

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GERALD LYNN BOSTOCK,)
)
Plaintiff,) CIVIL ACTION
) File No. 1:16-CV-01460-ODE-WEJ
v.)
)
CLAYTON COUNTY,)
)
Defendant.)

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Gerald Bostock, appeals to the United States Court of Appeals for the Eleventh Circuit from this Court's Order granting Defendant's Motion to Dismiss [Doc 24], and the Clerk's Judgment [Doc 25], both entered on July 21, 2017.

LET THIS NOTICE BE SERVED ON THE DEFENDANT.

Respectfully submitted,

BUCKLEY BEAL, LLP

s/ Thomas J. Mew
Thomas J. Mew
tmew@buckleybeal.com
Georgia Bar No. 503447
Brian J. Sutherland
bsutherland@buckleybeal.com
Georgia Bar No. 105408
T. Brian Green
bgreen@buckleybeal.com

Promenade, Suite 900
1230 Peachtree Street, NE
Atlanta, GA 30309
Telephone: (404) 781-1100
Facsimile: (404) 781-1101

Counsel for Plaintiff

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GERALD LYNN BOSTOCK,)	
)	
Plaintiff,)	CIVIL ACTION
)	File No. 1:16-CV-1460
v.)	
)	
CLAYTON COUNTY,)	
)	
Defendant.)	

CERTIFICATE OF COMPLIANCE

I hereby certify that the within and foregoing has been prepared in compliance with Local Rule 5.1 by using Times New Roman, 14 point font.

This 21st day of August, 2017.

s/Thomas J. Mew
Thomas J. Mew

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2017, I electronically filed
PLAINTIFF'S NOTICE OF APPEAL with the Clerk of Court using the
CM/ECF system which will automatically send email notification of such filing
to the following attorneys of record:

Jack Hancock, Esq.
William H. Buechner, Esq.

BUCKLEY BEAL, LLP

s/ Thomas J. Mew
Thomas J. Mew
tmew@buckleybeal.com
Georgia Bar No. 503447

**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

J U D G M E N T

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

FILED IN CHAMBERS
U.S.D.C. - Atlanta

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

JUL 21 2017

James M. Hatten, Clerk

By: *AMC*

GERALD LYNN BOSTOCK,
Plaintiff

v.

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

CLAYTON COUNTY,
Defendant

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. Background¹

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

¹Plaintiff 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.

²See 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 Iqbal, 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

³Examples 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).

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

GERALD LYNN BOSTOCK,

Plaintiff,

v.

CLAYTON COUNTY,

Defendant.

CIVIL ACTION FILE NO.

1:16-CV-001460-ODE-WEJ

FINAL REPORT AND RECOMMENDATION

Plaintiff, Gerald Lynn Bostock, brought this action against his former employer, Clayton County, Georgia (the “County”), for alleged violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (See Second Am. Compl. [10], Count I.) The County filed a Motion to Dismiss the Second Amended Complaint [13] pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting that it fails to state a claim upon which relief may be granted. As discussed below, the undersigned agrees and **RECOMMENDS** that defendant’s Motion be **GRANTED**.

I. GOVERNING STANDARD

When considering a motion to dismiss, a federal court is to accept as true “all facts set forth in the plaintiff’s complaint.” Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000) (citation omitted). Further, the court must draw all reasonable inferences in the light most favorable to the plaintiff. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007) (internal citations omitted); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). However, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” Id. The Supreme Court has dispensed with the rule that a complaint may only be dismissed under Rule 12(b)(6) when “‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” Twombly, 550 U.S. at 561 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Supreme Court has replaced that rule with the “plausibility standard,” which requires that factual allegations “raise a right to relief above the speculative level.” Id. at 555. The plausibility standard “does not [however,] impose a probability requirement at the pleading stage; it

simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence [supporting the claim].” Id. at 556.

II. PLAINTIFF’S ALLEGATIONS

Mr. Bostock is a gay male. (Sec. Am. Compl. ¶ 12). He began working for defendant on or about January 13, 2003. (Id. ¶ 11.) The County employed plaintiff as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County; he was charged with primary responsibility for the Clayton County Court Appointed Special Advocate (“CASA”). (Id. ¶ 13.) During the over ten years that Mr. Bostock worked for the County, he received good performance evaluations and the program he managed received accolades. (Id. ¶ 14.) For example, in 2007 Georgia CASA awarded Clayton County CASA its Established Program Award of Excellence. (Id.) National CASA also recognized Mr. Bostock for program expansion, and he served on its Standards and Policy Committee in or about 2011-12. (Id.)

Beginning in January 2013, Mr. Bostock became involved with a gay recreational softball league called the Hotlanta Softball League. (Sec. Am. Compl. ¶ 15.) Mr. Bostock actively promoted Clayton County CASA to softball league members as a source for volunteer opportunities. (Id. ¶ 16.) In the months after plaintiff joined the Hotlanta Softball League, he alleges “on information and belief” that his participation in the league and his sexual orientation and identity

were openly criticized by one or more persons who had significant influence on defendant's decision making. (Id. ¶ 17.)

In or around April 2013, defendant advised Mr. Bostock that it was conducting an internal audit on CASA program funds he managed. (Sec. Am. Compl. ¶ 18.) Mr. Bostock contends that he did not engage in any improper conduct with regard to program funds under his custody or control, and alleges that defendant initiated the audit as a pretext for discrimination based on his sexual orientation and failure to conform to a gender stereotype. (Id. ¶¶ 19-20.) Plaintiff further alleges "on information and belief" that in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where his supervisor was present, at least one individual made disparaging comments about Mr. Bostock's sexual orientation and identity and participation in the softball league. (Id. ¶ 21.)

On or about June 3, 2013, defendant terminated Mr. Bostock's employment. (Sec. Am. Compl. ¶ 22.) The stated reason for termination was conduct unbecoming of a County employee. (Id. ¶ 23.) Plaintiff alleges that this purported reason was a pretext for discrimination against him based on his sex and/or sexual orientation. (Id.)

Mr. Bostock filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on September 5, 2013. (See Ex. A to Pl.'s

Resp. in Opp'n to Def.'s Mot. to Dismiss [14-1] ("Pl.'s Resp. Br.") As reflected on the Charge, Mr. Bostock checked the box for sex discrimination and stated in part as follows: "I believe that I have been discriminated against because of my sex (male/sexual orientation)." (Id.)

On May 5, 2016, Mr. Bostock filed his initial Complaint [1] pro se. This pleading alleged only discrimination on the basis of sexual orientation. After Mr. Bostock secured counsel, he filed his First Amended Complaint [4] on August 2, 2016. This pleading also alleged only discrimination on the basis of sexual orientation. Plaintiff filed his Second Amended Complaint [10] on September 12, 2016, which has been summarized above.

III. ANALYSIS

Defendant argues that the Second Amended Complaint should be dismissed because Title VII does not encompass claims of sexual orientation discrimination. Defendant also contends that, while gender stereotyping claims are cognizable under Title VII, because the Second Amended Complaint is devoid of any factual support for such a claim, this claim fails as well. Finally, defendant asserts that, even if plaintiff had properly pled a gender stereotyping claim, it should be dismissed for failure to exhaust administrative remedies. (See Def.'s Mem. [13] 4-12.) The Court incorporates plaintiff's arguments in response (see Pl.'s Resp. Br. [14] 5-15) as necessary, infra.

A. A Sexual Orientation Discrimination Claim May Not Be Brought Under Title VII

Title VII prohibits discrimination against any individual because of such individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As the Fifth Circuit explained a few years after Title VII's enactment:

[T]here is little legislative history to guide our interpretation. The amendment adding the word 'sex' to 'race, color, religion and national origin' was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate. In attempting to read Congress' intent in these circumstances, however, it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women.

Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971).¹

Four years after Diaz in Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc), the Fifth Circuit again noted the meager legislative history related to the addition of "sex" to Title VII and stated as follows:

We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

¹ The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions handed down before the close of business on September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly lies.

Id. at 1090-91.

Also in 1975, the EEOC issued a decision which noted the absence of a definition of the word “sex” in Title VII and the “scant” evidence of what Congress intended in the statute’s legislative history, but which stated that “the congressional debates relative to the prohibition against employment discrimination based on sex which preceded the enactment of Title VII focused almost exclusively on disparities [sic] in employment opportunities between males and females.” EEOC Dec. No. 76-75 (Dec. 4, 1975), 1975 WL 342769, at *2. The EEOC then cited, inter alia, the Fifth Circuit’s Willingham decision as support for the statement “that when Congress used the word ‘sex’ in Title VII it was referring to a person’s gender.” Id. The EEOC then concluded as follows::

Charging Party alleges unlawful employment discrimination based on his homosexuality, a condition which relates to a person’s sexual proclivities or practices, not his or her gender; these two concepts are in no way synonymous. There being no support in either the language or the legislative history of the statute for the proposition that in enacting Title VII Congress intended to include a person’s sexual practices within the meaning of the term sex, and since the evidence in this case, viewed as a whole, indicates that Respondent Employer failed to rehire Charging Party at least in part because of his sexual practices, not his gender, the Commission must conclude that it lacks jurisdiction over the subject matter alleged by Charging Party as the basis for Respondent Employer’s failure to rehire him.

Id.²

Four years later in Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (per curiam), in a case brought by an employee who claimed that he was terminated because of his sexual preference, the Fifth Circuit stated, “Discharge for homosexuality is not prohibited by Title VII.” Id. at 938; see also Davis v. Signius Inv. Corp./Answernet, No. 1:12-CV-04143-TWT, 2013 WL 1339758, at *5 (N.D. Ga. Feb. 26, 2013) (“Title VII does not protect employees from discrimination based on sexual orientation.”), R. & R. adopted, No. 1:12-CV-4143-TWT, 2013 WL 1339751 (N.D. Ga. Mar. 29, 2013).

Every Circuit Court of Appeal which has considered the issue agrees with Blum that Title VII does not extend to sexual orientation discrimination. See Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764-65 (6th Cir. 2006); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); 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); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70

² As discussed infra, the EEOC changed its position in 2015.

(8th Cir. 1989) (per curiam); DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979).³

Plaintiff asserts that the “question of whether sexual orientation discrimination claims are cognizable under Title VII is ‘an open one’” in the Eleventh Circuit. (See Pl.’s Resp. Br. 6, quoting Issacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015).) Plaintiff accurately quotes Issacs. However, the former Fifth Circuit decision in Blum is binding authority in the Eleventh Circuit. See Bonner, 661 F.2d at 1209 (adopting as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981). Given the Blum precedent, the statement that plaintiff quotes from the district court’s order in Issacs is clearly wrong. The question is not open in the Eleventh Circuit.⁴

³ DeSantis was abrogated on other grounds by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 874-75 (9th Cir. 2001). However, that portion of DeSantis holding that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality[,]” remains undisturbed. See DeSantis, 608 F.2d at 329-30 (footnotes omitted).

⁴ Even without Blum, one could argue that the Eleventh Circuit is squarely in line with the weight of authority against application of Title VII to sexual orientation discrimination claims. See Fredette v. BVP Mgmt. Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) (“We do not hold that discrimination because of sexual orientation is actionable.”).

In apparent response to the fact that the Circuit Courts have uniformly held that Title VII's prohibition against sex discrimination does not extend to sexual orientation discrimination, supporters of an extension have fought unsuccessfully in Congress to amend Title VII since the mid-1970s. See Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 & n.11 (7th Cir. 1984) (citing HR. 166, 94th Cong., 1st Sess. (1975), which sought to add the phrase "affectional or sexual preference" to Title VII). 1994 saw introduction of The Employment Non-Discrimination Act ("ENDA"), which would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity. (See ENDA of 1994, H.R. 4636, 103d Cong. (1994).) The ENDA has been before Congress during almost every session since 1994, but it has failed to pass. (See <https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda>) (last visited Nov. 3, 2016.) The most recent proposal to amend Title VII to prohibit discrimination on the basis of, inter alia, sexual orientation and gender identity, is the Equality Act of 2015. See Equality Act of 2015, S. 1858, 114th Cong. (2015). It too has failed to pass.

As defendant points out, such proposed amendments would be "superfluous if sexual orientation was already covered by Title VII." (Def.'s Reply Br. [15] 4.) "Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand the reach

of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret ‘sex’ to include sexual orientation.” Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000).

Although the judicial branch has rejected calls to interpret Title VII broadly to encompass sexual orientation discrimination claims and the legislative branch has not amended Title VII to include such claims, the executive branch recently reversed the position it first took in 1975. In Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015), the EEOC held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII. Id. at *5. Plaintiff asks this Court to follow the EEOC’s Baldwin decision. (Pl.’s Resp. Br. 9.) He argues that the EEOC’s interpretation of Title VII, although not binding, is entitled to respect to the extent that it is persuasive. (Id. at 9 n.2, citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

EEOC interpretations of Title VII are entitled to Skidmore “deference to the extent [that they have] the power to persuade.” Vill. of Freeport v. Barrella, 814 F.3d 594, 607 n.47 (2d Cir. 2016) (internal quotation marks and citation omitted). As held in Skidmore, “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all

those factors which give it power to persuade, if lacking power to control.”
Skidmore, 323 U.S. at 140.

The Court makes no judgment about the thoroughness evident in Foxx’s consideration or the validity of its reasoning, but notes its inconsistency with the EEOC’s earlier pronouncement (discussed supra in the text preceding note 1). Several federal district courts have considered whether to defer to the EEOC’s interpretation. See, e.g., Hinton v. Va. Union Univ., No. 3:15CV569, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016); Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598 (S.D.N.Y. 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151 (C.D. Cal. 2015); Isaacs, 143 F. Supp. 3d at 1190; Roberts v. United Parcel Serv., Inc., 115 F. Supp. 3d 344 (E.D.N.Y. 2015); Burrows v. Coll. of Cent. Fla., No. 5:14-CV-197-OC-30PRL, 2015 WL 5257135 (M.D. Fla. Sept. 9, 2015).

These district courts have split on whether to defer to the EEOC’s decision or follow precedent in their own Circuits. For example, Hinton and Christiansen ruled that the EEOC’s decision could not displace contrary holdings of their regional Circuit Courts of Appeal, while Burrows ruled that the EEOC’s decision could not displace contrary holdings of other district courts in its Circuit.⁵ See Hinton, 2016 WL 2621967, at *5; Christiansen, 167 F. Supp. 3d at 620-21;

⁵ Burrows surprisingly failed to cite controlling precedent in Blum.

Burrows, 2015 WL 5257135, at *2. Isaacs and Videckis deferred to the EEOC's position without addressing binding precedent in their regional Circuits. See Isaacs, 143 F. Supp. 3d at 1193;⁶ Videckis, 150 F. Supp. 3d at 1159-60. Finally, Roberts recognized binding Second Circuit precedent but chose to disregard it in deferring to the EEOC's decision. Roberts, 115 F. Supp. 3d at 362.

The undersigned agrees with Hinton that the reasons offered in those decisions which deferred to the EEOC's position are matters that lie within the purview of the legislative branch, not the judicial branch. Title VII is a creation of Congress and, if Congress is so inclined, it can amend the statute to provide a claim for sexual orientation discrimination. It is not the province of unelected jurists to effect such an amendment. Hinton, 2016 WL 2621967, at *5.

This Court thus will not defer to the EEOC's decision but will follow the former Fifth Circuit decision in Blum, which is binding precedent binding in the Eleventh Circuit. Therefore, the undersigned **RECOMMENDS** that plaintiff's sexual orientation discrimination claim be **DISMISSED WITH PREJUDICE**.

⁶ As discussed in the text preceding note 3, Issacs erroneously concluded that the issue of whether a plaintiff could state a claim for sexual orientation discrimination in the Eleventh Circuit was an open one.

B. Plaintiff Has Failed to State a Gender Stereotyping Claim

“Title VII bar[s] not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.” Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989)); see also Anderson v. Napolitano, No. 09-60744-CIV, 2010 WL 431898, at *4 (S.D. Fla. Feb. 8, 2010) (“[A] plaintiff can state a Title VII claim for sex or gender stereotyping—a type of sex discrimination based on a person’s failure to comply with gender stereotypes.”).

To state such a claim, a plaintiff must allege that he suffered discrimination based on his employer’s belief that he failed “to conform to masculine stereotypes.” E.E.O.C. v. Family Dollar Stores, Inc., No. 1:06-CV-2569-TWT, 2008 WL 4098723, at *14 (N.D. Ga. Aug. 28, 2008) (adopting R. & R.); see also Higgins, 194 F.3d at 261 n.4 (noting that a man can support a Title VII claim “on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity”).

“The gender stereotype associated with being a man is masculinity.” Mowery v. Escambia Cty. Utilities Auth., No. 3:04CV382-RS-EMT, 2006 WL 327965, at *7 (N.D. Fla. Feb. 10, 2006). Therefore, in order to state a sex-stereotyping claim, a plaintiff is required to “show discrimination based on

gender non-conforming ‘behavior observed at work or affecting his job performance,’ such as his ‘appearance or mannerisms on the job.’” Gilbert v. Country Music Ass’n, Inc., 432 F. App’x 516, 519 (6th Cir. 2011) (quoting Vickers, 453 F.3d at 763); see also E.E.O.C. v. McPherson Cos., 914 F. Supp. 2d 1234, 1244 (N.D. Ala. 2012) (“In the few cases in which actionable harassment based on a male’s nonconformity to gender stereotype has been found, the undisputed evidence unequivocally established that the male ‘harassers’ perceived the employee to show feminine characteristics.”).

The County contends that any gender stereotyping claim must be dismissed because the Second Amended Complaint is devoid of any factual support for such a claim, aside from its single conclusory assertion that “Defendant initiated the audit as a pretext for discrimination against Plaintiff based on his sexual orientation and failure to conform to a gender stereotype.” (Sec. Am. Compl. ¶ 20.) Plaintiff responds that Rule 8 of the Federal Rules of Civil Procedure does not require that he plead a prima facie case of discrimination in order to survive a motion to dismiss, and that all he must do is provide fair notice of his claim. (Pl.’s Resp. Br. 12.) Mr. Bostock asserts that the Second Amended Complaint meets that standard because it details his position with the County, his participation in the softball league, and the ensuing criticism and discriminatory

treatment he allegedly received because of his sexual orientation and identity. (Id. at 12-13.)

A complaint in an employment discrimination case need not contain specific facts establishing a prima facie case under the evidentiary framework for such cases to survive a motion to dismiss. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511-12 (2002). Nevertheless, complaints alleging discrimination still must meet the plausibility standard of Twombly and Iqbal. See Edwards v. Prime, Inc., 602 F.3d 1276, 1300 (11th Cir. 2010) (noting that to state a hostile work environment claim post-Iqbal, recitals of the cause of action do not suffice and that employee “was required to allege” five prima facie elements, including that he was harassed because of his race).

As discussed supra, in order to state a gender stereotyping claim, Mr. Bostock was required to allege facts showing that he was discriminated against based on gender non-conforming behavior observed at work or affecting his job performance, such as his appearance or mannerisms on the job. See Gilbert, 432 F. App’x at 519. However, the Second Amended Complaint contains no allegations that plaintiff suffered discrimination based on his employer’s belief that he failed to conform to masculine stereotypes. See Family Dollar Stores, 2008 WL 4098723, at *14. Like the plaintiff in Mowery, Mr. Bostock “does not allege, nor can an inference be properly drawn, that [he] was perceived by [his

supervisor] and his co-workers as being feminine rather than masculine.” Mowery, 2006 WL 327965, at *7. Therefore, the undersigned reports that plaintiff has failed to allege a plausible gender stereotyping claim under Iqbal and Twombly.

The Court agrees with defendant that plaintiff is attempting to avoid dismissal of this case by bootstrapping a conclusory gender stereotyping allegation to his sexual orientation discrimination claim. The court in Bostick v. CBOCS, Inc., No. 8:13-CV-1319-T-30TGW, 2014 WL 3809169 (M.D. Fla. Aug. 1, 2014), explained why that cannot be allowed:

In sum, the record is clear that Bostick is not bringing a case based on having been harassed and retaliated against because others perceived him to be homosexual and therefore not adequately masculine. Instead, he alleges he is a gay man who was discriminated and retaliated against based on sexual stereotyping. Bostick’s response seems to imply that all gay men fail to comply with male stereotypes simply because they are gay. However, that would mean that every case of sexual orientation discrimination [would] translate into a triable case of gender stereotyping discrimination, which would contradict Congress’s decision not to make sexual orientation discrimination cognizable under Title VII.

Id. at *6 (internal quotations and citations omitted; bracket in original).

The question arises whether plaintiff could amend the Complaint yet again to add facts alleging that Clayton County took adverse action against him because his supervisor or co-workers perceived him to be feminine. “Although plaintiff is represented by counsel and defendant’s motion to dismiss has been pending . . . ,

[h]e has not filed a motion or otherwise requested an opportunity to amend h[is] complaint.” Wells v. W. Ga. Tech. Coll., No. 1:11-CV-3422-JEC, 2012 WL 3150819, at *4 (N.D. Ga. Aug. 2, 2012). Instead of amending his claims to address the problems identified in defendant’s Motion to Dismiss, plaintiff filed a Response Brief. In other words, plaintiff stands by the Second Amended Complaint as drafted. Therefore, the undersigned will not sua sponte recommend that plaintiff be granted leave to amend to salvage a gender stereotyping claim that is deficient under Twombly and Iqbal. See Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 542 (11th Cir. 2002) (en banc) (“A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.”).

Accordingly, the undersigned **RECOMMENDS** that plaintiff’s gender stereotyping claim be **DISMISSED WITH PREJUDICE**, because the Second Amended Complaint contains no factual allegations supportive of such any such claim. See Vickers, 453 F.3d at 764 (holding that the plaintiff’s claim failed “because [he] has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work”).

C. Plaintiff Failed to Exhaust Administrative Remedies With Regard To Any Gender Stereotyping Claim⁷

A potential claimant who intends to sue for discrimination must first file an administrative charge with the EEOC. See Bost v. Fed. Express Corp., 372 F.3d 1233, 1239 (11th Cir. 2004). “The filing of a charge of discrimination with the EEOC initiates ‘an integrated, multi-step enforcement procedure’ that enables the EEOC to detect and remedy various discriminatory employment practices.” Id. at 1238 (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984)). This multi-step process includes “(1) prompt notice from the EEOC to the employer that a charge has been filed; and (2) investigation of the charge by the EEOC.” Id. at 1239. The purpose of requiring litigants to first exhaust these administrative remedies is that the EEOC should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts. Gregory v. Ga. Dep’t of Human Res., 355 F.3d 1277, 1279 (11th Cir. 2004) (per curiam). As a result, a plaintiff’s judicial complaint is limited by the allegations of his charge of discrimination or

⁷ Given the other recommendations, the Court does not address defendant’s alternative argument that plaintiff’s gender stereotyping claim, which first appeared in the Second Amended Complaint, is time barred because he failed to file that pleading within 90 days of receipt of his notice of right to sue, and that claim does not relate back to the filing of the initial Complaint. (Def.’s Mem. [13] 12-14.)

by “the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.” Id. at 1280 (internal quotation marks and citation omitted); see also Green v. Elixir Indus., Inc., 407 F.3d 1163, 1168 (11th Cir. 2005) (“The proper inquiry, as these cases make clear, is whether the complaint is ‘like or related to, or grew out of’ the allegations in the EEOC charge.”). Although courts allow claims in litigation that “amplify, clarify, or more clearly focus” allegations in the EEOC charge, Gregory, 355 F.3d at 1279-80, claims of discrimination not alleged in a charge are not permitted. Wu v. Thomas, 863 F.2d 1543, 1547 (11th Cir. 1989).

Mr. Bostock’s EEOC charge alleges only sexual orientation discrimination, not gender stereotyping. One would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge’s allegation of sexual orientation discrimination. See Norris v. Diakin Drivetrain Components, 46 F. App’x 344, 346 (6th Cir. 2002) (claim for same-sex sexual harassment cannot be reasonably expected to grow out of EEOC charge asserting discrimination based on sexual orientation); Lankford v. BorgWarner Diversified Transmission Prods., Inc., No. 1:02CV1876-SEB-VSS, 2004 WL 540983, at *3 (S.D. Ind. Mar. 12, 2004) (“A claim of discrimination based on sex is not reasonably related to, nor may it be expected to grow out of, a charge of discrimination based on sexual orientation.”). As a result, plaintiff failed to

exhaust administrative remedies as to any alleged gender stereotyping claim. Accordingly, even if the Second Amended Complaint states a gender stereotyping claim, it should be dismissed for lack of exhaustion.

IV. CONCLUSION

For the reasons explained above, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss [13] be **GRANTED**, and that the Second Amended Complaint be **DISMISSED WITH PREJUDICE**.

SO RECOMMENDED, this 3rd day of November, 2016.



WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 24, 2017

Thomas J. Mew IV
Buckley Beal, LLP
1230 PEACHTREE ST NE STE 900
ATLANTA, GA 30309-7533

Appeal Number: 17-13801-BB
Case Style: Gerald Bostock v. Clayton County, Georgia
District Court Docket No: 1:16-cv-01460-ODE

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The referenced case has been docketed in this court. Please use the appellate docket number noted above when making inquiries.

Eleventh Circuit Rule 31-1 requires that APPELLANT'S BRIEF BE SERVED AND FILED ON OR BEFORE October 2, 2017. APPELLANT'S APPENDIX MUST BE SERVED AND FILED NO LATER THAN 7 DAYS AFTER FILING OF THE APPELLANT'S BRIEF. INCARCERATED PRO SE PARTIES ARE NOT REQUIRED TO FILE AN APPENDIX.

This is the only notice you will receive concerning the due date for filing briefs and appendices. See Fed.R.App.P. 28, 30, 31, 32, the corresponding circuit rules, General Order 39 and the Guide to Electronic Filing for further information. Pro se parties who are incarcerated are not required to file an appendix. (In cross-appeals pursuant to Fed.R.App.P. 28.1(b), the party who first files a notice of appeal is the appellant unless the parties otherwise agree.)

Every motion, petition, brief, answer, response and reply filed must contain a Certificate of Interested Persons and Corporate Disclosure Statement (CIP). Appellants/Petitioners must file a CIP within 14 days after the date the case or appeal is docketed in this court; Appellees/Respondents/Intervenors/Other Parties must file a CIP within 28 days after the case or appeal is docketed in this court, regardless of whether appellants/petitioners have filed a CIP. See Fed.R.App.P. 26.1 and 11th Cir. R. 26.1-1.

On the same day a party or amicus curiae first files its paper or e-filed CIP, that filer must also complete the court's web-based CIP at the [Web-Based CIP](#) link on the court's website. Pro se filers (except attorneys appearing in particular cases as pro se parties) are **not required or**

authorized to complete the web-based CIP.

Attorneys who wish to participate in this appeal must be properly admitted either to the bar of this court or for this particular proceeding pursuant to 11th Cir. R. 46-1. In addition, all attorneys (except court-appointed counsel) who wish to participate in this appeal must complete and return an appearance form within fourteen (14) days. [Application for Admission to the Bar](#) and [Appearance of Counsel Form](#) are available on the Internet at www.ca11.uscourts.gov. The clerk may not process filings from an attorney until that attorney files an appearance form. See 11th Cir. R. 46-6.

11th Cir. R. 33-1(a) requires appellant to file a Civil Appeal Statement in most civil appeals. You must file a completed Civil Appeal Statement, with service on all other parties, within 14 days from the date of this letter. Civil Appeal Statement forms are available on the Internet at www.ca11.uscourts.gov, and as provided by 11th Cir. R. 33-1(a).

MEDIATION. If a Civil Appeal Statement is required to be filed, your appeal and all related matters will be considered for mediation by the Kinnard Mediation Center. The mediation services are free and the mediation process is confidential. You may confidentially request mediation by calling the Kinnard Mediation Center at 404-335-6260 (Atlanta) or 305-714-1900 (Miami). See 11th Cir. R. 33-1.

Attorneys must file briefs electronically using the ECF system. Use of ECF does not modify the requirements of the circuit rules that counsel must also provide seven (7) paper copies of a brief to the court, nor does it modify the requirements of the circuit rules for the filing of appendices in a particular case.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Carol Lewis/mg, BB
Phone #: (404) 335-6179

DKT-7CIV Civil Early Briefing