No. 15-1720

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIMBERLY HIVELY,

Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division
Hon. Rudy Lozano, Judge

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF HIVELY'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

P. DAVID LOPEZ
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

GAIL S. COLEMAN
Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street, NE, Room 5SW24L
Washington, DC 20507
(202) 663-4055
gail.coleman@eeoc.gov

Rule 35(b)(1) Statement of Counsel

The panel decision holds that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., does not prohibit employment discrimination on the basis of sexual orientation. This holding conflicts with two decisions of the United States Supreme Court: *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which instructs that statutes must be interpreted as written even when the language goes beyond the principal evil Congress sought to address, and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which holds that Title VII makes sex "irrelevant" in employment decisions. Consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

The question whether sexual orientation discrimination is cognizable under Title VII is also one of exceptional importance. The panel's decision relies on *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and its progeny, which are based on pre-*Price Waterhouse* and pre-*Oncale* law. Although it remains an open question in the Eleventh Circuit whether Title VII prohibits employment discrimination on the basis of sexual orientation, that Court has held, contrary to *Ulane*, that "discrimination against a transgender individual because of his or her gender nonconformity is gender stereotyping prohibited by Title VII . . . ." *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011). The Eleventh Circuit clarified that *Ulane* has been "eviscerated" by *Price Waterhouse* and is "inconsistent with *Oncale*." *Id.* at

1318 n.5. Accordingly, the panel's decision conflicts with relevant and authoritative Eleventh Circuit precedent.

/s/ Gail S. Coleman

Table of Contents

Table of Authorities

Cases

Statute and Rule

Other Authority

Statement of Interest

The EEOC is charged by Congress with interpreting, administering, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. This appeal addresses whether claims of sexual orientation discrimination are cognizable under Title VII as claims of sex discrimination. Because such claims necessarily involve consideration of a plaintiff's sex, gender-based associational discrimination, and sex stereotyping, the EEOC believes that they fall squarely within Title VII's prohibition against discrimination on the basis of sex. The Court's resolution of this issue will significantly affect the EEOC's enforcement efforts. *See* Fact Sheet, Enforcement Protections for LGBT Workers, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm#charges (1,181 sexual orientation charges filed in FY 2015). Accordingly, the EEOC offers its views to the Court. The EEOC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

Statement of the Issue

Is discrimination on the basis of sexual orientation cognizable under Title VII as a form of sex discrimination?

Statement of the Case

Kimberly Hively, a part-time adjunct professor at Ivy Tech Community College, alleges that Ivy Tech refused to promote her or grant her full-time employment because she is a lesbian. She sued under Title VII, arguing that the statute's prohibition against sex discrimination incorporates a prohibition against

discrimination because of sexual orientation. Slip Op. at 2. The district court disagreed and dismissed Hively's complaint. *Id.* at 3.

The panel affirmed. The Court relied on *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and its progeny, which hold that Title VII does not prohibit discrimination on the basis of sexual orientation. *Id.* at 3 ("Both *Hamner [v. St. Vincent Hosp. & Health Care Ctr., Inc.,* 224 F.3d 701 (7th Cir. 2000),] and *Spearman [v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000),] relied upon our 1984 holding in *Ulane* . . . in which this court, while considering the Title VII claim of a transsexual airline pilot, stated in dicta that 'homosexuals and transvestites do not enjoy Title VII protection."); *see also id.* at 4 ("Since *Hamner* and *Spearman*, our circuit has, without exception, relied on those precedents to hold that the Title VII prohibition on discrimination based on 'sex' extends only to discrimination based on a person's gender, and not that aimed at a person's sexual orientation."). The panel also relied on Congress's subsequent rejection of legislation prohibiting sexual orientation discrimination. *Id.* at 6-9.

The panel then considered the merits of overturning Circuit precedent. It acknowledged the EEOC's "thorough analysis" in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *9 n.13 (EEOC July 15, 2015), which holds that Title VII prohibits discrimination on the basis of sexual orientation. *Id.* at 11. Specifically addressing *Price Waterhouse*, which prohibits discrimination based on gender stereotypes, the panel agreed with the EEOC that "almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination

on the basis of gender non-conformity." *Id.* at 15. Observing that the distinction between sexual orientation claims and gender nonconformity claims is "elusive," *id.* at 14, the panel nevertheless concluded that it is not "impossible" to disentangle gender discrimination from sexual orientation discrimination. *Id.* at 22.

The panel noted that its holding is inconsistent with Title VII's treatment of discrimination based on an employee's association with a person of another race. "[I]f Title VII protects from discrimination a white woman who is fired for romantically associating with an African-American man," the panel said, "then logically it should also protect a woman who has been discriminated against because she is associating romantically with another woman." *Id.* at 38-39. The panel did not explain why it rejected this logic, other than to say that it did not find a "compelling reason to overturn circuit precedent." *Id.* at 41.

The panel expressed discomfort with its ruling. "It may be that the rationale appellate courts, including this one, have used to distinguish between gender non-conformity discrimination claims and sexual orientation discrimination claims will not hold up under future rigorous analysis," the panel said. "It seems illogical to entertain gender non-conformity claims under Title VII where the non-conformity involves style of dress or manner of speaking, but not when the gender non-conformity involves the sine qua non of gender stereotypes – with whom a person engages in sexual relationships." *Id.*

The panel concluded that "[p]erchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our

precedent." *Id.* For now, the panel said, "writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent." *Id.* at 42.

Argument

Although the panel ruled that Title VII does not prohibit discrimination on the basis of sexual orientation, it explained that this Court's rule is illogical and unworkable. Without attempting to reconcile its holding with its criticism of Circuit precedent, the panel said that its hands were tied. For the following reasons, this Court should grant rehearing en banc to overturn its outdated and unworkable law.

A. This Court should grant rehearing en banc because the panel decision conflicts with Supreme Court precedent.

In *Ulane v. Eastern Airlines*, this Court said that Title VII does not prohibit discrimination on the basis of sexual orientation. 742 F.2d at 1084-85. The *Ulane* Court relied on the "plain meaning" of the word "sex," Congress's failure to discuss sexual orientation when enacting Title VII, and Congress's refusal to pass subsequent legislation barring sexual orientation discrimination. *Id.* at 1085-86. Until the panel opinion in the instant case, this Court has never questioned *Ulane*'s logic. *See, e.g.*, *Hamner*, 224 F.3d at 704; *Spearman*, 231 F.3d at 1085. The EEOC's recent opinion in *Baldwin*, however, "has created a groundswell of questions about the rationale for denying sexual orientation claims while allowing nearly indistinguishable gender non-conformity claims." Slip Op. at 2. It is time, therefore, for this Court to take a "fresh look" at *Ulane*. *Id.* at 11.

1. *Price Waterhouse v. Hopkins* holds that sex must be "irrelevant" in employment decisions.

Title VII generally forbids employers from considering sex. 42 U.S.C. § 2000e-2(a); *Price Waterhouse*, 490 U.S. at 240 ("gender must be irrelevant to employment decisions"). Sexual orientation discrimination violates this prohibition for three reasons. First, it involves impermissible consideration of an employee's sex. Second, it relies on gender-based associational discrimination. Finally, it treats employees adversely because of their failure to conform to gender norms.

Sexual orientation discrimination involves impermissible consideration of an employee's sex because it requires an employer to consider the sex of its employee in relation to the sex of the persons to whom the employee is attracted. *Baldwin*, 2015 WL 4397641, at *5. The panel's opinion did not address this straightforward point. If an employer would not have discriminated "if Plaintiff were a man dating a woman, instead of a woman dating a woman . . . then Plaintiff was discriminated against because of her gender." *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002).

This principle is evident in the case of spousal benefits. In *Hall v. BNSF Railway*, No. 13-2160, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014), for instance, the court held that a male plaintiff stated a plausible Title VII sex discrimination claim where his employer provided spousal benefits for female employees married to men but not for male employees married to men. The plaintiff "allege[d] disparate treatment based on his sex," the court held, because he alleged "that he (as a male who married a male) was treated differently in

comparison to his female coworkers who also married males." *Id.*

Sexual orientation discrimination fails the Supreme Court's "simple" test for sex discrimination: "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted). The consideration of sex remains true even though employers discriminating on the basis of sexual orientation do not discriminate against *all* men or women, but only against those who are gay or lesbian. Discrimination against a subset of a class is actionable when based on a protected characteristic. *See Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (Title VII does not provide "bottom line" defense).

Moreover, sexual orientation discrimination is sex discrimination even though the employer discriminates against both men and women. By analogy, firing a white employee for having a black spouse and a black employee for having a white spouse is discrimination against both employees based on race. Discrimination against one does not negate discrimination against the other. *See Palmer v. Thompson*, 419 F.2d 1222, 1232-33 (5th Cir. 1969) (Wisdom, J., dissenting) ("In cases such as *Loving v. Virginia* . . . the statute may have applied equally to Negroes and whites but that fact was irrelevant because race was the factor upon which the statute operated . . . ."), *aff'd*, 403 U.S. 217 (1971).

Sexual orientation discrimination also violates Title VII because the statute bars associational discrimination. In the race context, "decisions of this [Supreme] Court firmly establish that discrimination on the basis of racial affiliation and

association is a form of racial discrimination." *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983). Thus, a plaintiff claiming discrimination based upon an interracial marriage "alleges, by definition, that he has been discriminated against because of *his* race." *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (same); *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (interracial friendship); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (interracial friendships or associations); *Tetro v. Elliott Popham Pontiac*, 173 F.3d 988, 994-95 (6th Cir. 1999) (biracial child).

Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9. Just as an employer may not discriminate against a white woman because she is married to a black man, it also may not discriminate against a lesbian because she has exercised her constitutional right to marry a woman. *Cf. Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968) (teacher may not be fired for exercising First Amendment right to make substantially correct comments on matters of public concern regarding school where he works).

Finally, the plain language incorporates sexual orientation because Title VII prohibits discrimination based on sex stereotypes. *Price Waterhouse*, 490 U.S. at 250-51. The plaintiff in *Price Waterhouse* was a woman whose employer perceived her as insufficiently feminine. Several partners in her firm commented that she would have a better chance of becoming a partner if she would "walk more

femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. Six members of the Court agreed that these comments indicated gender discrimination based on sexual stereotypes. The plurality held that Title VII prohibits such discrimination. *Id.* at 251.

To a certain degree, this Court has enforced *Price Waterhouse*'s prohibition on sex stereotyping. *See Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) ("Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998). However, the Court has not applied *Price Waterhouse* to sexual orientation discrimination.[1] Such discrimination necessarily involves a stereotype that men should be attracted only to women and women should be attracted only to men. Slip Op. at 14-15, 27; *see also Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their

[1] Most of the cases in other circuits holding that Title VII does not prohibit sexual orientation discrimination rely on pre-*Price Waterhouse* precedent. *E.g., Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996). The Second Circuit is currently considering whether *Price Waterhouse* changes the analysis, *Christiansen v. Omnicom Grp., Inc.*, No. 16-748 (2d Cir.) (EEOC amicus brief filed June 28, 2016), and the Eleventh Circuit is currently considering the question for the first time, *Evans v. Ga. Reg'l Hosp.*, No. 15-15234 (11th Cir.) (EEOC amicus brief filed Jan. 11, 2016). The Sixth Circuit, meanwhile, has limited the impact of *Price Waterhouse* to "characteristics that [are] readily demonstrable in the workplace." *Vickers*, 453 F.3d at 763. This rule is illogical, as Title VII prohibits employment actions based on illegal motives regardless of why the employer has such motives. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

sexual practices."). There is no sexual orientation exception to *Price Waterhouse*. *See Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015); *Isaacs v. Felder Servs., LLC,* 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Heller*, 195 F. Supp. 2d at 1224; *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

2. *Oncale v. Sundowner Offshore Services* demands that statutes be interpreted as written even when the language goes beyond the principal evil Congress sought to address.

Fourteen years after this Court decided *Ulane*, the Supreme Court in *Oncale* rejected the notion that Title VII only proscribes the types of discrimination that Congress specifically considered. The *Oncale* Court unanimously interpreted Title VII's prohibition on sex discrimination to cover same-sex harassment even though the 1964 Congress probably never considered such conduct. *Oncale*, 523 U.S. at 78-80. In direct opposition to the reasoning of *Ulane*, the *Oncale* Court observed, "statutory 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.

Both the *Ulane* Court and the panel in the instant case found it significant that Congress repeatedly has rejected legislation prohibiting sexual orientation discrimination. As the Supreme Court has cautioned, however, "[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress" and is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not

become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted). Moreover, since the mid-1990s, the proposed legislation would not simply have added "sexual orientation" to Title VII, but would have created stand-alone statutes with numerous other provisions, some of which were highly controversial. *See* Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 Law & Sexuality 1, *8-11 (2010) (describing ENDA congressional history). Congress's failure to pass any of those bills, therefore, shows only that a majority of legislators could not agree on any single version of the provisions.

B. This Court should grant rehearing en banc because the Circuit precedent on which the panel decision relies is outdated and unworkable.

The panel acknowledged that precedent can be overturned when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . or [when] facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.'" Slip Op. at 41 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992)). Such is the case here. Although *Ulane* fell within the mainstream when it was decided, the legal landscape has changed. In the past, state legislatures could legally criminalize private homosexual conduct. *Bowers v. Hardwick*, 478 U.S. 186 (1986). In 2003, the Supreme Court overruled *Bowers*, reasoning that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Same-sex couples may now

marry, and laws refusing to permit or recognize such unions are invalid. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605-06 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2693-96 (2013). Additionally, the EEOC now holds that Title VII prohibits sexual orientation discrimination, *Baldwin*, 2015 WL 4397641, at *5, and it adjudicates claims by federal employees and applicants on this basis. The EEOC also accepts, investigates, and conciliates non-federal sector charges consistent with this position.

It is time for courts to stop "turn[ing] circles around themselves" trying to distinguish between actionable gender stereotyping claims and non-actionable sexual orientation claims. Slip Op. at 15. Sexual orientation discrimination *is* sex stereotyping discrimination. This Court's contrary rule is wrong.

Conclusion

As the panel recognized, intervening Supreme Court law has cast doubt on this Court's rule that Title VII does not prohibit discrimination based on sexual orientation. The EEOC urges this Court to grant the petition for rehearing en banc.

Respectfully submitted,

P. DAVID LOPEZ
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

/s/ Gail S. Coleman
Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street, NE, Room 5SW24L

Washington, DC 20507
(202) 663-4055 gail.coleman@eeoc.gov

Certificate of Service

I certify that on this 25th day of August, 2015, I filed the foregoing brief electronically in PDF format through the Court's CM/ECF system and sent thirty paper copies to the Clerk of the Court via UPS.

I certify that all counsel of record are registered CM/ECF users and that I served them via the Court's CM/ECF system.

/s/ Gail S. Coleman
Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street, NE, Room 5SW24L
Washington, DC 20507
(202) 663-4055
gail.coleman@eeoc.gov