

**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-ODE

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GERALD BOSTOCK
VOLUME I**

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Counsel for Appellant Gerald Bostock

GERALD BOSTOCK V. CLAYTON COUNTY, GEORGIA

Eleventh Circuit Court of Appeals Case No. 17-13801-BB

Index of Exhibits

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4months,APPEAL,CLOSED,TitleVII

**U.S. District Court
Northern District of Georgia (Atlanta)
CIVIL DOCKET FOR CASE #: 1:16-cv-01460-ODE**

Bostock v. Clayton County Board of Commissioners
Assigned to: Judge Orinda D. Evans
Case in other court: USCA - 11th Circuit., 17-13801-BB
Cause: 42:2000e Job Discrimination (other)

Date Filed: 05/05/2016
Date Terminated: 07/21/2017
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Plaintiff

Gerald Lynn Bostock

represented by **Brian J. Sutherland**
Buckley Beal, LLP
The Promenade, Suite 900
1230 Peachtree Street, NE
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V.

Defendant

Clayton County Board of Commissioners
TERMINATED: 09/12/2016

represented by **Martin B. Heller**
 Freeman Mathis & Gary, LLP
 Suite 1600
 100 Galleria Parkway
 Atlanta, GA 30339-5948
 770-818-1284
 Email: mheller@fisherphillips.com

Defendant

Clayton County

represented by **Jack Reynolds Hancock**
 Freeman Mathis & Gary, LLP
 661 Forest Parkway
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 Forest Park, GA 30297
 404-335-7143
 Fax: 404-361-3223
 Email: jhancock@fmglaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Martin B. Heller
 (See above for address)
TERMINATED: 06/22/2017

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 100 Galleria Parkway
 Suite 1600
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 770-818-0000
 Email: bbuechner@fmglaw.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/05/2016	<u>1</u>	COMPLAINT with Jury Demand filed by Gerald Lynn Bostock. (Filing fee \$ 400 receipt number 100082958.) (Attachments: # <u>1</u> Civil Cover Sheet)(bnw) Please visit our website at http://www.gand.uscourts.gov/commonly-used-forms to obtain Pretrial Instructions which includes the Consent To Proceed Before U.S. Magistrate form. Modified on 5/6/2016 to edit file date(bnw). (Entered: 05/06/2016)
05/05/2016	<u>2</u>	Electronic Summons Issued as to Clayton County Board of Commissioners. (bnw) (Entered: 05/06/2016)
05/09/2016		Submission of <u>1</u> Complaint to District Judge Orinda D. Evans. (bnw) (Entered: 05/09/2016)

08/01/2016	<u>3</u>	ORDER regarding above civil action. This civil action was filed on May 5, 2016, summons issued and since that time no action has taken place. IT IS THEREFORE ORDERED, that the Plaintiff show cause why above complaint should not be DISMISSED for failure to effectuate service of process pursuant to LR 41.2(B) within ten (10) days of date of entry of this order. The Clerk is directed to resubmit this action in ten (10) days. Signed by Judge Orinda D. Evans on 07/28/16. (fap) (Entered: 08/01/2016)
08/01/2016		Clerks Certificate of Regular and Certified Mailing Return Receipt (91 7199 9991 7032 5720 1816) as to Gerald Lynn Bostock re <u>3</u> Order. (fap) Modified on 8/1/2016 (fap). (Entered: 08/01/2016)
08/02/2016	<u>4</u>	First AMENDED COMPLAINT against Clayton County Board of Commissioners with Jury Demand, filed by Gerald Lynn Bostock. (Attachments: # <u>1</u> Plaintiff's Certificate of Interested Persons)(Mew, Thomas) Please visit our website at http://www.gand.uscourts.gov/commonly-used-forms to obtain Pretrial Instructions which includes the Consent To Proceed Before U.S. Magistrate form. (Entered: 08/02/2016)
08/02/2016	<u>6</u>	Certificate of Interested Persons and Corporate Disclosure Statement (attached to the Complaint) filed by Gerald Lynn Bostock. (jkl) (Entered: 08/17/2016)
08/03/2016	<u>5</u>	Return of Service Executed by Gerald Lynn Bostock. Clayton County Board of Commissioners served on 8/2/2016, answer due 8/23/2016. (Mew, Thomas) (Entered: 08/03/2016)
08/16/2016		Submission of <u>3</u> Order, submitted to District Judge Orinda D. Evans. (fap) (Entered: 08/16/2016)
08/23/2016	<u>7</u>	MOTION to Dismiss <i>and Memorandum of Law in Support</i> by Clayton County Board of Commissioners. (Heller, Martin) (Entered: 08/23/2016)
09/09/2016	<u>8</u>	Consent MOTION for Leave to File Second Amended Complaint (), MOTION to Substitute Party Clayton County, Georgia by Gerald Lynn Bostock. (Attachments: # <u>1</u> Exhibit A - Second Amended Complaint, # <u>2</u> Text of Proposed Order)(Mew, Thomas) (Entered: 09/09/2016)
09/12/2016	<u>9</u>	ORDER - Having reviewed PLAINTIFF'S CONSENT MOTION FOR LEAVE TO AMEND COMPLAINT AND TO SUBSTITUTE DEFENDANT, and for good cause shown, Plaintiff's Consent Motion is hereby GRANTED. The Clerk is directed to enter the Plaintiff's Second Amended Complaint and the same is deemed filed. Defendant's Motion to Dismiss the Plaintiff's First Amended Complaint is DENIED AS MOOT, without prejudice to Defendant's right to file a Motion to Dismiss Plaintiff's Second Amended Complaint. Signed by Magistrate Judge Walter E. Johnson on 9/12/16. (klb) (Entered: 09/12/2016)
09/12/2016	<u>10</u>	SECOND AMENDED COMPLAINT against Clayton County with Jury Demand, filed by Gerald Lynn Bostock.(klb) Please visit our website at http://www.gand.uscourts.gov/commonly-used-forms to obtain Pretrial Instructions which includes the Consent To Proceed Before U.S. Magistrate form. (Entered: 09/12/2016)
09/13/2016	<u>11</u>	

		NOTICE of Appearance by William H. Buechner, Jr on behalf of Clayton County (Buechner, William) (Entered: 09/13/2016)
09/13/2016	<u>12</u>	NOTICE of Appearance by Jack Reynolds Hancock on behalf of Clayton County (Hancock, Jack) (Entered: 09/13/2016)
09/26/2016	<u>13</u>	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Clayton County. (Attachments: # <u>1</u> Exhibit 1 - EEOC Charge of Discrimination, # <u>2</u> Exhibit 2 - EEOC Dismissal and Notice of Rights)(Heller, Martin) (Entered: 09/26/2016)
10/13/2016	<u>14</u>	RESPONSE in Opposition re <u>13</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Gerald Lynn Bostock. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(Mew, Thomas) (Entered: 10/13/2016)
10/27/2016	<u>15</u>	REPLY BRIEF re <u>13</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Clayton County. (Heller, Martin) (Entered: 10/27/2016)
10/28/2016		Submission of <u>13</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, submitted to Magistrate Judge Walter E. Johnson. (fap) (Entered: 10/28/2016)
11/03/2016	<u>16</u>	FINAL REPORT AND RECOMMENDATION re <u>10</u> Amended Complaint, filed by Gerald Lynn Bostock. Signed by Magistrate Judge Walter E. Johnson on 11/3/16. (klb) (Entered: 11/03/2016)
11/03/2016		FINAL REPORT AND RECOMMENDATION - The undersigned RECOMMENDS that Defendant's Motion to Dismiss <u>13</u> be GRANTED, and that the Second Amended Complaint be DISMISSED WITH PREJUDICE. Signed by Magistrate Judge Walter E. Johnson on 11/3/16. (klb) (Entered: 11/03/2016)
11/03/2016	<u>17</u>	ORDER for Service of <u>16</u> Final Report and Recommendation by Magistrate Judge Walter E. Johnson. Each party may file written objections to the Report & Recommendation within 14 days of service. If no objections are filed, the Report & Recommendation may be adopted as the opinion and order of the District Court. Signed by Magistrate Judge Walter E. Johnson on 11/3/16. (klb) (Entered: 11/03/2016)
11/17/2016	<u>18</u>	OBJECTIONS to <u>16</u> Report and Recommendation filed by Gerald Lynn Bostock. (Attachments: # <u>1</u> Exhibit)(Mew, Thomas) (Entered: 11/17/2016)
11/17/2016		Submission of <u>16</u> FINAL REPORT AND RECOMMENDATION re <u>10</u> Amended Complaint, filed by Gerald Lynn Bostock to District Judge Orinda D. Evans. (bnw) (Entered: 11/17/2016)
12/01/2016	<u>19</u>	REPLY to Objection to Report and Recommendation re <u>18</u> Objections to Report and Recommendation filed by Clayton County. (Heller, Martin) (Entered: 12/01/2016)
12/15/2016	<u>20</u>	REPLY to Objection to Report and Recommendation re <u>18</u> Objections to Report and Recommendation filed by Gerald Lynn Bostock. (Mew, Thomas) (Entered: 12/15/2016)
02/02/2017	<u>21</u>	

		ORDER: For the reasons stated, Defendant's Motion to Dismiss <u>13</u> , the R&R <u>16</u> , and Plaintiff's objections <u>18</u> are all DEFERRED pending the Eleventh Circuit's decision. Signed by Judge Orinda D. Evans on 2/2/17. (bnw) (Entered: 02/02/2017)
06/20/2017	<u>22</u>	Consent MOTION to Withdraw Martin B. Heller as Attorney by Clayton County, and Clayton County Board of Commissioners. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order Granting Consent Withdrawal) (Heller, Martin) (Entered: 06/20/2017)
06/22/2017	<u>23</u>	ORDER granting <u>22</u> Motion to Withdraw as Attorney. Attorney Martin B. Heller terminated. Signed by Judge Orinda D. Evans on 6/22/2017. (sap) (Entered: 06/22/2017)
07/21/2017	<u>24</u>	ORDER OVERRULING Plaintiff's <u>18</u> Objections and ADOPTING IN FULL the <u>16</u> Final Report and Recommendation. Defendant's <u>13</u> Motion to Dismiss for Failure to State a Claim is GRANTED and this case is hereby DISMISSED with prejudice. Costs are taxed to the Plaintiff. Signed by Judge Orinda D. Evans on 7/20/2017. (sap) (Entered: 07/21/2017)
07/21/2017	<u>25</u>	CLERK'S JUDGMENT in favor of Defendant against Plaintiff for the costs of this action. (sap)--Please refer to http://www.ca11.uscourts.gov to obtain an appeals jurisdiction checklist-- (Entered: 07/21/2017)
07/21/2017		Civil Case Terminated. (sap) (Entered: 07/21/2017)
08/21/2017	<u>26</u>	NOTICE OF APPEAL as to <u>25</u> Clerk's Judgment, <u>24</u> Order on Motion to Dismiss for Failure to State a Claim, Order on Final Report and Recommendation,, by Gerald Lynn Bostock. Filing fee \$ 505, receipt number 113E-7338353. Transcript Order Form due on 9/5/2017 (Mew, Thomas) (Entered: 08/21/2017)
08/21/2017	<u>27</u>	NOTICE Of Filing Appeal Transmission Letter by Gerald Lynn Bostock re: <u>26</u> Notice of Appeal. (kac) (Entered: 08/21/2017)
08/21/2017	<u>28</u>	Transmission of Certified Copy of Notice of Appeal, Clerk's Judgment, Orders, Report and Recommendation, and Docket Sheet to US Court of Appeals re: <u>26</u> Notice of Appeal. (kac) (Entered: 08/21/2017)
08/24/2017	<u>29</u>	USCA Acknowledgment of <u>26</u> Notice of Appeal, filed by Gerald Lynn Bostock. Case Appealed to USCA- 11th Circuit. Case Number 17-13801-BB. (pjm) (Entered: 08/24/2017)
09/13/2017		Pursuant to F.R.A.P.11(c), the Clerk certifies that the record is complete for purposes of this appeal re: <u>26</u> Notice of Appeal. Case Appealed to USCA - 11th Circuit. USCA Case Number 17-13801-BB. The entire record on appeal is available electronically. (kac) (Entered: 09/13/2017)

PACER Service Center
Transaction Receipt
11/15/2017 17:07:07

ORIGINAL

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

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

MAY 05 2016

JAMES N. HARTEN, Clerk
By: *[Signature]*
Deputy Clerk

Gerald Lynn Bostock

(Print your full name)

Plaintiff *pro se*,

v.

Clayton County Board of Commissioners

(Print full name of each defendant; an employer is usually the defendant)

Defendant(s).

CIVIL ACTION FILE NO.

1:16-CV-1460

(to be assigned by Clerk)

PRO SE EMPLOYMENT DISCRIMINATION COMPLAINT FORM

Claims and Jurisdiction

1. This employment discrimination lawsuit is brought under (check only those that apply):

X

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., for employment discrimination on the basis of race, color, religion, sex, or national origin, or retaliation for exercising rights under this statute.

NOTE: To sue under Title VII, you generally must have received a notice of right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC").

_____ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq., for employment discrimination against persons age 40 and over, or retaliation for exercising rights under this statute.

NOTE: To sue under the Age Discrimination in Employment Act, you generally must first file a charge of discrimination with the EEOC.

_____ Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., for employment discrimination on the basis of disability, or retaliation for exercising rights under this statute.

NOTE: To sue under the Americans With Disabilities Act, you generally must have received a notice of right-to-sue letter from the EEOC.

X

Other (describe) _____

Employment discrimination on the basis of

_____ of sexual orientation.

2. This Court has subject matter jurisdiction over this case under the above-listed statutes and under 28 U.S.C. §§ 1331 and 1343.

Parties

3. Plaintiff. Print your full name and mailing address below:

Name Gerald Lynn Bostock

Address 3818 Beya Way

Atlanta, Ga 30340

4. Defendant(s). Print below the name and address of each defendant listed on page 1 of this form:

Name Clayton County Board of Commissioners

Address 112 Smith Street

Jonesboro, Ga 30236

Name _____

Address _____

Name _____

Address _____

Location and Time

5. If the alleged discriminatory conduct occurred at a location different from the address provided for defendant(s), state where that discrimination occurred:

6. When did the alleged discrimination occur? (State date or time period)

June 03, 2013

Administrative Procedures

7. Did you file a charge of discrimination against defendant(s) with the EEOC or any other federal agency? Yes No

If you checked "Yes," attach a copy of the charge to this complaint.

8. Have you received a Notice of Right-to-Sue letter from the EEOC?

Yes No

If you checked "Yes," attach a copy of that letter to this complaint and state the date on which you received that letter:

February 05, 2016

9. If you are suing for **age discrimination**, check one of the following:

60 days or more have elapsed since I filed my charge of age discrimination with the EEOC

Less than 60 days have passed since I filed my charge of age discrimination with the EEOC

10. If you were employed by an agency of the State of Georgia or unsuccessfully sought employment with a State agency, did you file a complaint against defendant(s) with the Georgia Commission on Equal Opportunity?

Yes No Not applicable, because I was not an employee of, or applicant with, a State agency.

If you checked "Yes," attach a copy of the complaint you filed with the Georgia Commission on Equal Opportunity and describe below what happened with it (i.e., the complaint was dismissed, there was a hearing before a special master, or there was an appeal to Superior Court):

11. If you were employed by a Federal agency or unsuccessfully sought employment with a Federal agency, did you complete the administrative process established by that agency for persons alleging denial of equal employment opportunity?

Yes No Not applicable, because I was not an employee of, or applicant with, a Federal agency.

If you checked "Yes," describe below what happened in that administrative process:

Nature of the Case

12. The conduct complained about in this lawsuit involves (check only those that apply):

- failure to hire me
- failure to promote me
- demotion
- reduction in my wages
- working under terms and conditions of employment that differed from similarly situated employees
- harassment
- retaliation
- termination of my employment
- failure to accommodate my disability
- other (please specify) _____

13. I believe that I was discriminated against because of (check only those that apply):

- my race or color, which is _____
- my religion, which is _____
- my sex (gender), which is male female
- my national origin, which is _____
- my age (my date of birth is _____)
- my disability or perceived disability, which is: _____

my opposition to a practice of my employer that I believe violated the federal anti-discrimination laws or my participation in an EEOC investigation

other (please specify) Sexual Orientation

14. Write below, as clearly as possible, the essential facts of your claim(s). Describe specifically the conduct that you believe was discriminatory or retaliatory and how each defendant was involved. Include any facts which show that the actions you are complaining about were discriminatory or retaliatory. Take time to organize your statements; you may use numbered paragraphs if you find that helpful. Do not make legal arguments or cite cases or statutes.

1. The defendant discriminated against Bostock because of his sexual orientation.

2. Bostock was employed by Defendant as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County. Bostock's employment with Defendant began on or about January 13, 2003. Bostock was charged with the primary responsibility of Clayton County CASA (Court Appointed Special Advocate).

3. During the over ten (10) years Bostock was employed by the Defendant, he received good performance evaluations and carried out his duties. Clayton County CASA was awarded the Established Program Award of Excellence by Georgia CASA in 2007, and Bostock was recognized by National CASA for program expansion and served on the National CASA Standards and Policy committee in or around 2011-2012.

4. Beginning in January 2013, Bostock became openly involved with a gay recreational softball league, Hotlanta Softball League. The Hotlanta Softball League is an active member of the Amateur Sports Alliance of North America ("ASANA") and the North American Gay Amateur Athletic Alliance ("NAGAAA"). Both ASANA and the NAGAAA are non-profit organizations dedicated to the promotion of amateur athletics with a special emphasis on the participation of

(Attach no more than five additional sheets if necessary; type or write legibly only on one side of a page.)

4. continued-

amateur athletics with a special emphasis on the participation of members from the LGBTQ Community. The Hotlanta Softball League ranks as one of the largest member cities within ASANA and NAGAAA.

5. Bostock actively promoted the Clayton County CASA organization to the softball league.

6. In the months after Bostock joined the Hotlanta Softball League, Bostock's participation in the league was openly criticized by at one or persons who had a major and significant influence and impact on the Defendant.

7. In or around April of 2013, Defendant advised Bostock that an Internal Audit was being conducted on program funds managed by Bostock. Bostock did not engage in any improper conduct with regard to any funds under his custody or control.

8. During those months Bostock's sexual orientation was also openly criticized by one or more persons who had a major and significant influence and impact on the Defendant.

9. In May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where Bostock's termination was being discussed, comments about Bostock's sexual orientation were made multiple times.

10. Unexpectedly, and despite having received favorable evaluations in May 2013, Bostock was terminated on or about June 3, 2013.

11. Even after Bostock was terminated, comments about Bostock's participation in the Hotlanta Softball League continued to be a topic of discussion by at one or more persons with a major and significant influence on the Defendant, including comments made to Channel 2 ABC News.

12. Defendant conceded to pressures to terminate Bostock because of his sexual orientation and did in fact terminate him.

13. Defendant advised Bostock that he was being terminated for Conduct Unbecoming of a Clayton County Employee. That purported reason, however, was a pretense for discrimination.

14. Bostock applied for Unemployment Benefits during June 2013, which was approved by the Georgia Department of Labor ("GDOL"). Defendant appealed the GDOL's decision. In or around September 2013 the GDOL held a hearing and determined that the Defendant's termination was wrongful.

15. In or around September 2013, Bostock filed a complaint with the EEOC. On February 5, 2016, Bostock received a Right-to-Sue Letter.

16. As a direct and proximate cause of Defendant's wrongful conduct, Bostock has been injured and damaged, to wit: out of pocket expenses, loss of income and benefits, loss of employment;

16. continued-

to have to seek other employment and/or income; to forego compensation and benefits; to have his career significantly adversely impacted; to suffer termination; and to endure mental anguish, emotional distress, humiliation and shame.

15. Plaintiff still works for defendant(s)
 no longer works for defendant(s) or was not hired

16. If this is a disability-related claim, did defendant(s) deny a request for reasonable accommodation? Yes No

If you checked "Yes," please explain: _____

17. If your case goes to trial, it will be heard by a judge unless you elect a jury trial. Do you request a jury trial? Yes No

Request for Relief

As relief from the allegations of discrimination and/or retaliation stated above, plaintiff prays that the Court grant the following relief (check any that apply):

Defendant(s) be directed to _____

Money damages (list amounts) _____

Costs and fees involved in litigating this case

Such other relief as may be appropriate

PLEASE READ BEFORE SIGNING THIS COMPLAINT

Before you sign this Complaint and file it with the Clerk, please review Rule 11 of the Federal Rules of Civil Procedure for a full description of your obligation of good faith in filing this Complaint and any motion or pleading in this Court, as well as the sanctions that may be imposed by the Court when a litigant (whether plaintiff or defendant) violates the provisions of Rule 11. These sanctions may include an order directing you to pay part or all of the reasonable attorney's fees and other expenses incurred by the defendant(s). Finally, if the defendant(s) is the prevailing party in this lawsuit, costs (other than attorney's fees) may be imposed upon you under Federal Rule of Civil Procedure 54(d)(1).

Signed, this 5 day of May, 2016



(Signature of plaintiff *pro se*)

GERALD LYNN BOSTOCK

(Printed name of plaintiff *pro se*)

3818 BEYA WAY

(street address)

ATLANTA GA 30340

(City, State, and zip code)

gerbos11@yahoo.com

(email address)

404.938.3239

(telephone number)

1:16-CV-1460

JS44 (Rev. 1/16 NDGA)

CIVIL COVER SHEET

The JS44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket record. (SEE INSTRUCTIONS ATTACHED)

<p>I. (a) PLAINTIFF(S) Gerald Lynn Bostock</p> <p>(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____ (EXCEPT IN U.S. PLAINTIFF CASES)</p>	<p>DEFENDANT(S) Clayton County Board of Commissioners</p> <p>COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</p>
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<p>(c) ATTORNEYS (FIRM NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS)</p> <p>3818 BEYA WAY ATLANTA GA 30340 404.938.3239 gerbos11@yahoo.com</p>	<p>ATTORNEYS (IF KNOWN)</p>
--	------------------------------------

II. BASIS OF JURISDICTION
(PLACE AN "X" IN ONE BOX ONLY)

<input checked="" type="checkbox"/> 1 U.S. GOVERNMENT PLAINTIFF	<input type="checkbox"/> 3 FEDERAL QUESTION (U.S. GOVERNMENT NOT A PARTY)
<input type="checkbox"/> 2 U.S. GOVERNMENT DEFENDANT	<input type="checkbox"/> 4 DIVERSITY (INDICATE CITIZENSHIP OF PARTIES IN ITEM III)

III. CITIZENSHIP OF PRINCIPAL PARTIES
(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(FOR DIVERSITY CASES ONLY)

<input checked="" type="checkbox"/> PLF 1	<input checked="" type="checkbox"/> DEF 1	CITIZEN OF THIS STATE	<input type="checkbox"/> PLF 4	<input type="checkbox"/> DEF 4	INCORPORATED OR PRINCIPAL PLACE OF BUSINESS IN THIS STATE
<input type="checkbox"/> 2	<input type="checkbox"/> 2	CITIZEN OF ANOTHER STATE	<input type="checkbox"/> 5	<input type="checkbox"/> 5	INCORPORATED AND PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE
<input type="checkbox"/> 3	<input type="checkbox"/> 3	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	<input type="checkbox"/> 6	<input type="checkbox"/> 6	FOREIGN NATION

IV. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

<input checked="" type="checkbox"/> 1 ORIGINAL PROCEEDING	<input type="checkbox"/> 2 REMOVED FROM STATE COURT	<input type="checkbox"/> 3 REMANDED FROM APPELLATE COURT	<input type="checkbox"/> 4 REINSTATED OR REOPENED	<input type="checkbox"/> 5 TRANSFERRED FROM ANOTHER DISTRICT (Specify District)	<input type="checkbox"/> 6 MULTIDISTRICT LITIGATION	<input type="checkbox"/> 7 APPEAL TO DISTRICT JUDGE FROM MAGISTRATE JUDGE JUDGMENT
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V. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE - DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

(IF COMPLEX, CHECK REASON BELOW)

<input type="checkbox"/> 1. Unusually large number of parties.	<input type="checkbox"/> 6. Problems locating or preserving evidence
<input type="checkbox"/> 2. Unusually large number of claims or defenses.	<input type="checkbox"/> 7. Pending parallel investigations or actions by government.
<input type="checkbox"/> 3. Factual issues are exceptionally complex	<input type="checkbox"/> 8. Multiple use of experts.
<input type="checkbox"/> 4. Greater than normal volume of evidence.	<input type="checkbox"/> 9. Need for discovery outside United States boundaries.
<input type="checkbox"/> 5. Extended discovery period is needed.	<input type="checkbox"/> 10. Existence of highly technical issues and proof.

CONTINUED ON REVERSE

FOR OFFICE USE ONLY			
RECEIPT # _____	AMOUNT \$ _____	APPLYING IFF _____	MAG. JUDGE (IFF) _____
JUDGE _____	MAG. JUDGE _____ (Referral)	NATURE OF SUIT _____	CAUSE OF ACTION _____

ODE WET 442 42:2000T

VI. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT - "0" MONTHS DISCOVERY TRACK

- 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- 152 RECOVERY OF DEFAULTED STUDENT LOANS (Excl. Veterans)
- 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS

CONTRACT - "4" MONTHS DISCOVERY TRACK

- 110 INSURANCE
- 120 MARINE
- 130 MILLER ACT
- 140 NEGOTIABLE INSTRUMENT
- 151 MEDICARE ACT
- 160 STOCKHOLDERS' SUITS
- 190 OTHER CONTRACT
- 195 CONTRACT PRODUCT LIABILITY
- 196 FRANCHISE

REAL PROPERTY - "4" MONTHS DISCOVERY TRACK

- 210 LAND CONDEMNATION
- 220 FORECLOSURE
- 230 RENT LEASE & EJECTMENT
- 240 TORTS TO LAND
- 245 TORT PRODUCT LIABILITY
- 290 ALL OTHER REAL PROPERTY

TORTS - PERSONAL INJURY - "4" MONTHS DISCOVERY TRACK

- 310 AIRPLANE
- 315 AIRPLANE PRODUCT LIABILITY
- 320 ASSAULT, LIBEL & SLANDER
- 330 FEDERAL EMPLOYERS' LIABILITY
- 340 MARINE
- 345 MARINE PRODUCT LIABILITY
- 350 MOTOR VEHICLE
- 355 MOTOR VEHICLE PRODUCT LIABILITY
- 360 OTHER PERSONAL INJURY
- 362 PERSONAL INJURY - MEDICAL MALPRACTICE
- 365 PERSONAL INJURY - PRODUCT LIABILITY
- 367 PERSONAL INJURY - HEALTH CARE/ PHARMACEUTICAL PRODUCT LIABILITY
- 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

TORTS - PERSONAL PROPERTY - "4" MONTHS DISCOVERY TRACK

- 370 OTHER FRAUD
- 371 TRUTH IN LENDING
- 380 OTHER PERSONAL PROPERTY DAMAGE
- 385 PROPERTY DAMAGE PRODUCT LIABILITY

BANKRUPTCY - "0" MONTHS DISCOVERY TRACK

- 422 APPEAL 28 USC 158
- 423 WITHDRAWAL 28 USC 157

CIVIL RIGHTS - "4" MONTHS DISCOVERY TRACK

- 441 VOTING
- 442 EMPLOYMENT
- 443 HOUSING/ ACCOMMODATIONS
- 444 WELFARE
- 440 OTHER CIVIL RIGHTS
- 445 AMERICANS with DISABILITIES - Employment
- 446 AMERICANS with DISABILITIES - Other
- 448 EDUCATION

IMMIGRATION - "0" MONTHS DISCOVERY TRACK

- 462 NATURALIZATION APPLICATION
- 465 OTHER IMMIGRATION ACTIONS

PRISONER PETITIONS - "0" MONTHS DISCOVERY TRACK

- 463 HABEAS CORPUS- Alien Detainee
- 510 MOTIONS TO VACATE SENTENCE
- 530 HABEAS CORPUS
- 535 HABEAS CORPUS DEATH PENALTY
- 540 MANDAMUS & OTHER
- 550 CIVIL RIGHTS - Filed Pro se
- 555 PRISON CONDITION(S) - Filed Pro se
- 560 CIVIL DETAINEE: CONDITIONS OF CONFINEMENT

PRISONER PETITIONS - "4" MONTHS DISCOVERY TRACK

- 550 CIVIL RIGHTS - Filed by Counsel
- 555 PRISON CONDITION(S) - Filed by Counsel

FORFEITURE/PENALTY - "4" MONTHS DISCOVERY TRACK

- 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
- 690 OTHER

LABOR - "4" MONTHS DISCOVERY TRACK

- 710 FAIR LABOR STANDARDS ACT
- 720 LABOR/MGMT. RELATIONS
- 740 RAILWAY LABOR ACT
- 751 FAMILY and MEDICAL LEAVE ACT
- 790 OTHER LABOR LITIGATION
- 791 EML. RET. INC. SECURITY ACT

PROPERTY RIGHTS - "4" MONTHS DISCOVERY TRACK

- 820 COPYRIGHTS
- 840 TRADEMARK

PROPERTY RIGHTS - "8" MONTHS DISCOVERY TRACK

- 830 PATENT

SOCIAL SECURITY - "0" MONTHS DISCOVERY TRACK

- 861 HIA (1395f)
- 862 BLACK LUNG (923)
- 863 DIWC (405(g))
- 863 DIWW (405(g))
- 864 SSDI TITLE XVI
- 865 RSI (405(g))

FEDERAL TAX SUITS - "4" MONTHS DISCOVERY TRACK

- 870 TAXES (U.S. Plaintiff or Defendant)
- 871 IRS - THIRD PARTY 26 USC 7609

OTHER STATUTES - "4" MONTHS DISCOVERY TRACK

- 375 FALSE CLAIMS ACT
- 376 QUI TAM 31 USC 3729(a)
- 400 STATE REAPPORTIONMENT
- 430 BANKS AND BANKING
- 450 COMMERCE/ICC RATES/ETC.
- 460 DEPORTATION
- 470 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
- 480 CONSUMER CREDIT
- 490 CABLE/SATELLITE TV
- 890 OTHER STATUTORY ACTIONS
- 891 AGRICULTURAL ACTS
- 893 ENVIRONMENTAL MATTERS
- 895 FREEDOM OF INFORMATION ACT
- 899 ADMINISTRATIVE PROCEDURES ACT / REVIEW OR APPEAL OF AGENCY DECISION
- 950 CONSTITUTIONALITY OF STATE STATUTES

OTHER STATUTES - "8" MONTHS DISCOVERY TRACK

- 410 ANTITRUST
- 850 SECURITIES / COMMODITIES / EXCHANGE

OTHER STATUTES - "0" MONTHS DISCOVERY TRACK

- 896 ARBITRATION (Confirm / Vacate / Order / Modify)

*** PLEASE NOTE DISCOVERY TRACK FOR EACH CASE TYPE. SEE LOCAL RULE 26.3**

VII. REQUESTED IN COMPLAINT:

CHECK IF CLASS ACTION UNDER F.R.Civ.P. 23 DEMAND \$ _____

JURY DEMAND YES NO (CHECK YES ONLY IF DEMANDED IN COMPLAINT)

VIII. RELATED/REFILED CASE(S) IF ANY

JUDGE _____ DOCKET NO. _____

CIVIL CASES ARE DEEMED RELATED IF THE PENDING CASE INVOLVES: (CHECK APPROPRIATE BOX)

- 1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- 2. SAME ISSUE OF FACT OR ARISES OUT OF THE SAME EVENT OR TRANSACTION INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- 4. APPEALS ARISING OUT OF THE SAME BANKRUPTCY CASE AND ANY CASE RELATED THERETO WHICH HAVE BEEN DECIDED BY THE SAME BANKRUPTCY JUDGE.
- 5. REPETITIVE CASES FILED BY PRO SE LITIGANTS.
- 6. COMPANION OR RELATED CASE TO CASE(S) BEING SIMULTANEOUSLY FILED (INCLUDE ABBREVIATED STYLE OF OTHER CASE(S): _____)

7. EITHER SAME OR ALL OF THE PARTIES AND ISSUES IN THIS CASE WERE PREVIOUSLY INVOLVED IN CASE NO. _____, WHICH WAS DISMISSED. This case IS IS NOT (check one box) SUBSTANTIALLY THE SAME CASE.

 SIGNATURE OF ATTORNEY OF RECORD DATE 5/5/16

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

GERALD LYNN BOSTOCK,)	
)	
Plaintiff,	)	CIVIL ACTION
	)	File No. 1:16-CV-1460
v.)	
	)	JURY TRIAL DEMANDED
CLAYTON COUNTY BOARD OF)	
COMMISSIONERS,)	
)	
Defendant.)	

FIRST AMENDED COMPLAINT

Plaintiff Gerald Lynn Bostock (“Plaintiff”) files this First Amended Complaint against Defendant Clayton County Board of Commissioners (“Defendant”) for violations of Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.* (“Title VII”).

PARTIES

1.

At all times relevant to this action Defendant employed Plaintiff.

2.

Plaintiff submits himself to the jurisdiction of this Court.

3.

Defendant is subject to the jurisdiction and venue of this Court.

4.

Defendant may be served with process by delivering a copy of Summons and Complaint to Jeffrey E. Turner, Chairman, Clayton County Administration 112 Smith Street, Jonesboro, GA 30236 for service of process.

5.

Defendant is an “employer” as defined by Title VII.

ADMINISTRATIVE

6.

Mr. Bostock timely filed a charge for Sex (Sexual Orientation) Discrimination with the Equal Employment Opportunity Commission.

7.

Mr. Bostock filed this lawsuit within 90 days of the receipt of his Notice of Right to Sue.

JURISDICTION AND VENUE

8.

Jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1331 (federal question).

9.

Venue is proper in this district and division pursuant to 28 U.S.C. § 1391(b)(1) because Defendant resides within the Northern District of Georgia.

10.

Venue is also proper in this district and division pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and omissions giving rise to this Complaint occurred within the Northern District of Georgia.

STATEMENT OF FACTS

11.

Plaintiff began working for the Defendant on or about January 13, 2003.

12.

Plaintiff is a gay male.

13.

Plaintiff was employed by Defendant as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County. Plaintiff was charged with the primary responsibility of Clayton County CASA (Court Appointed Special Advocate).

14.

During the over ten (10) years Plaintiff was employed by the Defendant, he received good performance evaluations and the program received accolades. Clayton County CASA was awarded the Established Program Award of Excellence by Georgia CASA in 2007. Plaintiff was recognized by National CASA for program expansion and served on the National CASA Standards and Policy committee in or around 2011-2012 .

15.

Beginning in January 2013, Plaintiff became openly involved with a gay recreational softball league, Hotlanta Softball League.

16.

Plaintiff actively promoted the Clayton County CASA organization to the softball league as a source of volunteer opportunities for league members.

17.

In the months after Plaintiff joined the Hotlanta Softball League, Plaintiff's participation in the league and his sexual orientation were, on information and belief, openly criticized by one or more persons who had significant influence on the Defendant.

18.

In or around April 2013, Defendant advised Plaintiff that it was conducting an internal audit on program funds Plaintiff managed.

19.

Plaintiff did not engage in any improper conduct with regard to program funds under his custody or control.

20.

Defendant initiated the audit as a pretext for discrimination against Plaintiff based on his sexual orientation.

21.

On information and belief, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where Plaintiff's supervisor was present, at least one individual made disparaging comments about Plaintiff's sexual orientation and participation in the league.

22.

On or about June 3, 2013, Defendant terminated Plaintiff's employment.

23.

Defendant stated that Plaintiff was terminated for Conduct Unbecoming of a Clayton County Employee. That purported reason, however, was a pretense for discrimination against Plaintiff based on his sexual orientation.

COUNT I
Sex Discrimination in Violation of
Title VII of The Civil Rights Act of 1964, as Amended

24.

Plaintiff incorporates by reference the preceding Paragraphs as if fully restated herein.

25.

Plaintiff is a gay male.

26.

Plaintiff is an “employee” as defined by Title VII, 42 U.S.C. § 2000e *et seq.*

27.

Defendant is an “employer” as defined by Title VII, 42 U.S.C. § 2000e *et seq.*

28.

Having worked in his position previously, Plaintiff was qualified for the position of Child Welfare Services Coordinator.

29.

Defendant discriminated against Plaintiff in the terms and conditions of Plaintiff's employment when it terminated Plaintiff's employment.

30.

As a direct and proximate result of the Defendant's actions, Plaintiff has suffered damages including emotional distress, inconvenience, loss of income and benefits, humiliation, and other indignities.

31.

Plaintiff is entitled to an award of back pay and benefits, compensatory damages, reinstatement or front pay, attorney's fees, and all other appropriate damages, remedies, and other relief available under Title VII and all federal statutes providing remedies for violations of Title VII.

32.

Defendant acted intentionally and maliciously with respect to Plaintiff, entitling Plaintiff to recover punitive damages against Defendant.

33.

Additionally, or in the alternative, Defendant undertook its unlawful conduct recklessly with respect to Plaintiff and his federally protected rights, entitling Plaintiff to recover punitive damages against Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands a TRIAL BY JURY and requests the following relief:

- a. a declaratory judgment that Defendant violated Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*;
- b. a permanent injunction, prohibiting Defendant from engaging in unlawful employment practices in violation of Title VII;
- c. full back pay from the date of Plaintiff's termination, taking into account all raises to which Plaintiff would have been entitled but for his unlawful termination, and all fringe and pension benefits of employment, with prejudgment interest thereon;
- d. reinstatement to Plaintiffs' former position with Defendant at the same pay grade, or in the alternative, front pay to compensate Plaintiff for lost future wages, benefits and pension;
- e. compensatory damages in an amount to be determined by the enlightened conscience of the jury, for Plaintiff's emotional distress, suffering, inconvenience, mental anguish, loss of enjoyment of life and special damages;
- f. punitive damages;
- g. attorneys' fees and costs; and

h. all other and further relief as this Court deems just and proper.

Respectfully submitted,

BUCKLEY BEAL LLP

By: s/ Thomas J. Mew IV
Brian J. Sutherland
bsutherland@buckleybeal.com
Georgia Bar No. 105408
Thomas J. Mew IV
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Telephone: (404) 781-1100
Facsimile: (404) 781-1101

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

GERALD LYNN BOSTOCK,)	
)	
Plaintiff,	)	CIVIL ACTION
	)	File No. 1:16-CV-1460
v.)	
	)	JURY TRIAL DEMANDED
CLAYTON COUNTY BOARD OF)	
COMMISSIONERS,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2016, I electronically filed the **FIRST AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all current attorneys of record and have served the document on the following via hand delivery by process server, addressed as follows:

Clayton County Board of Commissioners
c/o Chairman Jeff Turner
112 Smith Street
Jonesboro, GA 30236

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

BUCKLEY BEAL, LLP
Promenade, Suite 900
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GERALD LYNN BOSTOCK,)	
)	
Plaintiff,	)	CIVIL ACTION
	)	File No. 1:16-CV-1460
v.)	
	)	JURY TRIAL DEMANDED
CLAYTON COUNTY BOARD OF)	
COMMISSIONERS,)	
)	
Defendant.)	

**PLAINTIFF’S CERTIFICATE OF INTERESTED
PERSONS AND CORPORATE DISCLOSURE STATEMENT**

(1) The undersigned counsel of record for a party to this action certifies that the following is a full and complete list of all parties in this action, including any parent corporation and any publicly held corporation that owns 10% or more of the stock of a party:

- Plaintiff Gerald Lynn Bostock
- Defendant Clayton County Board of Commissioners

(2) The undersigned further certifies that the following is a full and complete list of all other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case:

- Plaintiff Gerald Lynn Bostock
- Buckley Beal, LLP
- Defendant Clayton County Board of Commissioners

(3) The undersigned further certifies that the following is a full and complete list of all persons serving as attorneys for the parties in this proceeding:

For the Plaintiff:

Brian J. Sutherland
Thomas J. Mew IV
T. Brian Green
BUCKLEY BEAL, LLP

Respectfully submitted this 2nd day of August, 2016.

s/ Thomas J. Mew IV
Brian J. Sutherland
bsutherland@buckleybeal.com
Georgia Bar No. 105408
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Facsimile: (404) 781-1101
Counsel for Plaintiff

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

GERALD LYNN BOSTOCK,)

Plaintiff,)

v.)

**CLAYTON COUNTY BOARD
OF COMMISSIONERS,**)

Defendant.)

**CIVIL ACTION
NO: 1:16-cv-01460-ODE-WEJ**

**DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT
AND MEMORANDUM OF LAW IN SUPPORT**

COMES NOW, Clayton County Board of Commissioners (hereinafter, “Clayton County”), the Defendant in the above-referenced matter, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss Plaintiff’s First Amended Complaint for failure to state a claim upon which relief may be granted.

In his First Amended Complaint, Plaintiff alleges that he was terminated because of his sexual orientation. However, Title VII does not encompass discrimination on the basis of sexual orientation. Accordingly, Clayton County requests that its Motion be **GRANTED** and that Plaintiff’s First Amended Complaint be **DISMISSED**, with prejudice, in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initially filed this action *pro se* on May 5, 2016. [Doc. 2]. On or about August 1, 2016, this Court entered an Order recognizing that Plaintiff had not timely served his Complaint, and demanding that Plaintiff show cause as to why his Complaint should not be dismissed. The next day, on August 2, Plaintiff (through counsel) filed his First Amended Complaint. [Doc. 4].

In the First Amended Complaint, Plaintiff alleges that he is a gay male and that he worked for Clayton County as the Child Welfare Services Coordinator. Plaintiff claims that, beginning in January 2013, he began playing in a gay recreational softball league. [Doc. 4, ¶¶ 12-13, 15]. Plaintiff alleges that his participation in the league and his sexual orientation were criticized by one or more (unnamed) persons, and that the Board subjected him to an internal audit of the funds he managed. Plaintiff claims that the audit was a pretext for discrimination against him based upon his sexual orientation, and that his subsequent termination was actually due to his sexual orientation, rather than due to the findings of the audit. [Doc. 4, ¶¶ 18-23].

Based solely upon these allegations, Plaintiff alleges that he was discriminated against due to his sex in violation of Title VII of the Civil Rights Act of 1964

II. ARGUMENT AND CITATION OF AUTHORITY

A. Motion To Dismiss Standard

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint is subject to dismissal if it fails to state a claim upon which relief may be granted. The tenet that a court must accept a complaint's allegations as true is inapplicable to legal conclusions and threadbare recitals of a cause of action's elements, supported by mere conclusory allegations. Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." Id. To survive a motion to dismiss, a complaint must allege *facts*, and those facts must show "more than a sheer possibility that a defendant has acted unlawfully," but instead must state a claim to relief that is "plausible on its face." Id. at 678. If the complaint only pleads facts that are merely consistent with a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief" and is subject to dismissal for failure to state a claim upon which relief can be granted. Id.; Holland v. Pilot Travel Centers, LLC, No. 5:09-CV-262 (CAR), 2010 WL 2732047, at *3 (M.D. Ga. July 8, 2010) (quoting Iqbal, 556 U.S. at 679).

B. Plaintiff Cannot Assert A Viable Claim For “Sex Discrimination” Based Upon His Sexual Orientation

The sole basis of Plaintiff’s Title VII sex discrimination claim is that he was discriminated against and terminated because of his sexual orientation.

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. To this end, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (“Title VII”) prohibits discrimination on the basis of an individual’s “race, color, religion, sex, or national origin.” Sexual orientation is not an enumerated protected class within the statute, and case law throughout the district courts within the Eleventh Circuit consistently holds that sexual orientation claims are not covered by Title VII. Evans v. Georgia Regional Hosp., No. CV415-103, 2015 WL 5316694, at *2 (S.D. Ga. Sept. 9, 2015) (granting motion to dismiss claim for sexual orientation discrimination); Davis v. Signius Invest. Corp./Answernet, No. 1:12-cv-04143-TWT-AJB, 2013 WL 1339758, at *5 (N.D. Ga. Feb. 26, 2013) (Baverman, J.) (“Title VII does not protect employees from discrimination based on sexual orientation.”); Espinosa v. Burger King Corp., No. 11-62503-CIV, 2012 WL 4344323, at *5 (S.D. Fla. Sept. 21, 2012) (“[C]ourts in this circuit and across the country have consistently held that Title VII does not apply to discrimination claims based on sexual

orientation.”); Anderson v. Napolitano, No. 09-60744-CIV, 2010 WL 431898, at *4 (S.D. Fla. Feb. 8, 2010) (“The law is clear that Title VII does not prohibit discrimination based on sexual orientation.”); Mowery v. Escambia Cnty. Utils. Auth., No. 3:04CV382-RSEMT, 2006 WL 327965, at *9 (N.D. Fla. Feb. 10, 2006) (“[C]ase law throughout the circuits consistently holds that Title VII provides no protection for discrimination based on sexual orientation.”); Hudson v. Norfolk S. Ry. Co., 209 F. Supp.2d 1301, 1315 (N.D. Ga. 2001) (“[S]exual orientation is not a classification protected under Title VII.”) (Carnes, J.).

This is consistent with case law from other circuit courts around the country. See e.g. Hively v. Ivy Tech Community College, 2016 WL 4039703, at *2, - - - F.3d - - - (7th Cir. July 28, 2016) (“our precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination. That holding is in line with all other circuit courts to have decided or opined about the matter”); Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012) (“[U]nder Title VII, sexual orientation is not a protected classification.”); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (“To the extent that [the Plaintiff] is alleging discrimination based upon her Lesbianism, [the Plaintiff] cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class.”); Hamner v. St. Vincent Hosp. &

Health Care Center, Inc., 224 F.3d 701, 704 (7th Cir. 2000) (“[H]arassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”).

Because Plaintiff’s First Amended Complaint alleges that he was discriminated against and terminated because of his sexual orientation, he cannot state a cognizable claim for relief. Accordingly, Clayton County respectfully requests that the Court dismiss Plaintiff’s First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

C. The Board Of Commissioners Is Not Capable of Being Sued

Plaintiff’s sole claim is brought against the Clayton County Board of Commissioners. Plaintiff’s First Amended Complaint should be dismissed because the Board of Commissioners is not a legal entity capable of being sued. In this regard, the Georgia Supreme Court has stated that, in every suit, there must be a legal entity as the real defendant, and Georgia recognizes only three classes as legal entities: (1) natural persons; (2) an artificial person (a corporation); and (3) such quasi-artificial persons as the law recognizes as being capable to sue. Georgia Insurers Insolvency Pool v. Elbert County, 258 Ga. 317, 318 368 S.E.2d 500, 502 (1988).

In this case, Plaintiff has attempted to sue the Board of Commissioners, however, he has not alleged any facts or cited any legal authority (nor is Defendant aware of any) establishing that the Board is a legal entity having the capacity to be sued. To the contrary, the Board is not a political subdivision of the state, a body corporate, or any of the other recognized “legal entities.”

Georgia courts frequently have held that boards of a local government such as the Board named here are not legal entities capable of being sued. See Young v. Fulton County Government, 2006 WL 3022961, at *2 (N.D. Ga. Oct. 20, 2006) (dismissing county board of commissioners since it was not plaintiff’s employer and was not legal entity); Cook v. Colquitt County Bd. of Educ., 261 Ga. 841, 841, 412 S.E.2d 828, 828 (1992) (stating county board of education is not body corporate and does not have capacity to sue or be sued); Board of Road and Revenue Comm’rs of Candler County v. Collins, 94 Ga. App. 562, 562, 95 S.E.2d 758, 759 (1956) (holding county board of road and revenue commissioners was not legal entity and, thus, not proper party); Brownlee v. Dalton Board of Water, Light & Sinking-Fund Comm’rs, 1 S.E.2d 599, 600 (Ga. App. 1939) (holding board of water, light, and sinking fund commissioners was agency or instrumentality of city, was not separate and distinct corporate entity from city, and therefore not subject to suit). Therefore, because the Board of Commissioners is not a legal entity

capable of being sued under Georgia law, Plaintiff's sole claim should be dismissed with prejudice.

III. CONCLUSION

For the reasons stated herein, Clayton County respectfully requests that the Court **GRANT** the instant Motion to Dismiss and **DISMISS** Plaintiff's First Amended Complaint, with prejudice, in its entirety.

This 23rd day of August, 2016.

/s/Martin B. Heller

Jack Hancock
Georgia Bar No. 322450
Martin B. Heller
Georgia Bar No. 360538
William H. Buechner
Georgia Bar No. 086392

*Attorneys for Clayton County Board
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CERTIFICATE OF COMPLIANCE

I hereby certify that the within and foregoing **MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT** has been prepared in compliance with Local Rule 5.1 by using Times New Roman, 14 point font.

This 23rd day of August, 2016.

s/ Martin B. Heller

Martin B. Heller

Georgia Bar No. 360538

mheller@fmglaw.com

*Attorneys for Clayton County Board of
Commissioners*

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F: (770) 937-9960

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

Brian J. Sutherland, Esq.
Thomas J. Mew, IV, Esq.
Buckley Beal LLP
1230 Peachtree Street, NE, Suite 900
Atlanta, GA 30309

This 23rd day of August, 2016.

s/ Martin B. Heller

Martin B. Heller
Georgia Bar No. 360538
mheller@fmglaw.com

*Attorneys for Clayton County Board of
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**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 BOARD OF)	
COMMISSIONERS,)	
)	
Defendant.)	

**CONSENT MOTION FOR LEAVE TO AMEND COMPLAINT AND TO
SUBSTITUTE DEFENDANT**

Plaintiff Gerald Bostock respectfully submits this Consent Motion for Leave to Amend his First Amended Complaint.

1. Plaintiff filed his Complaint, *pro se*, on May 5, 2016, alleging that Defendant Clayton County Board of Commissioners discriminated against him based on his sexual orientation in violation of Title VII of the Civil Rights Act of 1964, as amended. [Doc. No. 1.]

2. Since then, Plaintiff has retained legal representation concerning the above-captioned matter.

3. After reviewing Plaintiff's *pro se* Complaint, Plaintiff's counsel filed an Amended Complaint on August 5, 2016. [Doc. No. 4.]

4. Defendant has moved to dismiss the Amended Complaint on the grounds that (1) sexual orientation discrimination is not a legally cognizable claim under Title VII and (2) the Clayton County Board of Commissioners is not a legal entity capable of being sued. [Doc. No. 7.]

5. Plaintiff seeks to file a Second Amended Complaint to add a claim based on gender stereotyping discrimination under Title VII and to substitute Clayton County as the Defendant. A copy of the proposed Second Amended Complaint is attached hereto as Exhibit A.

6. The Parties' counsel have conferred in advance of this Motion. Counsel for Defendant, who is also counsel for Clayton County, has consented to this motion and to accept service on behalf of Clayton County. Defendant's consent is given without prejudice to any arguments that it may raise as to the merit of the claims and Defendant's ability to move to dismiss the claims in the Second Amended Complaint.

7. Defendant has also consented to the form of the proposed Order attached hereto including that its motion to dismiss be denied as moot based upon the filing of the Second Amended Complaint without prejudice to Defendant's right to file a Motion to Dismiss the Second Amended Complaint.

8. Federal Rule of Civil Procedure 15(a) (2) provides that a party may amend

his pleading “with the opposing party’s consent.”

WHEREFORE, Plaintiff respectfully requests that the Plaintiff’s Consent Motion for Leave to Amend Complaint and to Substitute Defendant be granted, that Clayton County be substituted as Defendant in this action and that Plaintiff’s proposed Second Amended Complaint be filed. A Proposed Order is attached for the Court’s convenience.

This 9th day of September, 2016.

Respectfully submitted,

BUCKLEY BEAL, LLP

s/ Thomas J. Mew
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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 9th day of September, 2016.

s/Thomas J. Mew
Thomas J. Mew

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed
PLAINTIFF'S CONSENT MOTION FOR LEAVE TO AMEND COMPLAINT
AND TO SUBSTITUTE DEFENDANT 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
Martin B. Heller
William H. Buechner

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,	)	CIVIL ACTION
	)	File No. 1:16-CV-1460
v.)	
	)	JURY TRIAL DEMANDED
CLAYTON COUNTY,)	
)	
Defendant.)	

SECOND AMENDED COMPLAINT

Plaintiff Gerald Lynn Bostock (“Plaintiff”) files this Second Amended Complaint against Defendant Clayton County (“Defendant”) for violations of Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.* (“Title VII”).

PARTIES

1.

At all times relevant to this action, Defendant employed Plaintiff.

2.

Plaintiff submits himself to the jurisdiction of this Court.

3.

Defendant is a political division of the state of Georgia and is subject to the

jurisdiction and venue of this Court.

4.

Defendant may be served with process by delivering a copy of Summons and Complaint to Jeffrey E. Turner, Chairman, Clayton County Administration 112 Smith Street, Jonesboro, GA 30236 for service of process.

5.

Defendant is an “employer” as defined by Title VII.

ADMINISTRATIVE

6.

Mr. Bostock timely filed a charge for sex and sexual orientation discrimination with the Equal Employment Opportunity Commission.

7.

Mr. Bostock filed this lawsuit within 90 days of the receipt of his Notice of Right to Sue.

JURISDICTION AND VENUE

8.

Jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1331 (federal question).

9.

Venue is proper in this district and division pursuant to 28 U.S.C. § 1391(b)(1) because Defendant resides within the Northern District of Georgia.

10.

Venue is also proper in this district and division pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and omissions giving rise to this Complaint occurred within the Northern District of Georgia.

STATEMENT OF FACTS

11.

Plaintiff began working for the Defendant on or about January 13, 2003.

12.

Plaintiff is a gay male.

13.

Plaintiff was employed by Defendant as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County. Plaintiff was charged with the primary responsibility of Clayton County CASA (Court Appointed Special Advocate).

14.

During the over ten (10) years Plaintiff was employed by the Defendant, he received good performance evaluations and the program received accolades. Clayton County CASA was awarded the Established Program Award of Excellence by Georgia CASA in 2007. Plaintiff was recognized by National CASA for program expansion and served on the National CASA Standards and Policy committee in or around 2011-2012 .

15.

Beginning in January 2013, Plaintiff became involved with a gay recreational softball league called the Hotlanta Softball League.

16.

Plaintiff actively promoted the Clayton County CASA organization to the softball league as a source of volunteer opportunities for league members.

17.

In the months after Plaintiff joined the Hotlanta Softball League, Plaintiff's participation in the league and his sexual orientation and identity were, on information and belief, openly criticized by one or more persons who had significant influence on the decisionmaking of the Defendant.

18.

In or around April 2013, Defendant advised Plaintiff that it was conducting an internal audit on program funds Plaintiff managed.

19.

Plaintiff did not engage in any improper conduct with regard to program funds under his custody or control.

20.

Defendant initiated the audit as a pretext for discrimination against Plaintiff based on his sexual orientation and failure to conform to a gender stereotype.

21.

On information and belief, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board, where Plaintiff's supervisor was present, at least one individual made disparaging comments about Plaintiff's sexual orientation and identity and participation in the league.

22.

On or about June 3, 2013, Defendant terminated Plaintiff's employment.

23.

Defendant stated that Plaintiff was terminated for Conduct Unbecoming of a Clayton County Employee. That purported reason, however, was a pretext for discrimination against Plaintiff based on his sex and/or sexual orientation.

COUNT I
Sex Discrimination in Violation of
Title VII of The Civil Rights Act of 1964, as Amended

24.

Plaintiff incorporates by reference the preceding Paragraphs as if fully restated herein.

25.

Plaintiff is a gay male.

26.

Plaintiff is an “employee” as defined by Title VII, 42 U.S.C. § 2000e *et seq.*

27.

Defendant is an “employer” as defined by Title VII, 42 U.S.C. § 2000e *et seq.*

28.

Having worked in his position previously, Plaintiff was qualified for the position of Child Welfare Services Coordinator.

29.

Defendant discriminated against Plaintiff in the terms and conditions of Plaintiff's employment when it terminated Plaintiff's employment.

30.

As a direct and proximate result of the Defendant's actions, Plaintiff has suffered damages including emotional distress, inconvenience, loss of income and benefits, humiliation, and other indignities.

31.

Plaintiff is entitled to an award of back pay and benefits, compensatory damages, reinstatement or front pay, attorney's fees, and all other appropriate damages, remedies, and other relief available under Title VII and all federal statutes providing remedies for violations of Title VII.

32.

Defendant acted intentionally and maliciously with respect to Plaintiff, entitling Plaintiff to recover punitive damages against Defendant.

33.

Additionally, or in the alternative, Defendant undertook its unlawful conduct recklessly with respect to Plaintiff and his federally protected rights, entitling Plaintiff to recover punitive damages against Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands a TRIAL BY JURY and requests the following relief:

- a. a declaratory judgment that Defendant violated Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*;
- b. a permanent injunction, prohibiting Defendant from engaging in unlawful employment practices in violation of Title VII;
- c. full back pay from the date of Plaintiff's termination, taking into account all raises to which Plaintiff would have been entitled but for his unlawful termination, and all fringe and pension benefits of employment, with prejudgment interest thereon;
- d. reinstatement to Plaintiffs' former position with Defendant at the same pay grade, or in the alternative, front pay to compensate Plaintiff for lost future wages, benefits and pension;

- e. compensatory damages in an amount to be determined by the enlightened conscience of the jury, for Plaintiff's emotional distress, suffering, inconvenience, mental anguish, loss of enjoyment of life and special damages;
- f. punitive damages;
- g. attorneys' fees and costs; and
- h. all other and further relief as this Court deems just and proper.

Respectfully submitted,

BUCKLEY BEAL LLP

By: s/ Thomas J. Mew IV

Thomas J. Mew IV
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Georgia Bar No. 503447
Brian J. Sutherland
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

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

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the **SECOND AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all current attorneys of record.

s/ Thomas J. Mew IV
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**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 BOARD OF)	
COMMISSIONERS,)	
)	
Defendant.)	

[PROPOSED] ORDER

Having reviewed PLAINTIFF’S CONSENT MOTION FOR LEAVE TO AMEND COMPLAINT AND TO SUBSTITUTE DEFENDANT, and for good cause shown, Plaintiff’s Consent Motion is hereby GRANTED. The Clerk is directed to enter the Plaintiff’s Second Amended Complaint and the same is deemed filed. Defendant’s Motion to Dismiss the Plaintiff’s First Amended Complaint is DENIED AS MOOT, without prejudice to Defendant’s right to file a Motion to Dismiss Plaintiff’s Second Amended Complaint.

IT IS SO ORDERED on this ____ day of _____ 2016.

Hon. Walter E. Johnson
United States Magistrate Judge
Northern District of Georgia

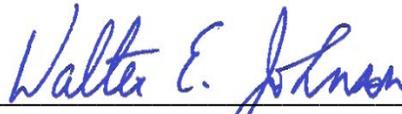
**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
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GERALD LYNN BOSTOCK,)	
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Plaintiff,)	CIVIL ACTION
)	File No. 1:16-CV-1460
v.)	
)	
CLAYTON COUNTY BOARD OF)	
COMMISSIONERS,)	
)	
Defendant.)	

ORDER

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IT IS SO ORDERED on this 12th day of September, 2016.



WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

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

GERALD LYNN BOSTOCK,)	
)	
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- b. a permanent injunction, prohibiting Defendant from engaging in unlawful employment practices in violation of Title VII;
- c. full back pay from the date of Plaintiff's termination, taking into account all raises to which Plaintiff would have been entitled but for his unlawful termination, and all fringe and pension benefits of employment, with prejudgment interest thereon;
- d. reinstatement to Plaintiffs' former position with Defendant at the same pay grade, or in the alternative, front pay to compensate Plaintiff for lost future wages, benefits and pension;

- e. compensatory damages in an amount to be determined by the enlightened conscience of the jury, for Plaintiff's emotional distress, suffering, inconvenience, mental anguish, loss of enjoyment of life and special damages;
- f. punitive damages;
- g. attorneys' fees and costs; and
- h. all other and further relief as this Court deems just and proper.

Respectfully submitted,

BUCKLEY BEAL LLP

By: s/ Thomas J. Mew IV

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

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

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the **SECOND AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all current attorneys of record.

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

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

**DEFENDANT’S MOTION TO DISMISS
PLAINTIFF’S SECOND AMENDED COMPLAINT
AND MEMORANDUM OF LAW IN SUPPORT**

COMES NOW, Clayton County, the Defendant in the above-referenced matter, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss Plaintiff’s Second Amended Complaint for failure to state a claim upon which relief may be granted.

In his Second Amended Complaint, Plaintiff alleges that he was terminated because of “gender stereotyping,” and his sexual orientation, which he claims are both sex discrimination claims. Plaintiff’s claims fail, however, because Title VII does not encompass discrimination on the basis of sexual orientation, and Plaintiff has not and cannot plead any facts to support a gender stereotyping claim. In addition, Plaintiff did not exhaust his administrative remedies with respect to his

gender stereotyping claim, and even if he did, his gender stereotyping claim is time-barred. For these reasons, Clayton County requests that its Motion be **GRANTED** and that Plaintiff's Second Amended Complaint be **DISMISSED**, with prejudice, in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initially filed this action *pro se* on May 5, 2016. [Doc. 2]. On or about August 1, 2016, this Court entered an Order recognizing that Plaintiff had not timely served his Complaint, and instructing Plaintiff to show cause as to why his Complaint should not be dismissed. Plaintiff never responded to the show cause order, but instead, the next day, Plaintiff (through counsel) filed his First Amended Complaint. [Doc. 4]. The Clayton County Board of Commissioners filed a Motion to Dismiss, arguing both that the Complaint failed to state a claim and that it was not a proper Defendant. [Doc. 7]. After consulting with Plaintiff's counsel, Defendant consented to the filing of Plaintiff's Second Amended Complaint, without prejudice to its right to move for its dismissal. [Doc. 8].

In the Second Amended Complaint, Plaintiff alleges that he is a gay male and that he worked for Clayton County as the Child Welfare Services Coordinator. Plaintiff claims that, beginning in January 2013, he began playing in a gay recreational softball league. [Doc. 10, ¶¶ 12-13, 15]. Plaintiff alleges that his

participation in the league and his sexual orientation and “identity” were criticized by one or more (unnamed) persons, and that Clayton County subjected him to an internal audit of the funds he managed. [Doc. 10, ¶ 17]. Plaintiff claims that the audit was a pretext for discrimination against him based upon his sexual orientation and his failure to conform to a gender stereotype, and that his subsequent termination was actually due to his sex / sexual orientation, rather than due to the findings of the audit. [Doc. 10, ¶¶ 18-23].

Based solely upon these allegations, Plaintiff alleges that he was discriminated against due to his sex in violation of Title VII of the Civil Rights Act of 1964. [Doc. 10, Count I, ¶ 24-33].

II. ARGUMENT AND CITATION OF AUTHORITY

A. Motion To Dismiss Standard

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint is subject to dismissal if it fails to state a claim upon which relief may be granted. The tenet that a court must accept a complaint’s allegations as true is inapplicable to legal conclusions and threadbare recitals of a cause of action’s elements, supported by mere conclusory allegations. Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009). “A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” Id. To survive a

motion to dismiss, a complaint must allege *facts*, and those facts must show “more than a sheer possibility that a defendant has acted unlawfully,” but instead must state a claim to relief that is “plausible on its face.” *Id.* at 678. If the complaint only pleads facts that are merely consistent with a defendant’s liability, it “stops short of the line between possibility and plausibility of entitlement to relief” and is subject to dismissal for failure to state a claim upon which relief can be granted. *Id.*; Holland v. Pilot Travel Centers, LLC, No. 5:09-CV-262 (CAR), 2010 WL 2732047, at *3 (M.D. Ga. July 8, 2010) (quoting *Iqbal*, 556 U.S. at 679).

B. Plaintiff Cannot Assert A Viable Claim For “Sex Discrimination” Based Upon His Sexual Orientation

Plaintiff alleges a Title VII sex discrimination claim based upon his claim that he was discriminated against and terminated because of his sexual orientation..

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. To this end, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (“Title VII”) prohibits discrimination on the basis of an individual’s “race, color, religion, sex, or national origin.” Sexual orientation is not an enumerated protected class within the statute, and case law throughout the district courts within the Eleventh Circuit consistently holds that sexual orientation claims are not covered by Title VII. Evans v. Georgia Regional

Hosp., No. CV415-103, 2015 WL 5316694, at *2 (S.D. Ga. Sept. 9, 2015) (granting motion to dismiss claim for sexual orientation discrimination); Davis v. Signius Invest. Corp./Answernet, No. 1:12-cv-04143-TWT-AJB, 2013 WL 1339758, at *5 (N.D. Ga. Feb. 26, 2013) (Baverman, J.) (“Title VII does not protect employees from discrimination based on sexual orientation.”); Espinosa v. Burger King Corp., No. 11-62503-CIV, 2012 WL 4344323, at *5 (S.D. Fla. Sept. 21, 2012) (“[C]ourts in this circuit and across the country have consistently held that Title VII does not apply to discrimination claims based on sexual orientation.”); Anderson v. Napolitano, No. 09-60744-CIV, 2010 WL 431898, at *4 (S.D. Fla. Feb. 8, 2010) (“The law is clear that Title VII does not prohibit discrimination based on sexual orientation.”); Mowery v. Escambia Cnty. Utils. Auth., No. 3:04CV382-RSEMT, 2006 WL 327965, at *9 (N.D. Fla. Feb. 10, 2006) (“[C]ase law throughout the circuits consistently holds that Title VII provides no protection for discrimination based on sexual orientation.”); Hudson v. Norfolk S. Ry. Co., 209 F. Supp.2d 1301, 1315 (N.D. Ga. 2001) (“[S]exual orientation is not a classification protected under Title VII.”) (Carnes, J.).

This is consistent with case law from other circuit courts around the country. See e.g. Hively v. Ivy Tech Community College, 2016 WL 4039703, at *2, - - - F.3d - - - (7th Cir. July 28, 2016) (“our precedent has been unequivocal in holding

that Title VII does not redress sexual orientation discrimination. That holding is in line with all other circuit courts to have decided or opined about the matter”); Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012) (“[U]nder Title VII, sexual orientation is not a protected classification.”); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (“To the extent that [the Plaintiff] is alleging discrimination based upon her Lesbianism, [the Plaintiff] cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class.”); Hamner v. St. Vincent Hosp. & Health Care Center, Inc., 224 F.3d 701, 704 (7th Cir. 2000) (“[H]arassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”).

Because Plaintiff’s Second Amended Complaint alleges that he was discriminated against and terminated because of his sexual orientation, he cannot state a cognizable claim for relief. Accordingly, Clayton County respectfully requests that the Court dismiss Plaintiff’s Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

C. Plaintiff Has Failed To State A Claim For Gender Stereotyping

Plaintiff’s gender stereotyping claim must be dismissed because the Second Amended Complaint is void of any factual support for this claim, aside from a

single conclusory assertion that “Defendant initiated the audit as a pretext for discrimination against Plaintiff based upon his sexual orientation and failure to conform to a gender stereotype.” [Doc. 10, ¶ 20]. This bare allegation is nothing more than a legal conclusion to be disregarded, and falls well short of alleging facts that plausibly support a sex discrimination gender stereotyping claim.

In reality, Plaintiff is attempting to avoid dismissal of his entire Second Amended Complaint by bootstrapping a “gender stereotyping” conclusory allegation to his sexual orientation claim. This simply is insufficient to state a claim and amounts to nothing more than alleging sexual orientation discrimination. See Vickers v. Fairfield Medical Center, 453 F.3d 757, 763-764 (6th Cir. 2006) (recognizing “faulty logic” in viewing a claim for sexual orientation as a claim for gender stereotyping, and finding that the plaintiff’s “claim fails because Vickers has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work,” because accepting such a claim “would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination”).

Courts within this Circuit have ruled that a discrimination complaint should be dismissed when, as here, the plaintiff fails to allege sufficient facts supporting such claims. See Patel v. Georgia Dept. BHDD, 485 Fed. Appx. 982, 983 (11th

Cir. 2012) (affirming dismissal of various discrimination and retaliation claims for failing to plead sufficient facts to support these claims); Evans v. Georgia Regional Hospital, 2015 WL 5316694, at *2-3 (S.D. Ga. Sept. 10, 2015) (allegations of gender non-conformity or gender stereotyping are subject to dismissal under Iqbal and 12(b)(6) when they are based solely upon an individuals' sexual orientation); Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010) (granting motion to dismiss gender stereotyping claim because the plaintiff did not identify himself as effeminate and did not allege that he was discriminated or harassed because of the way he walked, talked, or acted; sexual orientation allegations alone simply cannot support a gender stereotyping claim).

Here, the Plaintiff's third version of his Complaint alleges for the first time that he was subjected to "gender stereotyping." However, the Second Amended Complaint does not contain a single fact that could support such a claim. Based upon Iqbal, this conclusory assertion is insufficient to state a claim, and without factual support of any kind, this claim is ripe for dismissal. Accordingly, Clayton County respectfully requests that this Court grant its Motion and dismiss Plaintiff's "gender stereotyping" claim.

D. Plaintiff Failed To Exhaust His Administrative Remedies With Respect To His Gender Stereotyping Claim

Although Plaintiff's third iteration of his Complaint attempts to plead a claim for "gender stereotyping" on account of his sex in violation of Title VII, this claim should be dismissed because Plaintiff never included any such claim in a charge of discrimination.

Before a potential claimant may sue for discrimination or retaliation under Title VII, he must first file a timely charge of discrimination. Duble v. FedEx Ground Package Sys., Inc., 572 F. App'x 889, 892-93 (11th Cir. 2014); 42 U.S.C. §§ 2000e-5(e)(1), 12117(a). The scope of a federal lawsuit is limited strictly to those claims listed in the EEOC charge, with the only exception to this rule being that a plaintiff also can sue over those claims that reasonably can be expected to grow out of the charge of discrimination. Chanda v. Engelhard/ICC, 234 F.3d 1219, 1225 (11th Cir. 2000); Waldemar v. American Cancer Soc., 971 F. Supp. 547, 553 (N.D. Ga. 1996) (granting summary judgment for defendant on plaintiff's claim for discrimination based on unfavorable treatment because plaintiff did not raise claims of such discrimination in her EEOC charge).

Courts have noted that such a rule of law serves to enhance the administrative enforcement process by ensuring that the EEOC has the opportunity to investigate and attempt conciliation of all claims before litigation is brought. It

also provides the employer advance notice of the claim and an opportunity to resolve the dispute. See Selman v. Kendall/Hunt Publishing Co., 20 FEP 1712, 1713 (N.D. Ga. 1979) (holding that core of Title VII is private settlement and elimination of unfair practices without litigation).

Federal courts routinely dismiss claims when they are outside the scope of a plaintiff's EEOC charge. See, e.g., Hillemann v. University of Cent. Fla., 167 Fed. Appx. 747, 749-750 (11th Cir. 2006); Williams v. Wal-Mart Associates, Inc., 2013 WL 979103, at *3 (N.D. Ala. Mar. 8, 2013); Swindle v. Hale, No. 2:09-CV-1458-SLB, 2012 WL 4725579, at *20 (N.D. Ala. Sept. 30, 2012), aff'd sub nom, Swindle v. Jefferson Cnty. Comm'n, 593 F. App'x 919 (11th Cir. 2014); Hernandez v. Mohawk Indus., Inc., 2009 WL 3790369, at *4 (M.D. Fla. 2009).

Here, Plaintiff's Charge of Discrimination, attached as Exhibit 1¹, states in its entirety:

¹ Documents referenced in the Complaint, explicitly relied upon by the Plaintiff, or otherwise incorporated into the Complaint can be attached to a Motion to Dismiss without converting the Motion into one for Summary Judgment. See Horsley v. Feldt, 2002 WL 2023463, at *5-6 (11th Cir. 2002) (adopting "incorporation by reference" doctrine for motions for judgment on the pleadings and noting that document attached to motion to dismiss may be considered by court without converting motion into one for summary judgment if document is central to plaintiff's claim and is undisputed); see also Harris v. Ivax Corp., 182 F.3d 799, 802, n.2 (11th Cir. 1999.) Here, Plaintiff repeatedly referenced his EEOC charge and his right-to-sue letters, which are attached as Exhibit 1 and Exhibit 2 and are

I was hired by the above named employer on January 13, 2003, as a Court Appointed Special Advocate Program Coordinator. Around October 2007, I was promoted to Child Welfare Services Coordinator. On June 3, 2013, I was notified by the Director of Juvenile Court Services and Chief of Staff of Juvenile Court Services that I was being discharged. The reason given for my discharge was “Violation of Clayton County Civil Service Rules.” I believe that I have been discriminated against because of my sex (male / sexual orientation), in violation of Title VII of the Civil Rights Act of 1964, as amended.

Thus, Plaintiff’s charge mentioned only discrimination due to his sexual orientation, and did not mention or include any facts that possibly could have led to an investigation into a potential claim of gender stereotyping. As a result, Plaintiff failed to exhaust his administrative remedies as to gender stereotyping, because an EEOC charge that complains only of sexual orientation does not exhaust administrative remedies for other types of sex discrimination. Norris v. Hiakin Drivetrain Components, 46 Fed.Appx. 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 Products, Inc., 2004 WL 540983, at *3 (S.D. Indiana 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.”) Because Plaintiff’s EEOC charge claims that he was

incorporated into the Complaint and may be used as an exhibit for the purposes of this Motion to Dismiss.

discriminated against on the basis of his sexual orientation, he has failed to exhaust his administrative remedies as to his gender stereotyping claim, and this Court should dismiss that claim.

E. Plaintiff's Gender Stereotyping Claim Is Time-Barred

Even assuming, *arguendo*, that Plaintiff properly pled a gender stereotyping claim and that such a claim was exhausted by his EEOC charge, this claim still should be dismissed because he did not bring it within 90 days after receiving his right-to-sue letter. In this regard, Plaintiff alleges that he received a right-to-sue letter (attached as Exhibit 2) and that he filed his original lawsuit within 90 days of his receipt of the letter. [Doc. 10, ¶ 7]. The right-to-sue letter was issued on February 10, 2016. Plaintiff then filed his initial Complaint on May 5, 2016, and his First Amended Complaint on August 2, 2016. [Docs. 1, 4].

Both of Plaintiff's Complaints alleged only sexual orientation discrimination. *Id.* Now, for the first time, in his Second Amended Complaint filed on September 12, 2016, Plaintiff alleges a new and distinct claim - gender stereotyping. [Doc. 10]. This claim was not brought within 90 days of his receipt of his right-to-sue letter, as it was not filed until 215 days after his right-to-sue letter was issued.

Presumably, Plaintiff will claim that his gender stereotyping claim should “relate back” to the time he filed his original Complaint. However, any such contention would be meritless because neither the original Complaint nor the First Amended Complaint contained any facts that support, let alone gave Clayton County notice of, Plaintiff’s gender stereotyping claim. Under Federal Rule of Civil Procedure 15(c), an amended pleading relates back to the date of the original pleading when it “asserts a claim or defense that arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading.” Fed.R.Civ.P. 15(c)(1)(B); Brown v. Montgomery Surgical Center, 2013 WL 1163427, at *7 (M.D. Ala. Mar. 20, 2013). This means the original complaint must have given defendant notice of the claim asserted, and “[w]hen new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed.” Moore v. Baker, 989 F.2d 1129, 1131 (11th Cir. 1993).

In his present Second Amended Complaint, Plaintiff pleads a sexual orientation claim masquerading as a gender stereotyping claim as well. There are no allegations in any of the previous pleadings indicating that Plaintiff was discriminated against in any way because he failed to act as a traditional male. The

allegations in the original Complaint and First Amended Complaint do not allege that Plaintiff walked, talked or acted in any way different than the typical male, let alone that he was discriminated against for such activities. Accord Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010) (granting motion to dismiss gender stereotyping claim because sexual orientation allegations alone cannot support a gender stereotyping claim).

As a result, because the original Complaint and the First Amended Complaint failed to plead any facts to support a gender stereotyping claim, Plaintiff's gender stereotyping claim cannot relate back to the original Complaint. Thus, even if the Second Amended Complaint contained sufficient facts to support a gender stereotyping claim (which it does not for the reasons discussed in Section C above), Plaintiff's gender stereotyping claim is time-barred and should be dismissed. See Brown, 2013 WL 1163427, at * 8 (denying relation back to failure-to-accommodate claim pled for first time in amended complaint when initial complaint did not contain facts that put defendant no notice of the claim asserted).²

² In his Second Amended Complaint, Plaintiff makes passing references to his "identity", which presumably is a reference to his gender identity. (Doc. 10, ¶¶ 17, 21). Plaintiff, however, does not allege that he was terminated because of his gender identity. (Id. at ¶ 20). Even if he did, the Second Amended Complaint does not include any supporting facts relating to Plaintiff's gender identity or relating to any purported claim of discrimination based on Plaintiff's gender identity. Moreover, to the extent that any such claim is encompassed by Title VII, Plaintiff

III. CONCLUSION

For the reasons stated herein, Clayton County respectfully requests that the Court **GRANT** the instant Motion to Dismiss and **DISMISS** Plaintiff's Second Amended Complaint, with prejudice, in its entirety.

This 23rd day of September, 2016.

/s/Martin B. Heller

Jack Hancock
Georgia Bar No. 322450
Martin B. Heller
Georgia Bar No. 360538
William H. Buechner
Georgia Bar No. 086392

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Facsimile: (770) 937-9960
jhancock@fmglaw.com
mheller@fmglaw.com
bbuechner@fmglaw.com

failed to exhaust his administrative remedies with respect to any such claim, and any attempt by Plaintiff to assert such a claim in his Second Amended Complaint also is time-barred.

CERTIFICATE OF COMPLIANCE

I hereby certify that the within and foregoing **MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT** has been prepared in compliance with Local Rule 5.1 by using Times New Roman, 14 point font.

This 23rd day of September, 2016.

s/ Martin B. Heller

Martin B. Heller
Georgia Bar No. 360538
mheller@fmglaw.com

Attorney for Clayton County

FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway, Suite 1600
Atlanta, GA 30339
T: (770) 818-0000
F: (770) 937-9960

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

Brian J. Sutherland, Esq.
Thomas J. Mew, IV, Esq.
Buckley Beal LLP
1230 Peachtree Street, NE, Suite 900
Atlanta, GA 30309

This 23rd day of September, 2016.

s/ Martin B. Heller _____

Martin B. Heller
Georgia Bar No. 360538

Attorney for Clayton County

FREEMAN MATHIS & GARY, LLP
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F: (770) 937-9960

EXHIBIT “1”

EEOC Form 5 (11/09)

<h3 style="margin: 0;">CHARGE OF DISCRIMINATION</h3> <p style="font-size: small; margin: 0;">This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</p>		Charge Presented To: Agency(ies) Charge No(s): <input type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC 410-2013-06136	
and EEOC			
_____ State or local Agency, if any			
Name (indicate Mr., Ms., Mrs.) Gerald L. Bostock		Home Phone (Incl. Area Code) (404) 938-3239	Date of Birth 01-13-1964
Street Address City, State and ZIP Code 121 Pine Circle, Jonesboro, GA 30236			
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name CLAYTON COUNTY BOARD OF COMMISSIONERS - JUVENILE COURT		No. Employees, Members 500 or More	Phone No. (Include Area Code) (770) 477-3208
Street Address City, State and ZIP Code 112 Smith Street, Jonesboro, GA 30236			
Name _____		No. Employees, Members _____	Phone No. (Include Area Code) _____
Street Address City, State and ZIP Code _____			
DISCRIMINATION BASED ON (Check appropriate box(es).) <input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input checked="" type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN <input type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input type="checkbox"/> GENETIC INFORMATION <input type="checkbox"/> OTHER (Specify) _____			DATE(S) DISCRIMINATION TOOK PLACE Earliest Latest 06-03-2013 06-03-2013 <input type="checkbox"/> CONTINUING ACTION
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)): I was hired by the above named employer on January 13, 2003, as a Court Appointed Special Advocate Program Coordinator. Around October 2007, I was promoted to Child Welfare Services Coordinator. On June 3, 2013, I was notified by the Director of Juvenile Court Services and Chief of Staff of Juvenile Court Services that I was being discharged. The reason given for my discharge was "Violation of Clayton County Civil Service Rules." I believe that I have been discriminated against because of my sex (male/sexual orientation), in violation of Title VII of the Civil Rights Act of 1964, as amended.			
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures. I declare under penalty of perjury that the above is true and correct.		NOTARY - When necessary for State and Local Agency Requirements I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT _____ SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year) SEP 05 2013 EEOC-ATDO	
_____ Date Charging Party Signature		_____ Date Charging Party Signature	

CP Enclosure with EEOC Form 5 (5/01)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Form 5, Charge of Discrimination (5/01).
2. **AUTHORITY.** 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117.
3. **PRINCIPAL PURPOSES.** The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.
4. **ROUTINE USES.** This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.
5. **WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION.** Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII or the ADA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please notify EEOC or the state or local agency where you filed your charge if **retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, and Section 503(a) of the ADA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Atlanta District Office

100 Alabama Street, SW, Suite 4R30
Atlanta, GA 30303
(404) 562-6800
TTY (404) 562-6801
FAX (404) 562-6909/6910

REQUEST FOR INFORMATION

The EEOC is authorized by Section 710 of Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act of 1990, as amended, Section 626(a) of the Age Discrimination in Employment Act of 1967, as amended, 29 CFR Sections 1620.30 & 31 of the Equal Pay Act of 1963, as amended and Title II of The Genetic Information Nondiscrimination Act of 2008, Section 29 CFR 1635.3(c) to issue a subpoena compelling the production of the information in the event of non-compliance by a Respondent. However, your cooperation in timely providing the requested information will facilitate the prompt resolution of this charge and will avoid delays created by compulsory subpoena activity.

Submit a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge. The position statement should also include, at least, the following information:

1. The correct name and address of the facility named in the charge, and a statement or document indicating how many employees are employed at the location.
2. Submit a copy of your facilities most recently submitted EEO-1 Report. If not required to submit an EEO-1 Report, please explain.
3. A true and accurate copy of all documents in the Charging Party's personnel file, to include all evaluations/appraisals/performance reviews, and all job action documents which indicate all increases in pay, promotions, reassignments, demotions and if no longer employed, submit copies of all termination documents.
4. Submit copies of and/or explain all written rules relating to employees' duties, conduct, and use of discipline for Charging Party's job classification during the relevant time period. Explain how an employee learns the contents of the rules. If the disciplinary system is progressive, explain its structure, penalties, and mode of operation.
5. Did the Charging Party complain to a supervisor or manager regarding the conduct described in the charge of discrimination? If your answer is yes, identify the person or persons with whom the complaint was registered and describe each action taken by your organization in response to that complaint. Provide a copy or any written document which reflects the complaint and the action taken as a result.

We believe the information sought is relevant to the investigation and is not unduly burdensome to produce. If we do not receive the requested information by the date specified, we may proceed to subpoena the requested information.

EXHIBIT “2”

EEOC Form 161 (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: **Gerald L. Bostock**
 121 Pine Circle
 Jonesboro, GA 30236

From: **Atlanta District Office**
 100 Alabama Street, S.W.
 Suite 4R30
 Atlanta, GA 30303

On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
410-2013-06136	Larry E. Satterwhite, Sr. Investigator	(404) 562-6855

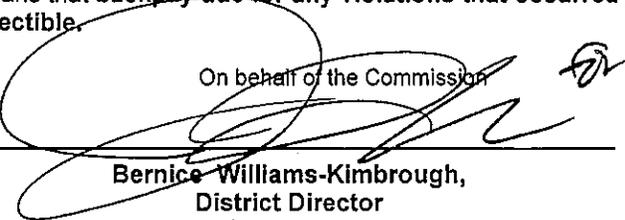
THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

- The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.
- Your allegations did not involve a disability as defined by the Americans With Disabilities Act.
- The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.
- Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge
- The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.
- The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.
- Other, (briefly state)

- NOTICE OF SUIT RIGHTS -
 (See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed **WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

On behalf of the Commission 

Bernice Williams-Kimbrough,
 District Director

FEB 10 2016

Enclosures(s)

(Date Mailed)

cc: **Jack R. Hancock**
 Attorney
FREEMAN, MATHIS & GARY, LLP.
 661 Forest Parkway
 Suite E
 Jonesboro, GA 30297

Enclosure with EEOC
Form 161 (11/09)

**INFORMATION RELATED TO FILING SUIT
UNDER THE LAWS ENFORCED BY THE EEOC**

*(This information relates to filing suit in Federal or State court under Federal law.
If you also plan to sue claiming violations of State law, please be aware that time limits and other
provisions of State law may be shorter or more limited than those described below.)*

**PRIVATE SUIT RIGHTS -- Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA),
the Genetic Information Nondiscrimination Act (GINA), or the Age
Discrimination in Employment Act (ADEA):**

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you receive this Notice**. Therefore, you should **keep a record of this date**. Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was mailed to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS -- Equal Pay Act (EPA):

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit **before 7/1/10 – not 12/1/10** -- in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

ATTORNEY REPRESENTATION -- Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

ATTORNEY REFERRAL AND EEOC ASSISTANCE -- All Statutes:

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, **please make your review request within 6 months of this Notice**. (Before filing suit, any request should be made within the next 90 days.)

IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

**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 RESPONSE IN
OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS PLAINTIFF'S SECOND AMENDED
COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT**

Plaintiff Gerald Bostock hereby submits his response to the Motion to Dismiss filed by Defendant Clayton County.

I. INTRODUCTION

Mr. Bostock has pleaded claims of sexual orientation discrimination and gender stereotype discrimination. Defendant argues, however, that Mr. Bostock's Complaint should be dismissed because (1) sexual orientation discrimination is not a cognizable legal claim; (2) Mr. Bostock failed to state a claim for gender stereotyping; (3) Mr. Bostock failed to exhaust his administrative remedies with respect to the gender stereotyping claim; and (4) Mr. Bostock's gender

stereotyping claim is time-barred. As set forth in more detail below, none of these arguments has merit.

With respect to the sexual orientation discrimination claim, the better view is that such a claim is legally cognizable. As to the gender stereotyping claim, Mr. Bostock has alleged more than sufficient factual allegations concerning discriminatory treatment on the basis of gender non-conformity. With respect to the exhaustion claim, Mr. Bostock properly exhausted his remedies at the EEOC by filing a charge for sex discrimination, which covers all claims asserted in this lawsuit. Finally, Mr. Bostock's gender stereotype discrimination claim is timely because it relates back to the same conduct alleged in his original complaint and First Amended Complaint. Defendant's motion is without merit and should be denied.

II. FACTUAL AND PROCEDURAL HISTORY

The facts, as alleged in Mr. Bostock's Second Amended Complaint and which must be taken as true for purposes of the Motion to Dismiss are as follows. Mr. Bostock is a gay male. (Sec. Am. Compl. ¶ 12). Mr. Bostock began working for defendant 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). (*Id.* ¶ 13.) During the over 10 years Mr. Bostock worked for defendant, he received favorable performance evaluations and the program received accolades. (*Id.* ¶ 14.) Clayton County CASA was awarded the established Program 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. (Sec. Am. Compl. ¶ 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 defendant. (*Id.* ¶ 17.) Shortly thereafter, in or around April 2013, defendant 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 the Defendant initiated the audit as a pretext for discrimination based on his

sexual orientation and failure to conform to gender stereotype. (*Id.* ¶¶ 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, Defendant terminated Mr. Bostock. (*Id.* ¶ 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 his charge of discrimination (copy attached as Ex. A) with the EEOC. As noted on the charge, Mr. Bostock checked the box for sex discrimination and stated, in part, “I believe that I have been discriminated against because of my sex (male/sexual orientation).” (Ex. A.)

On May 5, 2016, Mr. Bostock filed his initial Complaint, *pro se*. [Doc. No. 1.] After Mr. Bostock secured counsel, he filed his First Amended Complaint on August 2, 2016 and his Second Amended Complaint on September 12, 2016. (Doc. Nos. 4 and 10.)

III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

When deciding a motion to dismiss, courts must “accept[] the allegations in the complaint as true and constru[e] them in the light most favorable to the plaintiff.” *McCone v. Pitney Bowes, Inc.*, 582 Fed. Appx. 798, 799 (11th Cir.2014) (quoting *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004)). To survive a motion to dismiss, a complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must also contain “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotation marks omitted). “A claim is facially plausible when the court can draw the reasonable inference that the defendant is liable for the misconduct alleged.” *McCone*, 582 Fed. Appx. at 799–800 (emphasis added) (quoting *Iqbal*, 556 U.S. at 662) (internal quotation marks omitted). In this case, and as set forth below, Mr. Bostock’s Second Amended Complaint clearly meets this standard.

B. Sexual Orientation Discrimination Claims are Cognizable Under Title VII

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . .

sex.” 42 U.S.C. § 2000e-2(a)(1). In the Eleventh Circuit, the question of whether sexual orientation discrimination claims are cognizable under Title VII is “an open one.”¹ *Isaacs v. Felder Servs., LLC*, 143 F. Supp.3d 1190, 1193 (M.D. Ala. 2016) (holding in part that claims of sexual orientation-based discrimination are cognizable under Title VII.) Although district courts in this circuit have reached differing conclusions on the issue, the better-reasoned view is that such claims are actionable. This view is most consistent with Supreme Court precedent, agency guidance, Eleventh Circuit precedent, and the purpose of Title VII.

First, Supreme Court precedent makes plain that Title VII’s prohibition against discrimination because of sex has become a robust source of protection for men and women workers alike without regard for hyper-technical distinctions. In *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) the Court stated: “[i]n forbidding employers to discriminate against individuals

¹ Additionally, there is no definitive authority in the U.S. Supreme Court or the Fifth and District of Columbia Circuits regarding Title VII coverage of sexual orientation discrimination claims. *See, e.g., Espinosa v. Burger King Corp.*, No. 11-62503-CIV, 2012 WL 4344323, at *5 (S.D. Fla. Sept. 21, 2012) (“[n]either the Supreme Court nor the Eleventh Circuit has specifically addressed this issue” of whether Title VII “appl[ies] to discrimination claims based on sexual orientation.”); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 137 n.2 (S.D. Tex. 1993) (citing only cases from other circuits declaring Title VII inapplicable). Moreover, the Seventh Circuit recently vacated its opinion in *Hively v. Ivy Tech Comm. College*, 830 F.3d 698 (7th Cir. 2016) (cited by Defendant in its brief) and granted rehearing *en banc*. (Copy of order attached as Ex. B.)

because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes” (emphasis added). *See also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) (“Proponents of the legislation stressed throughout the debates that Congress had always intended to protect all individuals from sex discrimination in employment.”)

In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a case addressing same-sex sexual harassment, the Court again reiterated this expansive interpretation of Title VII. The Court stated that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. . . .” *Id.* at 80. In rejecting the argument in *Oncale* that some mistreatment “because of . . . sex” might be outside Title VII’s reach, the Supreme Court thus repudiated the notion that the scope of the statute is limited. In *Oncale*, the Court adopted perhaps the simplest test for whether discrimination had occurred: whether the conduct at issue met Title VII’s “statutory requirements,” i.e., whether the harassment occurred because of the employee’s sex. *Id.* at 80.

The same test should apply to discrimination against gay and lesbian

employees. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one's sex in relation to the sex of people to whom one is attracted. *See, e.g., Isaacs*, 143 F. Supp. 3d at 1193-94. There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation.

Second, the Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcing Title VII, has held that sexual orientation discrimination is *necessarily* sex discrimination. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015) ("Indeed, we conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."). "Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* This is because "[s]exual orientation' as a concept cannot be defined or understood without reference to sex." *Id.*

As the EEOC correctly noted:

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination --

whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action.

2015 WL 4397641, at *4 (July 15, 2015). This interpretation is fully consistent with the Supreme Court’s holding in *Oncale*.²

Baldwin is especially persuasive because the EEOC relied upon Eleventh Circuit precedent as part of its analysis. Specifically, the EEOC noted that “Title VII ... prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, ‘by definition,’ discrimination because of the employee or applicant’s sex.” In support, the EEOC cited to the Eleventh Circuit’s holding in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir.1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in

² While the EEOC’s interpretation of Title VII is not binding on this Court, it is entitled to respect to the extent that it is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The weight of deference afforded to agency interpretations under *Skidmore* depends 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.” *Id.* at 140. As noted above, *Baldwin* is particularly persuasive.

violation of Title VII].”). *See also Isaacs* 143 F. Supp.3d at 1193 (“Particularly compelling is [*Baldwin*’s] reliance on Eleventh Circuit precedent.”)

In *Isaacs*, the District Court for the Middle District of Alabama held that claims of sexual orientation-based discrimination are cognizable under Title VII.³ The court first noted that the question of whether such claims were cognizable was an open one in the Eleventh Circuit. 143 F. Supp.3d at 1193. The plaintiff was a gay man who alleged that he suffered harassment based on his sexual orientation and also based on his failure to conform to gender stereotypes. The court endorsed the EEOC’s view that claims of sexual orientation-based discrimination are cognizable under Title VII. 143 F. Supp.3d. at 1193.

This Court should follow *Isaac*’s cogent analysis and careful attention to EEOC and Eleventh Circuit authority. In contrast, the district court cases cited by Defendant for its incorrect statement that “case law throughout the district courts within the Eleventh Circuit consistently holds that sexual orientation claims are not covered by Title VII” all *pre-date Baldwin* with the single exception of *Evans v.*

³ The court also held in part that summary judgment was appropriate under the particular facts of that case because the former employee failed to identify an appropriate comparator female employee. The case was obviously in a different posture under summary judgment than this case which is before this Court on a motion to dismiss.

Ga. Reg'l Hosp., 2015 WL 5316694 (S.D. Ga. Sept. 10, 2015), which did not even address *Baldwin*.⁴

The only result that is consistent with both Supreme Court and EEOC precedent is that sexual orientation claims are covered under Title VII. The Court should deny Defendant's motion to dismiss Mr. Bostock's sexual orientation discrimination claim.

C. Mr. Bostock Has Stated a Claim For Gender Stereotype Discrimination

Mr. Bostock has set forth sufficient factual allegations to state a claim for gender stereotype discrimination. In the employment discrimination context, neither *Iqbal* nor *Twombly*, nor the Federal Rules of Civil Procedure, require a complaint to allege facts establishing each element of a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to survive a motion to dismiss. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding that a complaint need not contain "specific facts establishing a prima facie case of discrimination under the framework set forth by ... McDonnell Douglas"); *see also*

⁴ In one post-*Baldwin* decision not cited by Defendant, *Winstead v. Lafayette Cty. Bd. of Cty. Commissioners*, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601 (N.D. Fla. June 20, 2016), the court declined to follow *Baldwin* on the issue of whether sexual orientation discrimination is discrimination "because of sex" under Title VII (although it held plaintiff's claim for gender stereotype discrimination was actionable). Given *Baldwin*'s persuasive value, however, Mr. Bostock submits that *Isaacs* reached the correct result and that *Winstead* erred in declining to follow *Baldwin* on this specific point.

McCone, 582 Fed. Appx. at 801 n.4 (acknowledging that “*Twombly* effectively overruled *Swierkiewicz* when it rejected the old standard for dismissal” but that “this had no impact on *Swierkiewicz*’s statement that a plaintiff is not required to plead a prima facie case of discrimination in order to survive dismissal”). Rather, as the Eleventh Circuit has recently reiterated, the purpose of Rule 8(a)(2)’s pleading requirements is to ensure that defendants receive fair notice of what the claim is and on what grounds it is made. *See Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1260-1261 (11th Cir. 2015).

In this case, Mr. Bostock’s Second Amended Complaint clearly meets this standard. The Second Amended Complaint details Mr. Bostock’s position with Defendant, his participation in the softball league, and the ensuing criticism and discriminatory treatment suffered by Mr. Bostock. These allegations are more than sufficient to state a claim that is plausible on its face.

Defendant argues, however, that the Second Amended Complaint “is void of any factual support for [the gender stereotyping] claim, aside from a single conclusory allegation” regarding the audit. [Doc. No 13 at 6-7.] A simple reading of the Second Amended Complaint belies this argument.

Mr. Bostock’s allegations, which must be taken as true, include: 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 Defendant (Sec. Am. Compl. ¶17). Similarly, Mr. Bostock alleged that during a meeting with the Friends of Clayton County CASA Advisory Board, at least one individual made disparaging comments about Mr. Bostock's sexual orientation and identity. (*Id.* ¶ 21). Mr. Bostock has further alleged that the internal audit and the stated reason for his termination were simply a pretext for discrimination based on his sex and/or sexual orientation. (*Id.* ¶ 23). Thus, Mr. Bostock has sufficiently pleaded a claim for gender stereotype discrimination.

Defendant cites *Anderson v. Napolitano*, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010). But in that case, the court found that the plaintiff's complaint did not include instances of harassment based on gender stereotyping and consisted solely of instances of harassment based on sexual orientation. 2010 WL 431898 at *5. This is in contrast to Mr. Bostock, who has alleged that he was subject to comments and discrimination on both fronts. *See Prowel v. Wise Bus. Forms*, 579 F.3d 285, 292 (3rd. Cir. 2009) (finding that where evidence of harassment could plausibly be interpreted as being based on both sexual orientation and failure to conform to gender stereotypes, it was a question of fact for the jury).

Defendant also relies upon *Evans*, 2015 WL 5316694, at *2-3. But in *Evans*, the court appears to have misunderstood the distinction between gender stereotype discrimination and sexual orientation discrimination. In particular, the court noted that "to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation." 2015 WL 5316694, at *3. This is contrary to the Supreme Court's precedent that gender stereotype discrimination is a cognizable claim. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Mr. Bostock has set forth sufficient factual allegations to state a claim for gender stereotype discrimination. The Court should deny Defendant's motion.

D. Mr. Bostock Properly Exhausted His Administrative Remedies With Respect To His Gender Stereotyping Claim

Defendant alleges that Mr. Bostock somehow failed to exhaust his administrative remedies with respect to his gender stereotyping claim. This argument is meritless.

As an initial matter, courts are "extremely reluctant to allow procedural technicalities to bar claims brought under [Title VII]." *Sanchez v. Standard*

Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970).⁵ Thus, “the scope of an EEOC complaint should not be strictly interpreted’ ” *Id.* at 465 (citation omitted).

In this case, Mr. Bostock's EEOC charge, which was filed *pro se*, "checked" the *only* box he could applicable to *both* sexual orientation and gender stereotyping discrimination: Sex. (Ex. A.) Moreover, Mr. Bostock stated in the charge that he believed he had been discriminated against on the basis of his sex. (*Id.*) Thus, he clearly exhausted this claim at the EEOC level. *See Rhea v. Dollar Tree Stores, Inc.*, No. 04-2554MIV, 2004 WL 3313616, at *3 (W.D. Tenn. August 26, 2004) (holding in part that where plaintiff amended a complaint alleging sexual orientation discrimination to add gender stereotyping claims that “[t]he amendments do not fail on their face for failure to exhaust administrative remedies. Both plaintiffs alleged discrimination based on sex at the EEOC level by checking the appropriate box on the complaint form.”) Defendant’s arguments on this issue are without merit and its motion should be denied.

E. Mr. Bostock’s Gender Stereotyping Claim is Timely

⁵ As the Court is well aware, “the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.” *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Mr. Bostock's gender stereotyping claim is timely because it relates back to the same conduct alleged in his Complaint and First Amended Complaint. Rule 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

In this case, Mr. Bostock's allegations concerning gender stereotype discrimination arise from the same conduct set forth in his original pleading. Specifically, the allegations relate to his sexual orientation and identity being openly questioned and/or commented upon by individuals who had significant influence on the decision making of Defendant. Since the claim arises out of the same conduct as already set forth in the original complaint, it clearly relates back for purposes of the statute of limitations. *See Rhea*, 2004 WL 3313616 at *3 (holding in part that where plaintiff originally brought a sexual orientation discrimination claim and sought to amend to add claims of sexual stereotyping that "[t]o the extent a claim for sex-stereotyping arises out of the same conduct alleged in the original complaint, any amendment would relate back.").

IV. CONCLUSION

For the foregoing reasons, Mr. Bostock requests that the Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

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**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

The undersigned certifies that the foregoing has been prepared in Times New Roman 14 font, as approved by the Court in LR 5.1B.

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**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.)

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel for Defendant:

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 11, 2016

By the Court:

No. 15-1720

KIMBERLY HIVELY,
Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE,
South Bend,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division.

No. 3:14-cv-01791-RL-CAN

Rudy Lozano,
Judge.

ORDER

The Petition for Rehearing En Banc is **GRANTED**, and the panel's opinion and judgment are **VACATED**.

The court will announce the date for oral argument in a separate order.

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

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

**DEFENDANT’S REPLY BRIEF IN SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT**

I. INTRODUCTION

Grade school students watch Schoolhouse Rock to learn about our government. The classic song “Three Ring Government” taught students about the separation of powers, and that Congress in particular is tasked with writing and passing the laws. As the song states, “No one part can be more powerful than any other is. Each controls the other you see, and that’s what we call checks and balances.” In this case, however, Plaintiff asks this Court to ignore the separation of powers, disregard the founding tenants of our country, and to instead, judicially amend Title VII for some perceived public policy benefit. Although admittedly

over-simplified, this analysis shows why Plaintiff's claims all fail and why this Court should dismiss Plaintiff's Second Amended Complaint.

Plaintiff's Second Amended Complaint seeks redress for sexual orientation discrimination. When confronted with the daunting fact that sexual orientation discrimination is not covered by Title VII, Plaintiff urges this Court to judicially modify Title VII to include protection for sexual orientation claims, arguing this is the "better view" of the statute. [Doc. 14, p. 2]. Of course, it is without dispute that Title VII was not designed or written to include protections for sexual orientation. Instead, Plaintiff asks this Court to adopt the EEOC's interpretation of the statute (which is contrary to nearly every single case that has ever interpreted Title VII) that discrimination due to an individual's sex includes sexual orientation discrimination. Frankly, this misreading of the statute creates a palpable friction with the countless court decisions issued both before and after the EEOC's politically motivated decision in Baldwin v. Foxx. Simply stated, if Congress wants Title VII to cover sexual orientation discrimination, then Title VII must be amended to include it. Accordingly, Plaintiff's sexual orientation claim must fail.

Furthermore, Plaintiff's gender stereotyping claim fails because he has not (and apparently cannot) identify a single characteristic that makes him different than the typical male, aside from his sexual orientation. Because sexual orientation

alone cannot support a gender stereotyping claim, and because Plaintiff's Second Amended Complaint is devoid of any factual allegations to otherwise support a gender stereotyping claim (despite amending his pleadings multiple times already), Plaintiff has failed to state a gender stereotyping claim.

Finally, contrary to Plaintiff's claims, he did not include a gender stereotyping claim in his EEOC charge, nor did he allege facts to support such a claim in his original Complaint. Therefore, his gender stereotyping claim is subject to dismissal because it was not administratively exhausted and is now time-barred.

For all of these reasons, Plaintiff's Second Amended Complaint should be dismissed in its entirety.

II. LEGAL ARGUMENT

A. Title VII Does Not Cover Sexual Orientation Discrimination

Plaintiff spends much of his brief asking this Court to adopt what he calls the "better view" that Title VII covers sexual orientation discrimination. The plain language of the statute, however, speaks for itself. Title VII protects individuals from discrimination due to race, color, religion, sex or national origin; not from discrimination due to their sexual orientation. 42 U.S.C. § 2000e-2(a)(1); Stevens v. State Dep't of Corr., 2015 WL 1245355, at *7 (N.D. Ala. Mar. 18, 2015)

(“Noticeably absent from the statute is any protection against discrimination on account of sexual orientation.”).

The legislative history of Title VII shows that sexual orientation was not intended to be protected by Title VII. When Congress passed Title VII as part of the Civil Rights Act of 1964, its legislative discussions focused on protecting against discrimination due to race, religion and national origin. *Sex Discrimination*, 84 Harv. L. Rev. 1166, 1166 (1971). At the last minute, without prior hearing or debate, sex was added as a protected characteristic. *Id.*, at 1167. Nothing in the legislative history or plain language of the statute suggests that Congress intended to protect against discrimination due to one’s sexual orientation. In fact, since that time, Congress repeatedly has introduced ENDA, The Employment Non-Discrimination Act, explicitly designed to add sexual orientation to the protections under Title VII. This Act has never passed. Of course, ENDA would be superfluous if sexual orientation was already covered by Title VII.¹ Plaintiff argues that there is no precedent on this issue in this Circuit. However, in

¹ See *Thomas v. Keystone Real Estate Group, LP*, 2015 WL 1471273, at *2 (M.D. Pa. Mar. 31, 2015) (Title VII does not protect against sexual orientation discrimination and Congress repeatedly has rejected legislation to amend Title VII to include it); *Johnson v. Shinseki*, 2013 WL 1987352, at *2 (E.D. Mo. May 13, 2013) (same); *Mowery v. Escambia County Util. Auth.*, 2006 WL 327965, at *9, (N.D. Fla. Feb. 10, 2006) (Congress “specifically and repeatedly” rejected ENDA).

Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979), the Fifth Circuit recognized “discharge for homosexuality is not prohibited by Title VII.”²

Even if Blum was not binding on this Court, nearly every single court that has considered the question has ruled that Title VII does not include protection for discrimination due to sexual orientation. In his reply brief, Plaintiff claims that this plain language reading of Title VII is “hyper-technical” [Doc. 14, p. 6], and that Clayton County’s citations are primarily to cases issued prior to the EEOC’s Baldwin v. Foxx decision [Doc. 14, pp. 10-11], wherein the EEOC (apparently intent on re-writing provisions of Title VII) espoused its view that Title VII covers sexual orientation discrimination. Although the EEOC has taken the radical position that Title VII should be interpreted to cover characteristics that are not included within its plain language, a multitude of courts within the Eleventh Circuit and elsewhere disagree with the EEOC’s view and have refused to follow Baldwin. See, e.g., Dingle v. Bimbo Bakeries USA/Entenmann's, 624 F. App’x 57 (2d Cir. 2015) (noting that discrimination based on perceived sexual orientation was not cognizable under Title VII); Brandon v. Sage Corp., 808 F.3d 266, 270 n.2 (5th Cir. 2015) (“Title VII in plain terms does not cover ‘sexual orientation.’”);

² Fifth Circuit decisions issued prior to September 30, 1981 are binding on courts within the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981).

Murray v. North Carolina Dep't of Pub. Safety, 611 F. App'x 166, 166 (4th Cir. 2015) (affirming grant of motion to dismiss without need for oral argument, citing binding circuit precedent that "Title VII does not protect against sexual orientation discrimination"); Cargian v. Breitling USA, Inc., 2016 WL 5867445, at *4 (S.D.N.Y. Sept. 29, 2016) ("Despite significant changes in the broader legal landscape since the Second Circuit's decision in Simonton, the prevailing law in this and every other Circuit to consider the question is that, in the Title VII context, courts must distinguish between actionable gender-stereotyping claims and non-actionable sexual orientation claims."); Thompson v. CHI Health Good Samaritan Hosp., 2016 WL 5394691, at *2 (D. Neb. Sept. 27, 2016) ("[N]either Nebraska law nor Title VII encompass discrimination based upon sexual orientation."); Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 618 (S.D.N.Y. 2016) ("[D]iscrimination based on sexual orientation will not support a claim under Title VII"); Ashford v. Danberry at Inverness, 2016 WL 4615782, at *11 (N.D. Ala. Sept. 6, 2016) ("[A]ny assertion of discrimination based upon sexual orientation does not state a claim under Title VII."); Somers v. Express Scripts Holdings, 2016 WL 3541544, at *3 (S.D. Ind. June 29, 2016) ("Under binding precedent currently in effect, discrimination or harassment based on a person's sexual orientation alone is not actionable under Title VII. In other words, Congress intended the term 'sex'

to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.” (citations omitted)); Magnusson v. Cty. of Suffolk, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) (“Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here.”); Hinton v. Virginia Union Univ., --- F. Supp. 3d ---, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016) (“More importantly, the reasons offered in decisions that have adopted the EEOC’s position are matters that lie within the purview of the legislature, not the judiciary. Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment. In sum, Title VII does not encompass sexual orientation discrimination claims, and cannot be supplanted by the merely-persuasive power of the EEOC’s decision.”), *motion to certify appeal denied*, 2016 WL 3922053 (E.D. Va. July 20, 2016); Burrows v. Coll. of Cent. Fla., 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) (denying motion for reconsideration on grant of employer’s motion for summary judgment even though plaintiff cited to EEOC’s recent decision in Baldwin v. Foxx as intervening change

in law). Given the plain language of the statute, the legislative history and the overwhelming authority cited above and in the County's opening brief, Plaintiff's sexual orientation claim fails.

Undeterred, Plaintiff cites the Supreme Court's decision in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) to support his argument that this Court should judicially modify Title VII. Oncale, however, provides no such support. In Oncale, the Supreme Court ruled that Title VII's protection against sexual harassment included protection against sexual harassment perpetrated by someone of the same sex, so long as the harassment was still "because of sex." Essentially, the Oncale decision held that sexual harassment is unlawful, regardless of the gender of the individual who engages in such conduct. It is an unfathomable leap to claim Oncale states or even implies that sexual orientation is protected by Title VII. Plaintiff's argument otherwise misses the point - "because of sex" is very different than "because of sexual orientation." See King v. Super Serv., Inc., 68 Fed.Appx. 659, 664 (6th Cir. 2003) ("animosity directed towards the plaintiff because of his apparent sexual orientation is...different from discrimination on the basis of sex"); Bibby v. Phil. Coca-Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (noting difference between

“because of sex” and sexual orientation, the latter of which “Congress has not yet seen fit” to protect); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (same).

Similarly, the material flaw in the Baldwin v. Foxx EEOC decision relied upon by Plaintiff is that it, too, believes that “because of sex” includes sexual orientation. Sex, however, simply does not reference ones sexual orientation.³

B. Plaintiff Has Failed To State A Claim For Gender Stereotyping

Plaintiff’s Second Amended Complaint is completely devoid of any factual allegations to support a gender stereotyping claim, aside from Plaintiff’s allegation that he is a homosexual. Of course, this fact alone cannot support a gender stereotyping claim, as this would have the effect of re-writing Title VII to include sexual orientation discrimination.

Plaintiff alleges that he has stated a claim for gender stereotyping because his Second Amended Complaint claimed that he participated in a softball league

³ Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) does not support Plaintiff’s proposed amendment to Title VII. Parr concluded that racial discrimination prohibits discriminating against someone who is in an interracial marriage. In that context, the discrimination is “because of” race, albeit the race of that individual’s spouse. That is a natural extension of the race discrimination analysis, and has no application or role in interpreting the difference between someone’s sex and sexual orientation, a wholly different analysis. See Partners Healthcare Sys. v. Sullivan, 349 F.Supp.2d 29, 39 (D. Mass. 2007).

primarily for homosexuals, and received criticism and different treatment.⁴ [Doc. 14, p. 12]. This demonstrates a fundamental misunderstanding of what a gender stereotyping claim is, and are mere conclusions, not facts.

Specifically, the seminal Price Waterhouse decision found that a female employee could state a claim for sex discrimination based upon gender stereotyping when she alleged that she did not walk, talk or dress in the stereotypical feminine way, and instead exhibited more masculine characteristics. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Courts repeatedly have stated that such a gender stereotyping claim is not a piggyback for a sexual orientation claim under another name, but instead, that the individual must allege that they were discriminated against because they did not act like the typical male for a reason other than the mere fact that they are homosexual. See Simonton, 232 F.3d

⁴ Plaintiff argues that he does not need to plead facts to support every aspect of a *prima facie* case of gender stereotyping discrimination. Although a plaintiff is not required to plead facts establishing every element of a *prima facie* discrimination case, he still “must provide ‘enough factual matter (taken as true) to suggest’ intentional . . . discrimination.” See, e.g., Castillo v. Allegro Resort Marketing, 603 Fed.Appx. 913, 917 (11th Cir. 2015). See also Henderson v. JP Morgan Chase Bank, N.A., 436 Fed.Appx. 935, 937 (11th Cir. 2011) (complaint needed sufficient factual detail “to support reasonable inference that Chase engaged in racial discrimination against Henderson in relation to her loan”); Norwood v. Costco Wholesale Corp., 2014 WL 988863, at *5 (N.D. Ga. 2014) (notwithstanding Swierkiewicz, plaintiff must allege facts sufficient to support reasonable inference that employer discriminated against him on account of protected characteristic).

at 38 (noting that the gender stereotyping theory “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine”); Gilbert v. Country Music Ass’n, 432 Fed.Appx. 516, 520 (6th Cir. 2011) (dismissing claim for gender stereotyping due to lack of allegations to support claim, and noting “for all we know, Gilbert fits every male ‘stereotype’ save one – sexual orientation – and that does not suffice to obtain relief under Title VII”); Dawson v. Bumble & Bumble, 398 F.3d 211, 219 (2d Cir. 2005) (noting that courts “have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes”); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (holding that “theory of sex stereotyping under *Price Waterhouse* is not broad enough to encompass” a theory based solely on sexual orientation and that this did not conform to traditional masculine roles). As noted in Clayton County’s Motion to Dismiss, at least one court within this circuit has dismissed a gender stereotyping claim where the plaintiff failed to allege what traits or circumstances make him different than the stereotypical male (aside from their sexual preference). See Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8,

2010). Here, Plaintiff has not alleged any facts whatsoever to support a gender stereotyping claim. Plaintiff's attempt to claim that he was subjected to commentary based upon his sexual orientation and identity is simply nowhere near enough to state a gender stereotyping claim. First of all, his assertions are nothing more than legal conclusions and contain no factual detail. Furthermore, even if Plaintiff provided any factual detail, he has not alleged that he is in any way different than a typical male, aside from his sexual orientation. Under these facts, he has failed to allege anything near a gender stereotyping claim, and instead, is again asking this court to judicially modify Title VII. Respectfully, this Court should decline the invitation.

C. Plaintiff Failed To Allege Gender Stereotyping In His EEOC Charge

Even if Plaintiff's Complaint stated a claim for gender stereotyping, his claim still fails because he simply did not include any such claim in his EEOC charge. Plaintiff's only response to this argument is that he checked the box for "sex" discrimination, and therefore, a gender stereotyping claim is within the scope of his EEOC charge.

This argument fails. In this regard, the "crucial element of a charge of discrimination is the factual statement contained therein." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462 (5th Cir. 1970). "The selection of the type of

discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal conclusion to the facts alleged.” Id.

The Eleventh Circuit has held that merely checking a particular box on an EEOC charge does not satisfy the exhaustion requirement where the plaintiff provides no supporting facts in connection with the claim at issue. Chanda v. Engelhard/ICC, 234 F.3d 1219, 1224 (11th Cir. 2000). See also Jerome v. Marriott Residence Inn Barcelo Crestline/AIG, 211 Fed.Appx. 844, 846-847 (11th Cir. 2006) (circling “wages” on EEOC questionnaire without providing any supporting facts insufficient to exhaust wage discrimination claim); Houston v. Army Fleet Services, LLC, 509 F.Supp.2d 1033, 1043 (M.D. Ala. 2007) (“Indeed, checking the correct box alone is not sufficient to satisfy the filing requirement when no factual particulars relating to the claim are disclosed to the EEOC”).

Here, it is undisputed that Plaintiff checked the sex box on his EEOC charge, but did not include a single factual statement or allegation that indicated he was discriminated against due to gender stereotyping. For this reason, and because he alleged only that he was subject to sexual orientation discrimination, any gender stereotyping claim is outside the scope of his charge and was never administratively exhausted. Norris v. Hiakin Drivetrain Components, 46 Fed.Appx. 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 Products, Inc., 2004 WL 540983, at *3 (S.D. Indiana 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.”)

D. Plaintiff’s Gender Stereotyping Claim Is Untimely

Plaintiff alleges only that his claim is timely because it arises out of the same conduct as set forth in his original pleading. However, Plaintiff has not (whether in the original Complaint, the Amended Complaint or the Second Amended Complaint) alleged any facts or circumstances that may support a gender stereotyping claim, and certainly did not do so in his original Complaint, which included allegations related solely to Plaintiff’s sexual orientation. Accordingly, Plaintiff’s attempts to add a gender stereotyping claim are untimely and otherwise fail as a matter of law.

III. CONCLUSION

For the reasons stated herein, Clayton County respectfully requests that the Court **DISMISS** Plaintiff’s Second Amended Complaint, with prejudice.

CERTIFICATE OF COMPLIANCE

I hereby certify that the within and foregoing **DEFENDANT’S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT** has been prepared in compliance with Local Rule 5.1 by using Times New Roman, 14 point font.

This 27th day of October, 2016.

/s/Martin B. Heller

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 27th day of October, 2016.

s/ Martin B. Heller _____

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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

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

**ORDER FOR SERVICE OF
REPORT AND RECOMMENDATION**

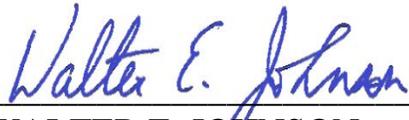
The Report and Recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), N.D. Ga. R. 72.1(B), (D), and Standing Order 14-01 (N.D. Ga. Aug. 15, 2014), has been filed. The Clerk is **DIRECTED** to serve upon counsel for the parties and directly upon any unrepresented parties a copy of the Report and Recommendation and a copy of this Order.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the Report and Recommendation within **FOURTEEN (14) DAYS** of service of this Order. Should objections be filed, they shall specify with

particularity the alleged error(s) made (including reference by page number to any transcripts if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the District Court, and on appeal, the Court of Appeals will deem waived any challenge to factual and legal findings to which there was no objection, subject to interests-of-justice plain error review. 11th Cir. R. 3-1.

The Clerk is **DIRECTED** to submit the Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED AND DIRECTED, this 3rd day of November, 2016.



WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

**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 OBJECTIONS TO THE MAGISTRATE JUDGE’S FINAL
REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and LR 72.1.B, NDGa, Plaintiff Gerald Bostock files these Objections to the Magistrate Judge’s Final Report and Recommendation [Doc. 16].

I. INTRODUCTION

The Magistrate Judge erroneously ignored established legal principles and Supreme Court precedent in recommending the dismissal of Mr. Bostock’s claims of sexual orientation discrimination and gender stereotype discrimination. With respect to the sexual orientation discrimination claim, this type of discrimination is actionable under Title VII of the Civil Rights Act of 1964 (“Title VII). As to the gender stereotyping claim, Mr. Bostock has alleged sufficient factual allegations concerning discriminatory treatment on the basis of gender non-conformity.

Finally, as to the exhaustion issue, Mr. Bostock properly exhausted all available remedies at the EEOC by filing a charge for sex discrimination, which encompasses all the claims asserted in this lawsuit. As set forth in greater detail below, Mr. Bostock requests that the Court reject the Report and Recommendation and deny Defendant's Motion to Dismiss.

II. PROCEDURAL HISTORY

On May 5, 2016, Mr. Bostock filed his initial Complaint, *pro se*. [Doc. 1.] 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, 10.]

On September 26, 2016, Defendant 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 Plaintiff's complaint be dismissed with prejudice. [Doc. 16.] Mr. Bostock objects to the Magistrate Judge's erroneous legal determinations in their entirety, and seeks to proceed with discovery and preparation for trial of his claims.

III. OBJECTIONS TO SPECIFIC RULINGS

Mr. Bostock objects specifically to the erroneous rulings of the Magistrate Judge that:

- (1) A sexual orientation claim may not be brought under Title VII;
- (2) Plaintiff failed to state a gender stereotyping claim;
- (3) Plaintiff failed to exhaust administrative remedies with regard to his gender stereotyping claim.

For the reasons set forth below, Mr. Bostock respectfully contends that the Magistrate Judge's rulings on these three issues were erroneous.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

Under Fed. R. Civ. P. 72 and 28 U.S.C. § 636, this Court reviews the recommended order of a Magistrate Judge to determine if it is either “clearly erroneous” or “contrary to law.” Normally, factual determinations fall under the deferential “clearly erroneous” standard, while legal issues and dispositive matters fall under the “contrary to law” standard, which mandates *de novo* review. Mixed questions of fact and law are reviewed *de novo*. Wright, Miller & Marcus, Fed. Prac. & Proc. § 3070.2 (2008) (collecting and discussing numerous authorities).

B. The Magistrate Judge Erred in Determining that Sexual Orientation Discrimination Claims are not Cognizable Under Title VII

The Magistrate Judge determined that sexual orientation discrimination claims are not cognizable under Title VII. For the reasons set forth below, Mr. Bostock respectfully contends that the Magistrate Judge erred on this issue.

1. *The Fifth Circuit's Decision in Blum v. Gulf Oil Corp is not Dispositive*

The Magistrate Judge relied in part upon *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), for the proposition that sexual orientation claims are not cognizable under Title VII. Mr. Bostock does not dispute that the Fifth Circuit in *Blum* stated that "[d]ischarge for homosexuality is not prohibited by Title VII[,]" 597 F.2d at 938, but in *Blum*, the primary issue on appeal was whether the defendant articulated a legitimate non-discriminatory reason for the plaintiff's discharge. The Fifth Circuit held that it did. 596 F.2d at 937. After reaching this decision, which effectively resolved the appeal, the Fifth Circuit went on, however, to "comment briefly" on other issues raised on appeal. It was in this section of the opinion in which the Fifth Circuit made its statement regarding discharge for homosexuality.¹ In support of this proposition, the Fifth Circuit did not recite any

¹ See Black's Law Dictionary (9th ed.2009) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is

analysis and simply cited to its prior holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

Smith, however, did not specifically address the issue of whether sexual orientation claims are cognizable under Title VII. Rather, in *Smith* the court considered whether discrimination on the basis of gender stereotyping (the plaintiff was not hired because the defendant considered him “effeminate”) was a viable claim under Title VII.² The Fifth Circuit held that it was not. 569 F.2d at 327. But *Smith* is no longer good law on this point since its holding “has clearly been abrogated by subsequent Supreme Court cases.” See *Winstead v. Lafayette County Board of County Commissioners*, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *6, n.4 (N.D. Fla. June 20, 2016); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The *Winstead* court also 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.* Because the entire basis on which *Blum* based its

unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive”).

² *Smith* noted in a footnote that “[t]he EEOC itself has ruled that adverse action against homosexuals is not cognizable under Title VII”, 569 F.2d at 327 n.1, (which is no longer the case).

statement regarding sexual orientation discrimination has been abrogated, Mr. Bostock respectfully contends that *Blum* is not controlling on this issue.

2. *The Eleventh Circuit's Decision in Fredette v. BVP Mgmt. Assocs did not Decide the Issue of Sexual Orientation Discrimination Claims Under Title VII*

The Magistrate Judge also stated that, 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” [Doc. 16. n.4] and cited *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997). The Magistrate Judge “could argue” this, and essentially did in his Final Report and Recommendation, but this is not the law. *Fredette* deliberately left the issue of sexual orientation discrimination entirely open and is not indicative one way or the other of how the Eleventh Circuit would determine this issue.

Fredette held that “when a homosexual male supervisor solicits sexual favors from a male subordinate ... the male subordinate can state a viable Title VII claim for gender discrimination.” 112 F.3d at 1510. The Eleventh Circuit specifically emphasized the “narrowness” of its holding and stated that “[w]e do not hold that discrimination because of sexual orientation is actionable.” *Id.* It thus did not hold that sexual orientation discrimination claims were not actionable as sex discrimination, it simply did not determine the issue one way or the other.

Although various district courts have interpreted *Fredette* differently, the interpretation that *Fredette* left the issue open is most consistent with the Eleventh Circuit’s pronouncement regarding the “narrowness” of its holding. Compare *Winstead*, 2016 WL 3440601, at *5 (“this Court’s interpretation—that *Fredette* left the issue open—is hardly unique”); *Mowery v. Escambia Cty. Utils. Auth.*, No. 3:04cv382, 2006 WL 327965, at *8 (N.D. Fla. Feb. 10, 2006) (characterizing *Fredette* as not “holding that discrimination because of sexual orientation is not actionable”); *Rodriguez v. Alpha Inst. of S. Fla., Inc.*, No. 10–80714–CIV, 2011 WL 5103950, at *5 (S.D. Fla. Oct. 27, 2011) (same), with *Stevens v. Ala. Dep’t of Corr.*, No. 1:12cv3782, 2015 WL 1245355, at *7 (N.D. Ala. Mar. 18, 2015) (suggesting that *Fredette* foreclosed claims of sexual orientation discrimination under Title VII); *Fitzpatrick v. Winn–Dixie Montgomery, Inc.*, 153 F.Supp.2d 1303, 1306 (M.D. Ala.2001) (citing *Fredette* for the proposition that “[s]exual orientation is not a protected class under Title VII.”)

3. *Congress’ Failure to Amend Title VII does not Provide a Basis to Find Sexual Orientation Discrimination Claims are not Cognizable*

The Magistrate Judge also relied on the fact that “supporters of an extension have fought unsuccessfully in Congress to amend Title VII since the mid-1970s.”

[Doc. 16, p. 10.] The Supreme Court, however, has warned against relying on

Congressional inaction as an interpretative tool. “[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.” *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted); accord *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (“It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.”) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *United States v. Price*, 361 U.S. 304, 310-311 (1960) (“nonaction by Congress affords the most dubious foundation for drawing positive inferences.”). “Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” *Pension Ben Guar. Corp.*, 496 U.S. at 650 (internal quotations omitted). Moreover, “Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.” *Zuber*, 396 U.S. at 185 n.21; *see also id.* (“Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment.”)

There is no need to amend Title VII to prohibit sexual orientation

discrimination. Title VII already makes it an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex.” 42 U.S.C. § 2000e-2(a)(1). Supreme Court precedent makes plain that Title VII’s prohibition against discrimination because of sex has become a robust source of protection for men and women workers alike without regard for hyper-technical distinctions. In *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) the Court stated: “[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” (emphasis added). See also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) (“Proponents of the legislation stressed throughout the debates that Congress had always intended to protect all individuals from sex discrimination in employment.”)

In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a case addressing same-sex sexual harassment, the Court again reiterated this expansive interpretation of Title VII. The Court stated that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with

when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. . . .” *Id.* at 80. In rejecting the argument in *Oncale* that some mistreatment “because of . . . sex” might be outside Title VII’s reach, the Supreme Court thus repudiated the notion that the scope of the statute is limited. In *Oncale*, the Court adopted perhaps the simplest test for whether discrimination had occurred: whether the conduct at issue met Title VII’s “statutory requirements,” i.e., whether the harassment occurred because of the employee’s sex. *Id.* at 80.

The same test should apply to discrimination against gay and lesbian employees. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one’s sex in relation to the sex of people to whom one is attracted. *See, e.g., Isaacs*, 143 F. Supp. 3d at 1193-94. There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation and no need to amend the statute to cover this type of discrimination.

4. *The EEOC’s Interpretation of Title VII is Entitled to Deference*

Mr. Bostock also respectfully submits that the Magistrate Judge failed to give proper deference to the position of the Equal Employment Opportunity Commission (“EEOC”) in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL

4397641, at *5 (EEOC July 15, 2015) that sexual orientation discrimination is necessarily sex discrimination. As the Magistrate Judge correctly noted, while the EEOC's interpretation of Title VII is not binding on this Court, it is entitled to respect to the extent that it is persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The weight of deference afforded to agency interpretations under *Skidmore* depends 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." *Id.* at 140. Here, the Magistrate Judge made "no judgment about the thoroughness evident in Foxx's consideration or the validity of its reasoning, but note[d] its inconsistency with the EEOC's earlier pronouncement." [Doc. 16 at 12.]³ Mr. Bostock respectfully contends that the Magistrate Judge erred in failing to consider the thoroughness and validity of *Baldwin*.

In *Baldwin*, the EEOC concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.>").

³ The Magistrate Judge also stated that "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." [Doc. 16 at 13.] For the reasons stated in Part B.3., Mr. Bostock contends that no amendment of Title VII is necessary to provide for protection against sexual orientation discrimination.

“Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.” *Id.* This is because “[s]exual orientation’ as a concept cannot be defined or understood without reference to sex.” *Id.*

As the EEOC correctly noted:

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action.

2015 WL 4397641, at *4 (July 15, 2015). “[S]exual orientation is inseparable from and inescapably linked to sex and, therefore ... allegations of sexual orientation discrimination involve sex-based considerations.” *Id.* at *5. This interpretation is fully consistent with the Supreme Court’s holding in *Oncale*.

Baldwin is also especially persuasive because the EEOC relied upon Eleventh Circuit precedent as part of its analysis. Specifically, the EEOC noted that “Title VII ... prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such

individuals are in a same-sex marriage or because the employee has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, ‘by definition,’ discrimination because of the employee or applicant’s sex.” *Id.* at *7. In support, the EEOC cited to the Eleventh Circuit’s holding in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII].”). The EEOC noted that an “employment action based on an employee’s relationship with a person of another race necessarily involves considerations of the employee’s race, and thus constitutes discrimination because of the employee’s race” and that “[t]his analysis is not limited to the context of race discrimination” since “Title VII ‘on its face treats each of the enumerated categories’ -- race, color, religion, sex, and national origin – ‘exactly the same.’” *Id.* at *6-7 (citing *Price Waterhouse*, 490 U.S. at 243 n.9; *See also Isaacs* 143 F. Supp.3d at 1193 (“Particularly compelling is [*Baldwin*’s] reliance on Eleventh Circuit precedent.”))

In *Isaacs*, the District Court for the Middle District of Alabama held that claims of sexual orientation-based discrimination are cognizable under Title VII. The court endorsed the EEOC's view that claims of sexual orientation-based

discrimination are cognizable under Title VII. 143 F. Supp.3d. at 1193. The cogent analysis and careful attention to EEOC and Eleventh Circuit authority in *Isaac* is the only analysis that makes sense.⁴ It is the only result that is consistent with both Supreme Court and EEOC precedent is that sexual orientation claims are covered under Title VII.

C. The Magistrate Judge Erred in Determining that Mr. Bostock Has Not Stated a Claim For Gender Stereotype Discrimination

Mr. Bostock contends that the Magistrate Judge erred in dismissing his complaint for gender stereotype discrimination. The Magistrate Judge correctly acknowledged that Mr. Bostock was not required to allege facts establishing each element of a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to survive a motion to dismiss, *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002), but determined that 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.” [Doc 16 at 16.]

⁴ In *Winstead*, the court declined to follow *Baldwin* on the issue of whether sexual orientation discrimination is discrimination “because of sex” under Title VII (although it held plaintiff’s claim for gender stereotype discrimination was actionable). Given *Baldwin*’s persuasive value, however, Mr. Bostock submits that *Isaacs* reached the correct result and that *Winstead* erred in declining to follow *Baldwin* on this specific point.

The purpose of Rule 8(a)(2)'s pleading requirements is to ensure that defendants receive fair notice of what the claim is and on what grounds it is made. *See Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1260-1261 (11th Cir. 2015). In this case, Mr. Bostock's Second Amended Complaint meets this standard. Mr. Bostock's allegations, which must be taken as true, include: 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 Defendant. (Sec. Am. Compl. ¶17). Similarly, Mr. Bostock alleged that during a meeting with the Friends of Clayton County CASA Advisory Board, at least one individual made disparaging comments about Mr. Bostock's sexual orientation and identity. (*Id.* ¶ 21). Mr. Bostock has further alleged that the internal audit and the stated reason for his termination were simply a pretext for discrimination based on his sex and/or sexual orientation. (*Id.* ¶ 23). Thus, Mr. Bostock has sufficiently pleaded a claim for gender stereotype discrimination.

D. The Magistrate Judge Erred in Determining that Mr. Bostock Failed to Exhaust His Administrative Remedies With Respect To His Gender Stereotyping Claim

The Magistrate Judge determined that Mr. Bostock failed to exhaust his administrative remedies with respect to his gender stereotyping claim and that

“[o]ne would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge’s allegation of sexual orientation discrimination.” Mr. Bostock respectfully submits that the Magistrate Judge erred in this determination.

As an initial matter, courts are “extremely reluctant to allow procedural technicalities to bar claims brought under [Title VII].” *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970). Thus, “the scope of an EEOC complaint should not be strictly interpreted’ ” *Id.* at 465 (citation omitted).

In this case, Mr. Bostock's EEOC charge, which was filed *pro se*, "checked" the *only* box he could applicable to *both* sexual orientation and gender stereotyping discrimination: Sex. (Redacted copy attached as Ex. A.) Moreover, Mr. Bostock stated in the charge that he believed he had been discriminated against on the basis of his sex. (*Id.*) Thus, he exhausted this claim at the EEOC level. *See Rhea v. Dollar Tree Stores, Inc.*, No. 04-2554MIV, 2004 WL 3313616, at *3 (W.D. Tenn. August 26, 2004) (holding in part that where plaintiff amended a complaint alleging sexual orientation discrimination to add gender stereotyping claims that the administrative remedies for the amendment were properly exhausted by an EEOC charge that checked the box marked “sex”).

The Magistrate Judge relied on two inapposite cases, *Norris v. Diakin Drivetrain Components*, 46 F. App’x 344, 346 (6th Cir. 2002) and *Lankford v.*

BorgWarner Diversified Transmission Prods., Inc., No. 1:02CV1876-SEB-VSS, 2004 WL 540983, at *3 (S.D. Ind. Mar. 12, 2004) in support of his erroneous determination that “[o]ne would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge’s allegation of sexual orientation discrimination.” [Doc. 16 at 20.] Neither of these cases dealt with gender stereotyping claims. *See Norris*, 46 Fed App’x 344 (holding that a charge alleging discrimination based on sexual orientation did not give district court subject matter jurisdiction over claim of same-sex sexual harassment); *Lankford*, 2004 WL 540983, at *3 (noting that the amended complaint asserted harassment and discrimination on the basis of sex while the EEOC charge described harassment and discrimination on the basis of sexual orientation). These cases therefore do not support the Magistrate Judge’s erroneous conclusion that sex discrimination in the form of gender stereotyping was not properly exhausted by Mr. Bostock’s EEOC charge. Moreover, because the issue of gender stereotyping is analytically indistinct from the issue of sexual orientation discrimination, *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (“claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex

discrimination claims”), his allegations of gender stereotyping are necessarily “like or related to, or grew out of” the allegations in the EEOC charge.” *Green v. Elixir Indus., Inc.*, 407 F.3d 1163, 1168 (11th Cir. 2005). The simple fact is that there is no box denoting the “gender stereotyping” theory of sex discrimination on the EEOC’s form charge. Mr. Bostock properly exhausted his administrative remedies for any and all theories of sex discrimination by checking the box marked “sex” for the type of discrimination of which he complained.

E. Mr. Bostock’s Gender Stereotyping Claim is Timely

Based on his other recommendations, the Magistrate Judge did not address Defendant’s alternative argument that Mr. Bostock’s gender stereotyping claim is untimely. [Doc. 16 at p. 19, n.7.] Should the Court agree with Mr. Bostock’s objections to the Report and Recommendation, Mr. Bostock contends that this claim is timely because the claim relates back to the same conduct alleged in his Complaint and First Amended Complaint. Rule 15(c) provides that “[a]n amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” Fed. R. Civ. P. 15(c)(2).

In this case, Mr. Bostock's allegations concerning gender stereotype discrimination arise from the same conduct and occurrences set forth in his original pleading. Specifically, the allegations relate to his sexual orientation and identity being openly questioned and disparagingly commented upon by individuals who had significant influence on the decision making of Defendant, which led to the discriminatory termination of Mr. Bostock. Since the claim arises out of the same conduct as already set forth in the original complaint, it clearly relates back for purposes of the statute of limitations. *See Rhea*, 2004 WL 3313616 at *3 (holding in part that where plaintiff originally brought a sexual orientation discrimination claim and sought to amend to add claims of sexual stereotyping that "[t]o the extent a claim for sex-stereotyping arises out of the same conduct alleged in the original complaint, any amendment would relate back.").

IV. CONCLUSION

There may not be a definitive recent ruling by the United States Supreme Court that Title VII prohibits sexual orientation discrimination, but the law is clear that it does. For all the reasons set forth above and in Mr. Bostock's Response in Opposition to Defendant's Motion to Dismiss [Doc. 14], Mr. Bostock requests that the Court reject the Magistrate Judge's Report and Recommendation and deny Defendant's Motion to Dismiss.

Respectfully submitted,

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**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

The undersigned certifies that the foregoing has been prepared in Times New Roman 14 font, as approved by the Court in LR 5.1B.

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**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.)

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel for Defendant:

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

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

**DEFENDANT’S RESPONSE IN OPPOSITION
TO PLAINTIFF’S OBJECTIONS TO
MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

I. INTRODUCTION

Plaintiff’s Objections to Judge Johnson’s Report and Recommendation (hereinafter, “R&R”) granting Defendant’s Motion to Dismiss [Doc. 18] ask this Court to ignore the separation of powers, disregard the founding tenants of our country, and to instead, judicially amend Title VII for some perceived public policy benefit. Specifically, Plaintiff argues that Title VII covers sexual orientation discrimination, and that his conclusory allegations (without any factual support) that he was subjected to discrimination due to his sexual orientation and his gender identity support a gender stereotyping claim. Because Title VII does not cover sexual orientation discrimination and because Plaintiff has not

sufficiently pled a gender stereotyping claim (nor was it included in his EEOC charge), Defendant respectfully requests that this Court overrule Plaintiff's objections and adopt the R&R in its entirety and dismiss Plaintiff's claims with prejudice.

II. LEGAL ARGUMENT

A. Title VII Does Not Cover Sexual Orientation Discrimination

1. Blum v. Gulf Oil Corp. Constitutes Binding Precedent

As Judge Johnson correctly concluded, Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), is binding precedent in the Eleventh Circuit and held that Title VII does not protect against discrimination due to sexual orientation. In his Objections, Plaintiff argues that Blum should be ignored because, in Plaintiff's view, its holding that Title VII does not protect sexual orientation discrimination is merely dicta. This argument is untenable..

In Blum, a former employee sued Gulf Oil Corp alleging that he was terminated due to (amongst other things) his sexual orientation. Gulf Oil presented evidence that he was terminated for making personal phone calls related to his side business rather than due to his sexual orientation. Blum, 597 F.2d at 936-37. After a bench trial, the trial court concluded that the plaintiff was terminated for legitimate, non-discriminatory reasons, mainly, his use of a phone for personal

reasons. Id. The plaintiff appealed to the Fifth Circuit, which affirmed the trial court's judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim. First, the Fifth Circuit found that the plaintiff could not establish pretext to support any of his claims, including his sexual orientation claim. Id. at 937-38. The Fifth Circuit also concluded that the district court properly rejected the plaintiff's sexual orientation claim because "discharge for homosexuality is not prohibited by Title VII or Section 1981." Id. at 938.

This statement obviously was not dicta, but rather was an alternative ground for the Fifth Circuit's decision to affirm the district court's judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim. In other words, the Fifth Circuit affirmed the judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim because (1) he failed to prove that the legitimate, non-discriminatory reasons given for his termination were a pretext for sexual orientation discrimination; and (2) even if he did, discrimination on the basis of sexual orientation is not prohibited by Title VII. Moreover, the Court explicitly stated that the issue of whether Title VII prohibited discrimination on the basis of sexual orientation was an issue briefed by the parties on appeal. Id. at 938.

While Blum's conclusion that Title VII does not prohibit discharge because of sexual orientation may be a separate and distinct reason for its holding, it is a

statement directly related to and an equally necessary basis for the decision to affirm the district court's judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim.

The United States Supreme Court and the Eleventh Circuit repeatedly have held that an alternative ground for a decision is binding precedent, not dicta. See, e.g., Massachusetts v. United States, 333 U.S. 611, 623 (1948) (where a case has “been decided on either of two independent grounds” and “rested as much upon the one determination as the other,” the “adjudication is effective for both”); Bravo v. United States, 532 F.3d 1154, 1162 (11th Cir.2008) (an “alternative holding counts because in this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings”); Johnson v. DeSoto Cnty. Bd. of Comm'rs, 72 F.3d 1556, 1562 (11th Cir.1996) (“[W]e are bound by alternative holdings”); McLellan v. Miss. Power & Light Co., 545 F.2d 919, 925 n. 21 (5th Cir.1977) (en banc) (“It has long been settled that all alternative rationales for a given result have precedential value.”).

Accordingly, the R&R correctly concluded that Blum's holding that Title VII does not prohibit discrimination on the basis of sexual orientation is binding precedent in the Eleventh Circuit, and Plaintiff's sexual orientation claim should therefore be dismissed.

2. The R&R Correctly Followed The Overwhelming Weight Of Authority Holding That Title VII Does Not Include Sexual Orientation As A Protected Class

Even if Blum's conclusion that Title VII does not encompass sexual orientation was dicta as Plaintiff contends, Blum's conclusion nonetheless is consistent with the overwhelming majority of cases that have held (both before and after the EEOC's Baldwin v. Foxx decision) that sexual orientation is not a protected class under Title VII. See, e.g., Dingle v. Bimbo Bakeries USA/Entenmann's, 624 F. App'x 57 (2d Cir. 2015) (holding that discrimination based on perceived sexual orientation was not cognizable under Title VII); Brandon v. Sage Corp., 808 F.3d 266, 270 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation.'"); Murray v. North Carolina Dep't of Pub. Safety, 611 F. App'x 166, 166 (4th Cir. 2015) (affirming grant of motion to dismiss without need for oral argument, citing binding circuit precedent that "Title VII does not protect against sexual orientation discrimination"); Cargian v. Breitling USA, Inc., 2016 WL 5867445, at *4 (S.D.N.Y. Sept. 29, 2016) ("Despite significant changes in the broader legal landscape since the Second Circuit's decision in Simonton, the prevailing law in this and every other Circuit to consider the question is that, in the Title VII context, courts must distinguish between actionable gender-stereotyping claims and non-actionable sexual orientation

claims.”); Thompson v. CHI Health Good Samaritan Hosp., 2016 WL 5394691, at *2 (D. Neb. Sept. 27, 2016) (“[N]either Nebraska law nor Title VII encompass discrimination based upon sexual orientation.”); Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 618 (S.D.N.Y. 2016) (“[D]iscrimination based on sexual orientation will not support a claim under Title VII”); Ashford v. Danberry at Inverness, 2016 WL 4615782, at *11 (N.D. Ala. Sept. 6, 2016) (“[A]ny assertion of discrimination based upon sexual orientation does not state a claim under Title VII.”); Somers v. Express Scripts Holdings, 2016 WL 3541544, at *3 (S.D. Ind. June 29, 2016) (“Under binding precedent currently in effect, discrimination or harassment based on a person’s sexual orientation alone is not actionable under Title VII. In other words, Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.” (citations omitted)); Magnusson v. Cty. of Suffolk, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) (“Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here.”); Hinton v. Virginia Union Univ., --- F. Supp. 3d ---, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016) (“More importantly, the reasons offered in decisions

that have adopted the EEOC's position are matters that lie within the purview of the legislature, not the judiciary. Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment. In sum, Title VII does not encompass sexual orientation discrimination claims, and cannot be supplanted by the merely-persuasive power of the EEOC's decision.”), *motion to certify appeal denied*, 2016 WL 3922053 (E.D. Va. July 20, 2016); Burrows v. Coll. of Cent. Fla., 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) (denying motion for reconsideration on grant of employer’s motion for summary judgment even though plaintiff cited to EEOC’s recent decision in Baldwin v. Foxx as intervening change in law). See also Doc. 15, at pp. 5-8 (citing these cases).

Plaintiff’s Objections fail to discuss or respond to these cases. Instead, Plaintiff ignores the overwhelming case law rejecting his position (only some of which is cited above), and instead focuses on the very few decisions he can find that incorrectly embrace the EEOC’s radical attempt to amend Title VII by executive fiat, rather than apply the plain text of Title VII and leave it to the legislative branch (Congress) to amend Title VII to include sexual orientation as a protected class if it so desires.

Plaintiff goes on to argue that Fredette v. BVP Mgmt. Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) is inapposite to his argument that sexual orientation discrimination should be protected by Title VII. While certainly Fredette is not as clear as Blum, the court's statement that "[w]e do not hold that discrimination because of sexual orientation is actionable" strongly implies that the Eleventh Circuit does not construe Title VII as prohibiting sexual orientation discrimination. As Plaintiff properly concedes - this reading is consistent with many district courts' interpretation of Fredette. See, e.g., Stevens v. Ala. Dep't of Corr., 2015 WL 1245355, at *7 (N.D. Ala. Mar. 18, 2015); Fitzpatrick v. Winn-Dixie Montgomery, Inc., 153 F.Supp.2d 1303, 1306 (M.D. Ala. 2001); Ashford v. Danberry at Iverness, 2016 WL 4615782, at *11 (Sept. 6, 2016); Rodriguez v. Alpha Inst. of S. Florida, Inc., 2011 WL 5103950, at *5 (S.D. Fla. Oct. 27, 2011); Luckey v. Martin, 2012 WL 665694, at *7 (D.N.J. Feb. 29, 2012).¹

¹ Plaintiff cites Winstead v. Lafayette County Board of Commissioners, 2016 WL 3440601, at *6 (N.D. Fla. June 20, 2016) to support his interpretation of Blum and Fredette. Notably, however, Winstead reached the same conclusion that nearly every court that has reviewed this issue has reached: Title VII does not protect against sexual orientation discrimination.

3. The R&R Correctly Cited Congressional Attempts To Pass ENDA As Further Confirmation That Title VII Does Not Encompass Sexual Orientation

Plaintiff next argues that Congress's attempts to enact the Employment Non-Discrimination Act are not controlling as to whether Title VII protects against sexual orientation discrimination. In support of this contention, Plaintiff cites to various Supreme Court decisions cautioning against relying on congressional inaction as a basis for interpreting a statute. [Doc. 18, p. 8].

However, the Second Circuit, while acknowledging such concerns, concluded that "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).² Indeed, numerous courts have cited Congress' refusal to enact ENDA as further confirmation that Title VII does not encompass sexual orientation. See, e.g., Thomas v. Keystone Real Estate Group, LP, 2015 WL 1471273, at *2 (M.D. Pa. Mar. 31, 2015) (Title VII does not protect against sexual orientation discrimination and Congress repeatedly has rejected legislation to amend Title VII to include it); Johnson v. Shinseki, 2013 WL 1987352, at *2 (E.D.

² Plaintiff has failed to present any evidence or argument that Congress' refusal to enact ENDA has been the result of unawareness, preoccupation or a belief that sexual orientation discrimination already is prohibited under Title VII.

Mo. May 13, 2013) (same); Mowery v. Escambia County Util. Auth., 2006 WL 327965, at *9, (N.D. Fla. Feb. 10, 2006) (Congress “specifically and repeatedly” rejected ENDA).

Moreover, Congress’ refusal to enact ENDA is only part of the overwhelming evidence to support the conclusion that Title VII does not cover sexual orientation discrimination. Plaintiff completely ignores the legislative history cited by Judge Johnson that supports the finding that discrimination “because of sex” under Title VII was intended to mean discrimination due to gender. [Doc. 16, at pp. 6-7]. When viewed in this context, the legislative history, combined with the repeated attempts by Congress to enact ENDA (unsuccessfully), and of course the plain language of the statute, conclusively demonstrate that Title VII simply does not protect against sexual orientation discrimination.

4. *Oncale And Foxx Do Not Provide A Basis To Support The Plaintiff’s Claims*

Plaintiff falls back on reliance upon Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) to argue that Title VII already protects sexual orientation discrimination. Oncale, however, provides no such support. In Oncale, the Supreme Court ruled that Title VII’s protection against sexual harassment included protection against sexual harassment perpetrated by someone of the same sex, so long as the harassment was still “because of sex.” Essentially, the Oncale decision

held that sexual harassment is unlawful, regardless of the gender of the individual who engages in such conduct. It is an unfathomable leap to claim Oncale states or even implies that sexual orientation discrimination is protected by Title VII. Plaintiff's argument otherwise misses the point - "because of sex" is very different than "because of sexual orientation." See King v. Super Serv., Inc., 68 Fed.Appx. 659, 664 (6th Cir. 2003) ("animosity directed towards the plaintiff because of his apparent sexual orientation is...different from discrimination on the basis of sex"); Bibby v. Phil. Coca-Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (noting difference between "because of sex" and sexual orientation, the latter of which "Congress has not yet seen fit" to protect); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (same).

Similarly, the material flaw in the EEOC's Baldwin v. Foxx decision relied upon by Plaintiff is that it, too, believes that "because of sex" includes sexual orientation. Sex, however, simply does not reference ones sexual orientation.³ Plaintiff's claim that Baldwin v. Foxx should be entitled to some deference (and

³ Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) does not support Plaintiff's proposed amendment to Title VII. Parr concluded that racial discrimination prohibits discriminating against someone who is in an interracial marriage. In that context, the discrimination is "because of" race, albeit the race of that individual's spouse. That is a natural extension of the race discrimination analysis, and has no application or role in interpreting the difference between someone's sex and sexual orientation, a wholly different analysis. See Partners Healthcare Sys. v. Sullivan, 349 F.Supp.2d 29, 39 (D. Mass. 2007).

apparently that all courts should reevaluate their previous interpretations of the statute because of a single radical decision by the EEOC that reverses its own previous interpretation of Title VII) simply is inconceivable given the EEOC's own previous contradictory interpretations, and the fact that its new position is contrary to controlling law in nearly every single Circuit in the country.⁴

Thus, distilled to its essence, Plaintiff is asking this Court to ignore Blum and all of the circuit and district courts that have ruled that Title VII does not protect against sexual orientation discrimination. Because this is contrary to the binding precedent in this Circuit, the reasoning of nearly every single court to ever consider this issue, the legislative history of Title VII, and the plain language of the statute, Defendant respectfully submits that this Court should decline Plaintiff's invitation to amend Title VII. Instead, the Court should follow the overwhelming case law holding that Title VII does not cover sexual orientation, and that it is up to

⁴ Judge Johnson correctly noted that the EEOC's position is not entitled to any deference, as it attempts to change something that is within the purview of the legislative branch, and "if Congress is so inclined, it can amend the statute to provide a claim for sexual orientation discrimination." [Doc. 16, p. 13]. Moreover, Plaintiff ironically argues that Baldwin v. Foxx is entitled to deference because of its supposed reliance on Eleventh Circuit precedent. [Doc. 18, p. 12]. Yet, significant portions of Plaintiff's Objections are devoted to a futile attempt to explain away Eleventh Circuit precedent holding, or at the very least strongly suggesting or implying, that Title VII does not encompass sexual orientation.

Congress to amend Title VII to add sexual orientation as a protected class if it so desires.

Accordingly, the Court should adopt the R&R and dismiss Plaintiff's sexual orientation claim with prejudice.

B. Plaintiff Has Failed To State A Claim For Gender Stereotyping

Plaintiff's objection attempts to bootstrap his gender stereotyping claim to his sexual orientation claim without any factual support.⁵ Sexual orientation alone, however, cannot support a gender stereotyping claim, as this would have the effect of re-writing Title VII to include sexual orientation discrimination.

Plaintiff claims that his allegations in the Second Amended Complaint that his sexual orientation and identity were criticized by one or more individuals, and that someone made disparaging comments about his sexual orientation and identity, is sufficient to state a gender stereotyping claim. This argument fails. As Judge Johnson noted, a gender stereotyping claim is based upon allegations that "he suffered discrimination based on his employer's belief that he failed 'to conform to masculine stereotypes.'" (Doc. 16, p. 14)(citing EEOC v. Family Dollar Stores, Inc., 2008 WL 4098723, at *14 (N.D. Ga. Aug. 28, 2008)).

⁵ Plaintiff's bootstrapping attempt is made abundantly clear when he argues later in his brief that "the issue of gender stereotyping is analytically indistinct from the issue of sexual orientation discrimination," citing a California case. [Doc. 18, p. 17]. Of course, this is not the law in the Eleventh Circuit.

Courts repeatedly have stated that such a gender stereotyping claim cannot masquerade as a sexual orientation claim under another name, but instead, that the plaintiff must allege that he was discriminated against because he did not act like the typical male for a reason other than the mere fact that he is homosexual, such as his appearance or mannerisms on the job. See Simonton, 232 F.3d at 38 (noting that the gender stereotyping theory “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine”); Gilbert v. Country Music Ass’n, 432 Fed.Appx. 516, 520 (6th Cir. 2011) (dismissing claim for gender stereotyping due to lack of allegations to support claim, such as non-stereotypical appearance or mannerisms, and stating “for all we know, Gilbert fits every male ‘stereotype’ save one – sexual orientation – and that does not suffice to obtain relief under Title VII”); Dawson v. Bumble & Bumble, 398 F.3d 211, 219 (2d Cir. 2005) (noting that courts “have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes”); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (holding that “theory of sex stereotyping under

Price Waterhouse is not broad enough to encompass” a theory based solely on sexual orientation and that this did not conform to traditional masculine roles).

At least one court within this circuit has dismissed a gender stereotyping claim where the plaintiff failed to allege what traits or circumstances made him different than the stereotypical male (aside from his sexual preference). See Anderson v. Napolitano, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010). Here, as Judge Johnson correctly found, “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.” [Doc. 16, p. 16]. Accordingly, because Plaintiff has not and cannot plead any facts that support that he fails to meet or conform to masculine stereotypes, his claim fails. Accordingly, Defendant respectfully requests that this Court dismiss Plaintiff’s claim with prejudice.

C. The R&R Correctly Concluded That Plaintiff Failed To Allege Gender Stereotyping In His EEOC Charge

Plaintiff’s final objection argues that Judge Johnson erred in concluding that Plaintiff’s EEOC charge did not include a claim for gender stereotyping, and thus, Plaintiff failed to exhaust his administrative remedies with respect to this claim. Plaintiff’s argument is based entirely upon the fact that he “checked the box” for sex discrimination in his EEOC charge. This argument conveniently ignores, however, that the narrative (not the box he checked) in Plaintiff’s EEOC charge

controls whether he exhausted his administrative remedies, and his gender stereotyping claim fails because he simply did not include any gender stereotyping allegations or factual support in the narrative of his EEOC charge.

In this regard, the “crucial element of a charge of discrimination is the factual statement contained therein.” Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462 (5th Cir. 1970). “The selection of the type of discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal conclusion to the facts alleged.” Id. The Eleventh Circuit has held that merely checking a particular box on an EEOC charge does not satisfy the exhaustion requirement where the plaintiff provides no supporting facts in connection with the claim at issue. Chanda v. Engelhard/ICC, 234 F.3d 1219, 1224 (11th Cir. 2000). See also Jerome v. Marriott Residence Inn Barcelo Crestline/AIG, 211 Fed.Appx. 844, 846-847 (11th Cir. 2006) (circling “wages” on EEOC questionnaire without providing any supporting facts insufficient to exhaust wage discrimination claim); Houston v. Army Fleet Services, LLC, 509 F.Supp.2d 1033, 1043 (M.D. Ala. 2007) (“Indeed, checking the correct box alone is not sufficient to satisfy the filing requirement when no factual particulars relating to the claim are disclosed to the EEOC”).

Here, it is undisputed that Plaintiff did not include a single factual statement or allegation that indicated he was discriminated against due to gender stereotyping in his charge of discrimination. As a result, Judge Johnson reached the proper conclusion that “[o]ne would not reasonably expect an EEOC investigation of gender stereotyping to grow out of the charge’s allegation of sexual orientation discrimination.” [Doc. 16, p. 20].

Contrary to Plaintiff’s assertions, the two decisions cited by Defendant and by Judge Johnson support this conclusion, and stand for the proposition that a charge alleging “sexual orientation” discrimination and nothing else simply does not exhaust a claim for some other type of sex discrimination, such as gender stereotyping. Norris v. Hiakin Drivetrain Components, 46 Fed.Appx. 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 Products, Inc., 2004 WL 540983, at *3 (S.D. Indiana 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.”)

Because Plaintiff does not dispute that his EEOC charge does not mention or describe any gender stereotyping allegation, and because merely “checking the

box” for sex discrimination does not mean that Plaintiff has exhausted a claim of gender stereotyping, Defendant respectfully requests that this Court overrule Plaintiff’s Objections and dismiss Plaintiff’s gender stereotyping claim with prejudice.

D. Plaintiff’s Gender Stereotyping Claim Is Untimely

Although Magistrate Judge Johnson did not address this argument because he already properly concluded that Plaintiff’s Second Amended Complaint should be dismissed, for the reasons identified in Defendant’s Motion to Dismiss and reply brief in support thereof, Plaintiff’s attempt to add a gender stereotyping claim is untimely and otherwise fails as a matter of law. [Doc. 13, pp. 12-14 and Doc. 15, p.14].

III. CONCLUSION

For the reasons stated herein, Clayton County respectfully requests that the Court overrule Plaintiff’s objections and **DISMISS** Plaintiff’s Second Amended Complaint with prejudice.

This 1st day of December, 2016.

/s/Martin B. Heller

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CERTIFICATE OF COMPLIANCE

I hereby certify that the within and foregoing **RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION** has been prepared in compliance with Local Rule 5.1 by using Times New Roman, 14 point font.

This 1st day of December, 2016.

/s/ Martin B. Heller

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 1st day of December, 2016.

/s/ Martin B. Heller
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**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 REPLY IN SUPPORT OF OBJECTIONS TO THE
MAGISTRATE JUDGE’S FINAL REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and LR 72.1.B, NDGa, Plaintiff Gerald Bostock files this Reply in Support of Objections to the Magistrate Judge’s Final Report and Recommendation.

I. INTRODUCTION

In his opening brief in support of his Objections, Mr. Bostock established that the Magistrate Judge erred in recommending dismissal of Mr. Bostock’s claims of sexual orientation discrimination and gender stereotype discrimination. Defendant raises a number of meritless arguments in opposition. As set forth in greater detail below, and in his initial brief and his opposition to Defendant’s Motion to Dismiss, Mr. Bostock requests that the Court reject the Report and Recommendation and deny Defendant’s Motion to Dismiss.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Blum v. Gulf Oil Corp. is Not Controlling Authority

In his initial brief in support of his objections, Mr. Bostock established that the “comment” in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) that sexual orientation claims are not cognizable under Title VII is not controlling on this issue. Defendant attempts to characterize this dicta in *Blum* as an alternative holding. This is not the case.

In the first place, nowhere in the opinion does it state that the footnote “comment” that “discharge for homosexuality is not prohibited by Title VII” is in any way an alternative holding. The court simply stated that it would “comment briefly” on other issues raised in the appeal. 596 F.2d at 938. The language in the footnote, moreover, could not resolve the case in full, because the plaintiff also had claims for other forms of discrimination. The primary issue on appeal, and the basis for the court's decision, was whether the defendant articulated a legitimate nondiscriminatory reason for the plaintiff's discharge. *Id.* at 937. The court determined that it did which resolved the appeal. *Id.*

Moreover, as set forth in detail in Plaintiff's initial brief, in *Blum*, the Fifth Circuit did not recite any analysis for its comment regarding sexual orientation

discrimination and simply cited to its prior holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978), a case which *did not even address* the issue of whether sexual orientation claims are cognizable under Title VII and whose holding “has clearly been abrogated by subsequent Supreme Court cases.” *Winstead v. Lafayette County Board of County Commissioners*, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *6, n.4 (N.D. Fla. June 20, 2016); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Thus, the entire basis on which *Blum* based its dicta regarding sexual orientation claims has been abrogated. *Blum* is not controlling on this issue.

B. *Fredette V. BVP Mgmt. Assocs.* did not Address the Issue of Sexual Orientation Discrimination Either Way

Defendant also argues that *Fredette v. BVP Management Associates*, 112 F.3d 1503 (11th Cir. 1997), “strongly implies that the Eleventh Circuit does not construe Title VII as prohibiting sexual orientation discrimination.” (Doc. 19 at 8.) In fact, as set forth in detail in Plaintiff’s initial brief, the only conclusion that can reasonably be drawn from *Fredette* is that the Eleventh Circuit deliberately left open the issue of sexual orientation discrimination. The Eleventh Circuit specifically emphasized the “narrowness” of its holding and merely stated it was not holding that sexual orientation discrimination was actionable. Thus, it did not

hold that sexual orientation discrimination claims were actionable or not actionable. It deliberately and carefully left the issue open. While courts have reached differing conclusions on this point (*see* Pl.’s Initial Br. at 7 (Doc. 18)), the better reasoned cases have properly read *Fredette* as leaving the issue open. *Winstead*, 2016 WL 3440601, at *5 (“this Court’s interpretation—that *Fredette* left the issue open—is hardly unique”); *Mowery v. Escambia Cty. Utils. Auth.*, No. 3:04cv382, 2006 WL 327965, at *8 (N.D. Fla. Feb. 10, 2006) (characterizing *Fredette* as not “holding that discrimination because of sexual orientation is not actionable”); *Rodriguez v. Alpha Inst. of S. Fla., Inc.*, No. 10–80714–CIV, 2011 WL 5103950, at *5 (S.D. Fla. Oct. 27, 2011) (same).

C. Congress’ Failure to Amend Title VII Does not Provide a Basis to Find Sexual Orientation Discrimination Claims are not Cognizable

Defendant maintains that Congress failure to amend Title VII to specifically include a claim for sexual orientation discrimination somehow means that there is no such claim. As set forth in detail in Mr. Bostock’s initial brief in support of his Objections, courts have continually cautioned against relying on Congressional inactivity as any type of interpretive tool. (Doc.18 at 7-8.) Indeed, Congressional inactivity could just as easily establish that amendment of Title VII is unnecessary because sexual orientation discrimination already is covered by the prohibition against discrimination “because of sex” (which it is).

Moreover, subsequent legislative inaction or speculation concerning Congressional intent has no bearing on the plain language of Title VII. “[I]t is what Congress *says*, not what Congress *means* to say, that becomes the law of the land.” *Bernstein v. Bankert*, 733 F.3d 190, 211 (7th Cir. 2013). The Supreme Court in *Oncale* specifically rejected the notion that sex discrimination is limited by some type of unwritten exceptions to Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. . . .”) *Oncale* makes clear that with limited exceptions not relevant here, an employer violates Title VII when an employee suffers discrimination that would not have occurred had the employee been of the other sex.

That is what Mr. Bostock alleges here: that Defendant took adverse employment actions against him because he is a man who is attracted to men that it would not have taken had he been a man who is attracted to women. In other words, but for Mr. Bostock’s sex, Defendant would not have taken the action it did. Contrary to Defendant’s assertion, there is no need to “amend” Title VII or

“redefine” the term “sex” under Title VII for sexual orientation claims to be cognizable.¹ The plain language of the statute is more than sufficient.

D. The EEOC’s Position on This Issue is Persuasive as are the Court Decisions That Have Reached the Same Conclusion

Defendant has offered no compelling reason to depart from the EEOC's cogent guidance on this issue in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015) or the cases that have held that sexual orientation discrimination is actionable. *Isaacs v. Felder Servs., LLC*, 143 F. Supp.3d 1190 (M.D. Ala. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp.3d 1151(C.D. Cal. 2015). Mr. Bostock’s initial brief in support of his Objections discussed this issue in detail and he will not belabor the point here. The bottom line is that these authorities are most consistent with both the plain language of Title VII and Supreme Court precedent.

Defendant cites cases that have held that sexual orientation discrimination is not actionable under Title VII. Certainly, courts have reached different conclusions on this issue. But the fact that other circuits may have resolved the

¹ Defendant argues that Mr. Bostock is attempting to amend Title VII through “executive fiat,” but this is not so. By contending that the plain language of Title VII does not protect Mr. Bostock, *Defendant* is essentially arguing for a *judicially-created* exception to Title VII.

issue differently (or that district courts did so) does not compel the same result in this case, where the issue remains open in the Eleventh Circuit.

Defendant also attempts to distinguish *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986) addressing racial discrimination against someone in an interracial marriage from discrimination based on sexual orientation. Although Defendant argues that this is "a wholly different analysis" it is, in fact, the same analysis. In both instances it is the employee's race or sex (relative to the race or sex of the person with whom the employee is in a relationship or to whom the employee is attracted) that is causing the differential treatment. Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (justifying reliance on statements of legislative intent regarding the treatment of race in the workplace as authoritative regarding the appropriate treatment of sex). Thus, the EEOC properly cited *Parr* in support of its position that sexual orientation claims are actionable under Title VII. Its careful attention to Eleventh Circuit precedent provides compelling reason to defer to the EEOC's guidance on this issue.

The only result that is consistent with both Supreme Court and EEOC precedent is that sexual orientation claims are covered under Title VII. The Magistrate Judge erred on this issue.

E. Mr. Bostock Has Stated a Timely Claim for Gender Stereotype Discrimination

Mr. Bostock's opening brief established that he timely and adequately pleaded his gender stereotype claim and that he properly exhausted his administrative remedies before bringing this claim. Mr. Bostock relies on his initial brief and his opposition brief to Defendant's Motion to Dismiss for these points and addresses here only the points in Defendant's response brief that merit further discussion.

With respect to the exhaustion issue, Defendant argues that it is "undisputed" that Mr. Bostock did not include in his EEOC charge any factual allegation or statement that he was discriminated against due to gender stereotyping. (Doc. 19 at 17.) In the first place, "the scope of an EEOC complaint should not be strictly interpreted" *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970). In his charge, Mr. Bostock, who was *pro se* at the time, recited the circumstances of his employment and termination and then stated "I believe that I have been discriminated against because of my sex (male/sexual orientation)." (Doc. 18, Ex. A.) Nothing further is required. It is well-established that gender

stereotyping discrimination is a form of sex discrimination. *Price Waterhouse*, 490 U.S. 228.

Moreover, the issue of gender stereotyping is analytically close to the issue of sexual orientation discrimination so that Mr. Bostock's allegations of gender stereotyping in his Second Amended Complaint are "'like or related to, or grew out of' the allegations in the EEOC charge." *Green v. Elixir Indus., Inc.*, 407 F.3d 1163, 1168 (11th Cir. 2005). *See also Videckis*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (concluding that this distinction between sexual orientation discrimination claims and gender stereotype claims is "illusory and artificial" and that "sexual orientation discrimination is not a category distinct from sex or gender discrimination.")² Thus, Mr. Bostock properly raised and exhausted his gender stereotype discrimination claim.

III. CONCLUSION

For the foregoing reasons, and for the reasons raised in his initial brief in support of his Objections and his opposition to Defendant's Motion to Dismiss,

² Defendant argues that this citation somehow shows "bootstrapping" on Mr. Bostock's part. (Doc. 19 at 13, n.5.) What is really shows is that the two claims are so analytically overlapping that there is no rational basis for prohibiting one form of sex discrimination (gender stereotype) while permitting another (sexual orientation) based on an illusory distinction. Both claims are forms of actionable sex discrimination.

Mr. Bostock requests that the Court reject the Magistrate Judge's Report and Recommendation and deny Defendant's Motion to Dismiss.

Respectfully submitted,

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

GERALD LYNN BOSTOCK,)	
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Plaintiff,)	CIVIL ACTION
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CLAYTON COUNTY,)	
)	
Defendant.)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing has been prepared in Times New Roman 14 font, as approved by the Court in LR 5.1B.

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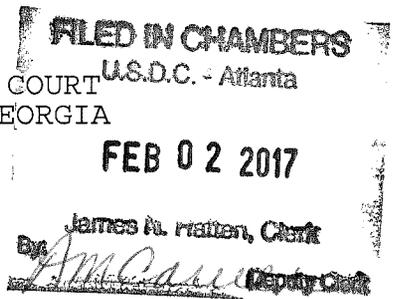
CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel for Defendant:

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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-WEJ

ORDER

This employment discrimination case is before the Court on Magistrate Judge Walter E. Johnson's Final Report and Recommendation ("R&R") [Doc. 16], Plaintiff Gerald Lynn Bostock's ("Plaintiff") Objections [Doc. 18], Defendant Clayton County's ("Defendant") Response in Opposition [Doc. 19], and Plaintiff's reply [Doc. 20]. For the reasons stated below, Plaintiff's objections to the R&R are DEFERRED.

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, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq. ("Title VII") [Doc. 10]. Plaintiff, a gay male, began working for Defendant on or about January 13, 2003. Defendant employed Plaintiff

¹Plaintiff has objected only to the conclusions of law in the R&R and not the findings of fact. Therefore, the following facts are adopted from the R&R, unless otherwise noted.

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

as the Child Welfare Services Coordinator assigned to its Juvenile Court; he had primary responsibility for the Clayton County Court Appointed Special Advocate ("CASA") program. During his ten-year career with Defendant, 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 Defendant'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, Defendant 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, Defendant 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, Defendant 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, the Magistrate Judge 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], and on December 1, 2016, Defendant responded in opposition to Plaintiff's objections [Doc. 19]; on December 15, 2016, Plaintiff replied [Doc. 20].

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 the Magistrate Judge's conclusions of law, the Court should review de novo Defendant's motion to dismiss.

III. 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]. The extent of Defendant's objection to this claim is that "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 4]. The Magistrate Judge agreed on the basis of purported binding precedent in this circuit.

In Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979), the court held: "Discharge for homosexuality is not prohibited by Title VII" ³ In Bonner v. City of Prichard, 661 F.2d 1206,

³Potentially undermining Blum's holding, the Fifth Circuit based it entirely on Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978), which is arguably "no longer good law" in the wake of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). See Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *6 n.4 (N.D. Fla. June 20, 2016) ("[Smith's] holding vis-à-vis discrimination on the basis of sex stereotyping has clearly been abrogated by subsequent Supreme Court cases."). Also, at least

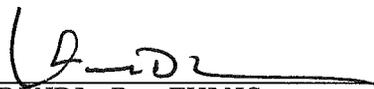
1207 (11th Cir. 1981), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions rendered by the United States Court of Appeals for the Fifth Circuit prior to September 30, 1981.

The question whether Blum is currently binding authority arose recently in a case on appeal in the Eleventh Circuit, Evans v. Ga. Regional Hospital (2016) (No. 15-15234). At oral argument on December 15, 2016, a member of the panel suggested that Blum is binding authority in the Eleventh Circuit at present. In light of the pending Eleventh Circuit decision on the very question presented here, the Court will defer its decision on the objections to the R&R.

IV. Conclusion

For the reasons stated above, Defendant's Motion to Dismiss [Doc. 13], the R&R [Doc. 16], and Plaintiff's objections [Doc. 18] are all DEFERRED pending the Eleventh Circuit's decision in Evans.

SO ORDERED, this 2 day of February, 2017.



ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

two district courts in this circuit have recently determined that Title VII protects employees from discrimination based upon their sexual orientation. See Winstead, 2016 WL 3440601, at *7-8; Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190 (M.D. Ala. 2015).

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

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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).

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

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

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

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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
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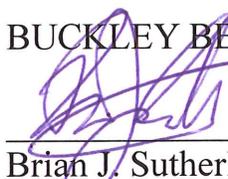
CERTIFICATE OF SERVICE

This is to certify that I have this 20TH day of November, 2017, served a copy of **Appellant Gerald Bostock's Appendix Volume I** upon the parties listed below by depositing same in the United States mail, prepaid, addressed to:

Jack Reynolds Hancock
William Hollis Buechner, Jr.
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By: _____


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