IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 17-13801-BB

GERALD BOSTOCK,

Appellant,

v.

CLAYTON COUNTY, GEORGIA

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CASE NO. 1:16-CV-01460

PETITION FOR HEARING EN BANC

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Bostock v. Clayton County
Docket No.: 17-13801-BB

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record verifies that those persons or entities listed below have or may have an interest in the outcome of this case:

Bostock, Gerald – Appellant/Plaintiff

Buckley Beal, LLP – counsel for Appellant

Buechner, William – counsel for Appellee

Clayton County, Georgia – Appellee/Defendant

Evans, Orinda D. – Senior Judge, United States District Court

Freeman Mathis & Gary, LLP - counsel for Appellee

Green, Brian – counsel for Plaintiff in underlying case

Hancock, Jack – counsel for Appellee

Heller, Martin B. – counsel for Appellee in underlying case

Indian Harbor Insurance Company (Insurer for Appellee)

Johnson, Walter E. (United States Magistrate Judge for the Northern District of Georgia)

Mew, Thomas – counsel for Appellant

Sutherland, Brian – counsel for Appellant

STATEMENT OF COUNSEL REGARDING EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgment, that the District Court's decision in this case and the panel decision in *Evans v. Ga. Regional Hospital*, 850 F3d 1248 (11th Cir. 2017) are contrary to the following decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). I also express the belief, based on a reasoned and studied professional judgment, that this proceeding also involves a question of exceptional importance, namely, whether discrimination against an employee on the basis of sexual orientation is actionable as sex discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII").

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal of a final decision of the United States District Court for the Northern District of Georgia.

I. STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

Whether the District Court erred in dismissing Appellant's Complaint for sexual orientation discrimination under the authority of *Evans v. GA Regional Hospital*, 850 F3d 1248 (11th Cir. 2017) because *Evans* was wrongly decided on this point and conflicts with the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and this Court's decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

II. STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff-Appellant Gerald Bostock alleges that his former employer, Defendant-Appellee Clayton County, terminated his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Specifically, he alleges that Clayton County discriminated against him on the basis of his sexual orientation and also alleges gender stereotype discrimination.[1]

Mr. Bostock filed this lawsuit, *pro se*, on May 5, 2016, alleging that Clayton County violated his rights under Title VII when it terminated his employment in November 2012. (Doc. 1, ¶¶ 1, 12-14.) Specifically, he alleges that Clayton County discriminated against him on the basis of his sexual orientation. (*Id.* at ¶¶ 13-14.) After Mr. Bostock secured counsel, he filed his First Amended Complaint on August 2, 2016 and his Second Amended Complaint on September 12, 2016. (Docs. 4 and 10.) The Second Amended Complaint alleges that Clayton County discriminated against Mr. Bostock on the basis of his sexual orientation and also alleges gender stereotype discrimination. (Doc. 10 ¶¶ 17, 20-21, 23, 24-31.)

[1] Mr. Bostock does not appeal the dismissal of his gender stereotype discrimination claim but, as set forth in the Argument section, the distinction between sexual orientation discrimination and gender stereotype discrimination is a distinction without a difference since, in either case, the employer has discriminated because of the employee's sex.

On September 26, 2016, Clayton County filed a Motion to Dismiss the Second Amended Complaint. (Doc. 13.) On November 3, 2016, the Magistrate Judge issued his Final Report and Recommendation, recommending that Mr. Bostock's complaint be dismissed with prejudice. (Doc. 16.) Mr. Bostock filed objections to the Report and Recommendation to which Clayton County responded and Mr. Bostock replied. (Docs. 18, 19, 20.)

The District Court deferred ruling on the objections pending the outcome of this Court's decision in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017). (*See* Doc. 21.) On March 10, 2017, this Court issued its decision in *Evans*, in which a majority of the panel decided that Title VII's prohibition of sex discrimination does not include discrimination based on sexual orientation. 850 F.3d at 1255-57. This Court denied a petition for rehearing and rehearing en banc on July 6, 2017. (Order dated July 6, 2017, per curiam).[2] The next day, on July 7,

[2] Mr. Bostock recognizes that the appellant in *Evans* unsuccessfully petitioned for rehearing and rehearing en banc. The order denying that petition simply states: "The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED." (No. 15-15234-BB, July 6, 2017). Mr. Bostock's case is apparently in a different posture procedurally then that of *Evans*. In *Evans*, the District Court questioned the timeliness of the appellant's EEOC charge and whether the allegations in her complaint were sufficiently similar to the EEOC's investigation. The appellant's objections to those issues were determined to be abandoned on appeal. 850 F.3d at 1254 n.3. As alleged in his Second Amended Complaint, however, Mr. Bostock timely filed a charge for sex and sexual orientation

2017, the District Court adopted the Report and Recommendation and granted Clayton County's Motion to Dismiss. (Doc. 24.)[3]

III. STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES[4]

Mr. Bostock is a gay male. (Doc. 10 ¶ 12). He began working for Clayton County on or about January 13, 2003. (*Id.* ¶ 11.)

Mr. Bostock worked as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County and was charged with the primary responsibility of Clayton County CASA (Court Appointed Special Advocate). (Doc. 10 ¶ 13.) During the over ten years Mr. Bostock worked for Clayton County, he received favorable performance evaluations and the program received accolades. (*Id.* ¶ 14.) Clayton County CASA was awarded the established Program

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discrimination with the EEOC and filed suit within 90 days of the receipt of his Notice of Right to Sue. (Doc. 10 ¶¶ 6-7).

[3] 11th Cir. R. 35-5(k) states that a petition must include "a copy of the opinion sought to be reheard." Although Mr. Bostock is seeking initial hearing of his appeal en banc rather than rehearing, he has, out of an abundance of caution, attached a copy of the District Court's Order to this Petition.

[4] These are the facts as alleged in Mr. Bostock's Second Amended Complaint. Many of these facts are denied by Clayton County, but this Court reviews an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) *de novo*. *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017). In assessing the sufficiency of a claim, the Court accepts all well-pleaded allegations as true and draws all reasonable inferences in the plaintiff's favor. *Montgomery Cty. Comm'n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1254 (11th Cir. 2015).

Award of Excellence by Georgia CASA in 2007. (*Id.*) Mr. Bostock received recognition from National CASA for his work and served on the National CASA Standards and Policy Committee in or about 2011 through 2012. (*Id.*)

Beginning in January 2013, Mr. Bostock became involved with a gay recreational softball league called the Hotlanta Softball League. (Doc. 10 ¶ 15.) Mr. Bostock actively promoted Clayton County CASA to the softball league as a source of volunteer opportunities for league members. (*Id.* ¶ 16.)

In the months after Mr. Bostock joined the softball league, his participation in the league and his sexual orientation and identity were openly criticized by one or more persons who had significant influence on the decision making of Clayton County. (Doc. 10 ¶ 17.) Shortly thereafter, in or around April 2013, Clayton County advised Mr. Bostock it was conducting an internal audit on the CASA program funds that Mr. Bostock managed. (*Id.* ¶ 18.)

Mr. Bostock did not engage in any improper conduct with regard to program funds under his custody or control and alleges Clayton County initiated the audit as a pretext for discrimination based on his sexual orientation and failure to conform to gender stereotype. (Doc. 10 ¶¶ 19-20.) In fact, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where Mr. Bostock's supervisor was present, at least one individual made disparaging comments about

Mr. Bostock's sexual orientation and identity and his participation in the softball league. (*Id.* ¶ 21.)

On or about June 3, 2013, Clayton County terminated Mr. Bostock. (Doc. 10 ¶ 22.) The stated reason for Mr. Bostock's termination was conduct unbecoming of a county employee. (*Id.* ¶ 23.) That purported reason however, was a pretext for discrimination against Mr. Bostock based on his sex and/or sexual orientation. (*Id.*)

Mr. Bostock timely filed a charge for sex and sexual orientation discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Doc. 10 ¶ 6.) Mr. Bostock filed this lawsuit within 90 days of the receipt of his Notice of Right to Sue from the EEOC. (*Id.* ¶ 7.)

IV. ARGUMENT AND CITATION OF AUTHORITIES

A. *EVANS* CONFLICTS WITH THE SUPREME COURT'S DECISION IN *PRICE WATERHOUSE v. HOPKINS*

In *Price Waterhouse v. Hopkins*, the United States Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination that violates Title VII. *See* 490 U.S. 228, 251 (1989). Six members of the Supreme Court agreed that Title VII prohibits not simply discrimination because of one's biological sex, but also gender stereotyping -- that is, failing to act and appear according to stereotypical gender expectations. *Id.* at 250-51(plurality opinion); *id.*

at 258-61, (White, J., concurring); *id.* at 272-73(O'Connor, J., concurring). The Supreme Court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group . . ." *Id.* at 251. The Court also emphasized that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Id.* (emphasis added).

As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, "*Price Waterhouse* . . . demand[s] the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination 'because of ... sex.'" *Evans,* 850 F.3d at 1264 (Rosenbaum, J., concurring in part and dissenting in part). When an employer discriminates against a gay or lesbian employee, "the employer discriminates against the employee because she does not conform to the employer's prescriptive stereotype of what a person of that birth-assigned gender should be. And so the employer discriminates against the employee 'because of ... sex.'" *Id.* (footnotes and citations omitted). *See also Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 350 (7th Cir. 2017) (noting that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and that "[t]he 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, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line").

In *Evans*, the majority of the panel held that it was bound by the prior precedent rule to follow *Blum v. Gulf Oil Corp.,* 597 F.2d 936 (5th Cir. 1979), and rejected the appellant's argument that *Price Waterhouse* and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), support a cause of action for sexual orientation discrimination under Title VII. *Evans*, 850 F.3d at 1256. The basis of this conclusion was the majority's determination that "*Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum*." 850 F.3d at 1256. With respect to the majority of the *Evans* panel, this is error.

Blum "'directly conflict[s] with' *Price Waterhouse*'s holding that Title VII prohibits an employer from discriminating against its employee on the basis that she fails to conform to the employer's view of what a woman should be." *Evans*, 850 F.3d at 1270 (Rosenbaum, J., concurring in part and dissenting in part). As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, "*Price Waterhouse* requires us to apply the rule that '[a]n individual cannot be punished because of his or her perceived gender-nonconformity.'" *Id.* Since continued application of *Blum* would allow a woman to be punished precisely because of her perceived gender non-conformity--in this case, sexual attraction to other women--

Price Waterhouse undermines these cases to the point of abrogation." *Id.* (internal citations omitted).

Moreover, the entire basis on which the *Blum* Court based its statement regarding sexual orientation discrimination has been abrogated. In *Blum*, the primary issue on appeal was whether the defendant articulated a legitimate nondiscriminatory reason for the plaintiff's discharge. The former Fifth Circuit held that it did. 596 F.2d at 937. But after reaching this conclusion, which effectively resolved the appeal, the Fifth Circuit went to "comment briefly" on other issues raised on appeal. It was in this section of the opinion in which the former Fifth Circuit offered the statement that "[d]ischarge for homosexuality is not prohibited by Title VII." 597 F.2d at 938. In support of the proposition that Title VII does not prohibit "discharge for homosexuality," the former Fifth Circuit did not provide any analysis and simply cited an earlier holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

In *Smith*, "the claim [wa]s not that [the plaintiff] was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.'" 569 F.2d at 327. The court held that such discrimination was not sex discrimination within the meaning of Title VII, *id.*, and noted in a footnote that "[t]he EEOC itself has ruled that adverse action against homosexuals

is not cognizable under Title VII," *id.* n.1. *Smith* is no longer good law on this point since its holding "vis-à-vis discrimination on the basis of sex stereotyping has clearly been abrogated by subsequent Supreme Court cases." *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F. Supp.3d 1334, 1342 n.4 (N.D. Fla. 2016); *see also Price Waterhouse*, 490 U.S. 228 (1989). The District Court in *Winstead* also correctly noted that "[o]f course the EEOC has changed course" also on this issue. *Id.* In sum, "[e]very pillar supporting the reasoning of the *Smith* court has been knocked down." *Id.* Thus, "*Smith* is one of many examples of a parsimonious reading of Title VII failing to stand the test of time." *Id.* Thus, the entire basis on which *Blum* based its language regarding sexual orientation discrimination has been abrogated, and the Court in *Evans* erred in relying upon it as binding precedent. This error led to a decision that is itself in conflict with *Price Waterhouse*. This Court must act en banc to rectify that error. [5]

[5] Mr. Bostock acknowledges that under the prior panel precedent rule, a panel of this Court is generally bound to follow a prior panel decision except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision. *See, e.g., Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998). For this reason, Mr. Bostock files this Petition for Hearing En Banc. As this Court is also aware, a petition for certiorari has been filed in *Evans* and is currently pending before the United States Supreme Court. (Sup. Ct. Case No. 17-370).

B. *EVANS* CONFLICTS WITH THIS COURT'S DECISION IN *GLENN V. BRUMBY*

Evans also conflicts with this Court's holding in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, this Court clearly held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." 663 F.3d at 1317. This Court noted that a number of pre-*Price Waterhouse* decisions had concluded that Title VII afforded no protection to transgender victims of sex discrimination. This Court determined, however, that these cases had been "'eviscerated' by *Price Waterhouse's* holding that 'Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.'" *Id.* at 1318 n.5 (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

In *Glenn*, this Court stated that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype." *Id.* at 1318 (11th Cir. 2011). The same is true for gay or lesbian employees. In *Hively*, the Seventh Circuit correctly observed that the appellant in that case, a lesbian employee,

> represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America,

> which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.

853 F.3d at 346. Thus, *Glenn*, like *Price Waterhouse*, "demand[s] the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination 'because of ... sex.'" *Evans,* 850 F.3d at 1264 (Rosenbaum, J. concurring in part and dissenting in part). *Evans* and *Glenn* "cannot be reconciled." *Id.* at 1269.

To quote Judge Rosenbaum again:

> And discrimination against an employee solely because she fails to conform to the employer's view that a woman should be sexually attracted to men only is no different than discrimination against a transsexual because she fails to conform to the employer's view that a birth-assigned male should have male anatomy. In both cases, the employer discriminates because the employee does not comport with the employer's vision of what a member of that particular gender should be. It's just as simple as that.

Id. at 1265-66. *Evans* was erroneously decided on the issue of sexual orientation discrimination because it directly conflicts with *Glenn*. This Court must therefore act en banc to overrule *Evans* and reverse the District Court's dismissal of Mr. Bostock's claim for sexual orientation discrimination under Title VII.

V. CONCLUSION

The District Court's decision in this case and the panel's decision in *Evans* are in direct conflict with the Supreme Court's holding in *Price Waterhouse* and

this Court's holding in *Glenn*. Mr. Bostock respectfully requests that the Court hear this appeal en banc and reverse the District Court's dismissal of his claim for sexual orientation discrimination.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that this brief complies with the type-volume limitation set forth in FRAP 35(b)(2) because, excluding the parts of the document exempted by 11th Cir. R. 35-1, this brief contains 3,336 words.

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CERTIFICATE OF SERVICE

This is to certify that I have this 13th day of November, 2017, served a copy of the **Petition for Hearing En Banc** upon the parties listed below by depositing same in the United States mail, with sufficient postage thereon, addressed to:

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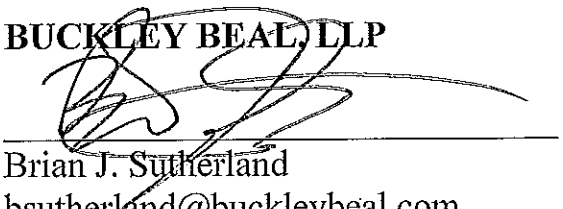

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK,

Plaintiff

v.

CLAYTON COUNTY,

Defendant

CIVIL ACTION NO.
1:16-CV-1460-ODE

ORDER

This employment discrimination case is before the Court on United States Magistrate Judge Walter E. Johnson's Final Report and Recommendation [Doc. 16]. Plaintiff Gerald Lynn Bostock ("Plaintiff") has filed objections [Doc. 18], to which Defendant Clayton County ("Clayton County") has responded in opposition [Doc. 19] and Plaintiff has replied [Doc. 20]. For the reasons stated below, the R&R is adopted in full and Clayton County's underlying motion to dismiss [Doc. 13] thereby granted.

I. Background[1]

On September 12, 2016, Plaintiff filed his Second Amended Complaint, the operative document before the Court,[2] in which he alleges violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq. [Doc. 10]. Plaintiff, a gay male, began working for Clayton County on or about January 13, 2003. Clayton County employed

[1]Plaintiff has objected only to Judge Johnson's conclusions of law and not his findings of fact. Therefore, the following facts are taken from the R&R, unless otherwise noted.

[2]See Lowery v. Ala. Power Co., 483 F.3d 1184, 1219-20 (11th Cir. 2007).

Plaintiff as the Child Welfare Services Coordinator assigned to its Juvenile Court; he had primary responsibility for the Clayton County Court Appointed Special Advocate ("CASA"). During his ten-year career with Clayton County, Plaintiff received good performance evaluations and the program he managed received accolades. For example, in 2007, Georgia CASA awarded Clayton County CASA its Established Program Award of Excellence. National CASA also recognized Plaintiff for his program expansion efforts, and he served on its Standards and Policy Committee in or about 2011-2012.

Beginning in January 2013, Plaintiff became involved with a gay recreational softball league, the Hotlanta Softball League. Plaintiff actively promoted Clayton County CASA to league members as a good volunteer opportunity. In the subsequent months, Plaintiff alleges that his participation in the league and his sexual orientation and identity were openly criticized by one or more persons with significant influence on Clayton County's decision-making. For example, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board at which Plaintiff's supervisor was present, Plaintiff alleges that at least one individual made disparaging comments about his sexual orientation and identity and participation in the league.

In or around April 2013, Clayton County advised Plaintiff that it would be conducting an internal audit on the CASA program funds that he managed. Plaintiff contends that he engaged in no improper conduct as to funds under his custody or control and that this audit was a pretext for discrimination. On or about June 3, 2013, Clayton County terminated Plaintiff, allegedly for conduct unbecoming one of

its employees. Plaintiff alleges that this reason was pretext for discrimination based on his sexual orientation.

On September 5, 2013, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In that document, Plaintiff checked the box for sex discrimination and stated: "I believe I have been discriminated against because of my sex (male/sexual orientation)" [Doc. 14-1].

On May 5, 2016, Plaintiff pro se filed his initial Complaint in which he alleged only discrimination based on sexual orientation [Doc. 1]. After securing counsel, Plaintiff filed his First Amended Complaint on August 2, 2016 [Doc. 4]. Plaintiff's Second Amended Complaint was the first to explicitly add allegations of discrimination for failure to conform to a gender stereotype [Doc. 10]. On September 26, 2016, Clayton County filed a motion to dismiss for failure to state a claim [Doc. 13], to which Plaintiff responded in opposition on October 13, 2016 [Doc. 14] and Defendant replied on October 27, 2016 [Doc. 15].

On November 3, 2016, Judge Johnson issued his R&R recommending dismissal with prejudice on three grounds: (1) Title VII does not encompass claims of sexual orientation discrimination, (2) the Second Amended Complaint contains no factual allegations supporting a gender stereotyping claim, and (3) the gender stereotyping claim was not referenced in Plaintiff's EEOC charge and thus he failed to exhaust his administrative remedies [Doc. 16]. On November 17, 2016, Plaintiff filed objections to each of these conclusions of law [Doc. 18], on December 1, 2016, Clayton County responded in opposition [Doc. 19], and on December 15, 2016, Plaintiff replied [Doc. 20]. On February 2, 2017, the Court deferred ruling on this case pending a

decision from the United States Court of Appeals for the Eleventh Circuit in the related case of Evans v. Ga. Regional Hospital. The Eleventh Circuit has now issued its decision, and this Court may now rule with the benefit of that precedent.

II. **Legal Standard**

In reviewing an R&R, the Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Absent objection, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id. Because Plaintiff objects to each of Judge Johnson's conclusions of law, the Court will review de novo Clayton County's motion to dismiss.

To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level," and "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, Powell v. Thomas, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not

accept as true the plaintiff's legal conclusions, including those couched as factual allegations, Iqbal, 556 U.S. at 678. Particularly important is the requirement that a complaint contain enough factual allegations to provide "'fair notice' of the nature of the claim" and the "'grounds' on which the claim rests." Twombly, 550 U.S. at 555 n.3.

A. Sexual Orientation Discrimination

In his Second Amended Complaint, Plaintiff alleges discrimination in violation of Title VII based on his sex, sexual orientation, and failure to conform to gender stereotypes [Doc. 10]. Clayton County objected because "Plaintiff cannot state a viable claim for relief under established law because Title VII does not protect Plaintiff (or anyone else) from discrimination due to his sexual orientation" [Doc. 13 at 14]. Judge Johnson agreed on the basis of precedent that the Eleventh Circuit has recently affirmed. See Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) ("[Plaintiff] next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent foreclosed such an action.") (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII . . . .")). As a matter of law, the Eleventh Circuit has thus foreclosed the possibility of a Title VII action alleging discrimination on the basis of sexual orientation as a form of sex discrimination protected by that Act. Plaintiff's objection on this point is overruled.

B. Gender Stereotyping

In his Second Amended Complaint, Plaintiff also explicitly alleges for the first time that he was fired for "failure to conform to a gender stereotype" [Doc. 10 ¶ 20]. Other than sexual orientation, however, there is not a single mention of or fact supporting gender stereotype discrimination in this case.[3] The Court agrees with Judge Johnson that Plaintiff has failed to state any facts to facially support this claim standing alone. See Igbal, 556 U.S. at 678; Twombly, 550 U.S. at 555-56. Plaintiff's objection on this point is also overruled.

Because the Court finds that Plaintiff has failed to meet the pleading standard for a gender stereotype discrimination claim, it need not address the parties' dispute as to exhaustion of administrative remedies and timeliness.

III. Conclusion

For the reasons stated above, Plaintiff's Objections [Doc. 18] are OVERRULED and Judge Johnson's R&R [Doc. 16] is ADOPTED IN FULL. Clayton County's Motion to Dismiss [Doc. 13] is GRANTED. Plaintiff's case is hereby DISMISSED WITH PREJUDICE. Costs taxed to Plaintiff.

SO ORDERED, this 20 day of July, 2017.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[3]Examples of proper pleading on this issue include refusing to promote a woman perceived as "aggressive," Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989), or declining to hire a qualified applicant because he was "effeminate," Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326 (5th Cir. 1978).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD LYNN BOSTOCK,
Plaintiff,

vs.

CLAYTON COUNTY
Defendant.

CIVIL ACTION FILE

NO. 1:16-CV-1460-ODE

JUDGMENT

This action having come before the court, Honorable Orinda D. Evans, United States District Judge, for consideration of the Defendant's Motion to Dismiss and the Court having GRANTED said motion, it is

Ordered and Adjudged that the Plaintiff take nothing; that the Defendant recover its costs of this action, and the action be, and the same hereby, is **DISMISSED with prejudice**.

Dated at Atlanta, Georgia, this 21st day of July, 2017.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Stephanie Pittman
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
July 21, 2017
James N. Hatten
Clerk of Court

By: s/ Stephanie Pittman
Deputy Clerk