leave only a portion of the LGBT workers protected. Instead, all LGBT employees should be secure in the knowledge that they should be free from illegal discrimination based on their sexual orientation. Recent Supreme Court precedent demonstrates the acknowledgement in the legal landscape that LGBT individuals should be afforded equal rights; the employment context should be no different.

ARGUMENT

I. DISCRIMINATION BASED ON SEXUAL ORIENTATION IS DISCRIMINATION BASED ON SEX AND VIOLATES TITLE VII

Discrimination based on sexual orientation is discrimination based on sex and violates Title VII. Full stop. The panel decision found that Plaintiff/Appellant could amend her complaint to make a clearer claim of stereotype, or gender non-conformity discrimination under Title VII. See Evans v. Ga. Reg'l Hosp., 850 F.3d

1248 at *12 (11th Cir. 2017).² However, the panel ruled that its hands were tied as to Plaintiff's sexual orientation discrimination claim based on Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), and upheld the trial court's dismissal of this claim. See id. This is error – discrimination based on sex or gender stereotyping is discrimination based on sex:

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, **evidence of gender stereotyping is simply one means of proving sex discrimination.** Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, “sex stereotyping” is not itself an independent cause of action.

Macy v. Holder, 2012 EEO PUB LEXIS 1181, *29-30 (E.E.O.C. 2012) (emphasis added); see also, Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986)(noting that “EEOC’s interpretation of Title VII is to be accorded ‘great deference’”). The distinction between discrimination based on stereotyping and sexual orientation discrimination is “illusory and artificial” – “sexual orientation discrimination is not a category distinct from sex or gender discrimination” but covered under the prohibition of discrimination based on sex.

² This case has been assigned a citation in the official reporter; however, page numbers are not yet available. Accordingly, citations are to the actual pages of the decision attached as an addendum to Appellant’s Petition for Rehearing En Banc.

Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (holding claims of sexual orientation discrimination are covered under Title VII and Title IX). “[T]he question for purposes of Title VII coverage of a sexual orientation claim is the same as 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’ when taking the challenged employment action.” Baldwin v. Foxx, 2015 EEOPUB LEXIS 1905, *12 (E.E.O.C. 2015). And, any employer who takes an employee’s sexual orientation into consideration when taking an adverse action “necessarily” considers the employee’s sex. Id. at *13.

Further, just last week, the Seventh Circuit issued an *en banc* decision recognizing that discrimination based on sexual orientation is sex discrimination under Title VII. See Hively v. Ivy Tech Cmty. Coll. of Ind., No. 15-1720, 2017 U.S. App. LEXIS 5839 (7th Cir. Apr. 4, 2017). The majority analyzed the issue through the lenses of comparators, as well as nonconformity and associational discrimination theories. See id. at *13-23. Notably, the court found that “the line between a gender nonconformity claim and one based on sexual orientation...does not exist at all.” Id. at *15. But, ultimately, the court acknowledged that their job was “to consider what the correct rule of law is now in light of the Supreme Court’s authoritative interpretations, not what someone thought it meant one, ten,

or twenty years ago.” Id. at *25 (emphasis added). The court held that based on the “logic of the Supreme Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.” Id. at *25-26.

In his concurrence, Judge Posner put forth the argument to “update [Title VII] to the present, a present that differs markedly from the era in which the Act was enacted.” Id. at *30. He calls for a “broader understanding of the word ‘sex’” in order to provide protections to LGBT employees. Id. at *34. And this makes perfect sense. Based on our present era and culture, the law cannot make a distinction between the illegal termination of an employee who is a woman and the illegal termination of an employee who is a woman and also lesbian. As Judge Posner makes clear, it is not a dramatic leap to say that lesbian may be in the subset of the category of “women.” See id. at *36, 42. This view of Title VII is not radical – it is simply “taking advantage of what the last half century has taught.” Id. at 43.

This Court needs to conduct a reexamination of what constitutes “sex” in order to preserve the fundamental protections under Title VII. This Court chipped away at Blum with extending protections to transgender individuals in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) under the theory of stereotyping or nonconformity discrimination. And while the question of whether Blum is still

good law is in dispute,³ the Court should now make a clean break from the 38 year-old case. Indeed, recent Supreme Court precedent compels such a decision. See Section II, infra. Whether termed discrimination based on nonconformity, stereotyping, association or some other formulation, in the end, the issue is discrimination based on sex. This Court should rule the same and clarify its prior holding that nonconformity discrimination is but one way to prove sex discrimination, and that all LGBT employees are protected under Title VII based on their sexual orientation.

II. SUPREME COURT PRECEDENT MANDATES RECOGNITION OF SEXUAL ORIENTATION DISCRIMINATION AS SEX DISCRIMINATION

Noticeably absent from the panel decision is any reference to, let alone discussion of, recent Supreme Court precedent outside of the employment realm that mandates the inclusion of sexual orientation discrimination as discrimination based on sex. Only two years ago, the Supreme Court issued its landmark decision permitting same-sex couples to marry. See Obergefell v. Hodges, 135 S. Ct. 2584 (2015).⁴ Justice Kennedy wrote for the majority that “[i]f rights were defined by

³ See Evans at *48-50, J. Rosenbaum dissenting, discussing whether Blum remains valid following the Supreme Court’s decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

⁴ The only reference to Obergefell in the panel opinion is in J. W. Pryor’s concurrence; however, it is simply a cite to an amicus brief supporting the respondents in that case. See Evans at *22.

who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.” Id. at 2602. He also noted that prior decisions denying civil rights to LGBT individuals perpetuated the “pain and humiliation” historically suffered by these individuals and only served to “disrespect and subordinate them.” Id. at 2604, 2606.

Prior to Obergefell, the Court held the Defense of Marriage Act (DOMA) to be unconstitutional because it specifically excluded same-sex partners. See United States v. Windsor, 133 S. Ct. 2675, 2679 (2013). And, a decade before that, the Court found state laws that criminalize consensual homosexual acts are unconstitutional. See Lawrence v. Texas, 539 U.S. 558 (2003). Notably, in Lawrence, the Court overruled its 1986 decision in Bowers v. Hardwick, 478 U.S. 1039 (1986), stating that Bowers “was not correct when it was decided, and it is not correct today.” Id. at 578. And, in Romer v. Evans, 517 U.S. 620 (1996), the Court invalidated a Colorado law prohibiting any government agency from protecting LGBT persons. While none of these cases are employment related, they do provide insight to the trajectory of our culture and our law. The Seventh Circuit understood that these four seminal cases served as “the backdrop” for ruling that discrimination based on sexual orientation is illegal. Hively at *23. Likewise, the Chief Judge for Second Circuit opined that Obergefell and Lawrence provided substantive authority for recognizing sexual orientation discrimination under Title

VII. See Christiansen v. Omnicom Grp., Inc., No. 16-748, 2017 U.S. App. LEXIS 5278 at *21, 26 (2d Cir. Mar. 27, 2017)(C.J. Katzmann, concurring)(noting the “legal landscape has changed” under these decisions). This Court should do the same and bring our Circuit’s jurisprudence into alignment with Supreme Court precedent, acknowledging the innate characteristic of sexual orientation is protected under the category of sex in Title VII.

III. ALL LGBT EMPLOYEES SHOULD BE SECURE IN THE KNOWLEDGE THAT THEY ARE PROTECTED FROM ILLEGAL DISCRIMINATION BASED ON THEIR SEXUAL ORIENTATION UNDER TITLE VII

Under our current precedent and the present panel decision, employees who are LGBT can only seek the protections given by Title VII if they assert a gender stereotype claim. As noted in his concurrence, J. William Pryor claims that the division lies between “behavior” and “status” – the former being protected but not the latter. See Evans at *20-26. In other words, if the employee does not “act” in some sort of proscribed manner for his or her sex and suffers an adverse employment action, that employee may claim sex discrimination. But as J. Rosenbaum points out in her dissent, employers can claim it did not terminate the employee because of their behavior, but ‘only’ because of their status in being gay. See id. at *41-42. J. Rosenbaum points out the obvious incongruity of such reasoning:

It cannot possibly be the case that a lesbian who is private about her sexuality—or even a heterosexual woman who is mistakenly perceived by her employer to be a lesbian—can be discriminated against by the employer because she does not comport with the employer's view of what a woman should be, while the outwardly lesbian plaintiff enjoys Title VII protection.

Id.

Plus, the concurrence's distinction between "behavior" and "status" is nonsensical in that Title VII looks to the mindset of the employer – the one who engaged in the discriminatory act. See, e.g., EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015) (noting "intentional discrimination provision [of Title VII] prohibits certain motives"); Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) (holding that that an employee could challenge acts of First Amendment retaliation "even if [] the employer makes a factual mistake about the employee's behavior," because the motive or intent of the employer is at issue); Videckis, 150 F. Supp. 3d at 1159 (noting that "[i]n 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"). The alleged behavior of any employee does not make the decisionmaker discriminatory – that animus lies within the person engaging in the illegal act. Further, as shown above, discrimination based on stereotypes is simply one manner of describing sex discrimination but it is not a distinct claim of discrimination. What about gay employees who are discriminated

against based on their intimate associations? What about gay employees who are discriminated against because they exercise their fundamental constitutional right and marry someone of the same sex? What about gay employees who are discriminated against simply because they are LGBT? All LGBT employees should be secure in their employment from invidious discrimination based on their sexual orientation, not just limited subgroups of these employees based on false judicial constructs.

CONCLUSION

This Court should grant rehearing en banc and acknowledge that discrimination based on sexual orientation is discrimination based on sex, which is prohibited under Title VII.

Respectfully submitted,

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I hereby certify in accordance with FRAP 32(a)(7)(c) that this brief complies with the type-volume limitation specified in Rule 32(a)(7)(B). Specifically, it contains 2,483 words in the Brief.

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