

No. 17-13801-BB

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

GERALD BOSTOCK,

Plaintiff-Appellant,

v.

CLAYTON COUNTY, GEORGIA,

Defendant-Appellee.

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

BRIEF OF APPELLEE

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

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for Appellee shows that the following trial judge(s), attorneys, persons, associations of persons, firms, partnerships, and corporations have an interest in the outcome of this appeal:

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4. Clayton County, Georgia (Defendant-Appellee)
5. Evans, Orinda D. (Senior United States District Judge for the Northern District of Georgia)
6. Freeman Mathis & Gary, LLP (Attorneys for Defendant-Appellee)
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8. Hancock, Jack R. (Attorney for Defendant-Appellee)
9. Indian Harbor Insurance Company (Insurer for Defendant-Appellee)
10. Johnson, Walter E. (United States Magistrate Judge for the Northern District of Georgia)
11. Mew, Thomas (Attorney for Plaintiff-Appellant)
12. Sutherland, Brian (Attorney for Plaintiff-Appellant)

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee respectfully submits that oral argument is not necessary to address the issues raised in this appeal.

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JURISDICTIONAL STATEMENT

I. District Court Jurisdiction

The United States District Court for the Northern District of Georgia had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as Plaintiff-Appellant brought claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq.

II. Court of Appeals Jurisdiction

The Eleventh Circuit Court of Appeals has jurisdiction to review the district court's dismissal of the Second Amended Complaint pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly followed and applied binding Eleventh Circuit precedent in Evans v. Ga. Reg'l Hosp., 850 F.3d, 1248 (11th Cir.), cert. denied, 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017) and held that Plaintiff's claim that he was terminated because of his sexual orientation fails to state a claim for relief under Title VII?

STATEMENT OF THE CASE

I. Course of Proceedings

Plaintiff filed this action *pro se* on May 5, 2016 asserting claims against the Clayton County Board of Commissioner (“the Board”). (Doc. 1). Plaintiff retained counsel and filed his First Amended Complaint on August 2, 2016. (Doc. 2). In response to the Board’s Motion to Dismiss and with the consent of the Board and Clayton County (“the County”), Plaintiff filed his Second Amended Complaint (“SAC”) on September 12, 2016, which dropped the Board as a Defendant and named the County as the Defendant. (Doc. 7-10). In his SAC, Plaintiff asserted that he was terminated in violation of Title VII because of his sexual orientation and because he did not conform with gender stereotypes. (Doc. 10).

The County filed a Motion to Dismiss the SAC, arguing that Plaintiff’s claim that he was terminated because he is gay should be dismissed because Title VII does not prohibit discrimination on the basis of sexual orientation. (Doc. 10, at pp. 4-6). The County also argued that Plaintiff’s claim that he was terminated because he did not conform with gender stereotypes should be dismissed because (among other reasons) the SAC did not sufficiently allege a gender stereotyping claim. (*Id.* at pp. 6-8)

After briefing by the parties, the magistrate judge issued a Report and Recommendation on November 3, 2016 recommending dismissal of the SAC. (Doc.

16). With respect to Plaintiff's claim that he was terminated because of his sexual orientation, the R&R concluded that Title VII does not encompass claims of discrimination on the basis of sexual orientation. (Id. at pp. 8-9). The R&R determined that Plaintiff's contention to the contrary was precluded by Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (per curiam), which held that Title VII does not prohibit discrimination on the basis of sexual orientation. (Id. at pp. 8-9). The R&R recognized that the EEOC changed its position in 2015 and interpreted Title VII as encompassing sexual orientation, but the R&R declined to defer to the EEOC's position in light of the binding precedent set forth in Blum. (Id. at pp. 11-13). The R&R also recommended dismissal of Plaintiff's gender stereotyping claim. (Id. at pp. 14-18).

Plaintiff filed Objections to the R&R on November 17, 2016, asserting that Title VII encompasses discrimination on the basis of sexual orientation and that the SAC adequately pled a gender stereotyping claim. (Doc. 18). After briefing by the parties, the district court issued an Order on February 2, 2017 deferring consideration of the R&R. (Doc. 21). The 2/2/17 Order noted that the Eleventh Circuit had recently heard oral argument in the Evans v. Ga. Reg'l Hosp. case and was considering whether Blum was binding precedent. (Id. at pp. 4-5). The 2/2/17 Order decided to defer a ruling on the R&R until after the Eleventh Circuit issued its decision in Evans. (Id. at p. 5).

On March 10, 2017, the Eleventh Circuit issued its decision in Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017), which holds that Blum remained binding precedent and that Title VII therefore does not prohibit discrimination on the basis of sexual orientation. Relying on Evans, the district court entered an Order on July 21, 2017 adopting the R&R and dismissing Plaintiff's Title VII claim that he was terminated because of his sexual orientation. (Doc. 24, at p. 5). The district court also adopted the R&R and dismissed Plaintiff's gender stereotyping claim. (Id. at p. 6). This appeal followed.¹

II. Statement of the Facts

In the SAC, Plaintiff alleges that he is a gay male and that he worked for Clayton County as the Child Welfare Services Coordinator. (Doc. 10, ¶¶ 11-13). Plaintiff claims that, beginning in January 2013, he began playing in a gay recreational softball league. (Id. at ¶ 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 the County subjected him to an internal audit of the funds he managed. (Id. at ¶¶ 17-18). 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

¹ Plaintiff does not appeal the district court's dismissal of his gender stereotyping claim.

to his sexual orientation and gender non-conformity, rather than due to the findings of the audit. (Id. at ¶¶ 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. (Id. at ¶¶ 24-33).

III. Standard of Review

This Court reviews de novo a district court’s dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. Warner v. City of Marathon, 2017 U.S. App. LEXIS 24790, at *7, 2017 WL 6209600 (11th Cir. Dec. 8, 2017); Hunt v. Aimco Properties, L.P., 814 F.3d 1213, 1221 (11th Cir. 2016); Leib v. Hillsborough Cty. Pub. Transp. Comm’n, 558 F.3d 1301, 1305 (11th Cir. 2009).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, accepted as true, states a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is plausible on its face if there is a “reasonable inference that the defendant is liable for the misconduct alleged.” Id. Although a court is required to accept the allegations in a complaint as true, “[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) (citation omitted).

SUMMARY OF THE ARGUMENT

The district court correctly followed the Eleventh Circuit’s binding precedent in Evans v. Ga. Reg’l Hosp., 850 F.3d 1248, 1255-57 (11th Cir. 2017), cert. denied, 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017) and dismissed Plaintiff’s claim that he was terminated because of his sexual orientation in violation of Title VII. In Evans, the Eleventh Circuit held that Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), which held that Title VII does not prohibit termination because of sexual orientation, remains good law and is binding Circuit precedent.

In this appeal, Plaintiff improperly urges this Court to “overrule” Evans because it was “wrongly decided.” (Brief of Appellant, pp. 2, 7, 20). However, under the prior panel rule, the Court must follow a prior panel decision unless it has been clearly and directly overruled or abrogated by an intervening or subsequent decision by the Supreme Court or the Eleventh Circuit sitting en banc. Plaintiff has not identified any such decision, but rather contends that Evans incorrectly construed or applied prior Supreme Court and Eleventh Circuit decisions.

Regardless, Plaintiff’s contention that Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) directly conflicts with Evans and Blum is meritless and was properly rejected by Evans. Under the prior panel rule, Plaintiff cannot re-litigate Evans’ holding that Price Waterhouse is not clearly on point or contrary to Blum, and that Price Waterhouse did not squarely address whether discrimination on the basis of

sexual orientation is prohibited under Title VII. Evans' conclusion also was correct because Price Waterhouse simply held that an employer may not make employment decisions based on stereotypes concerning how a female should appear, dress and behave in the workplace. Moreover, the fact that most circuit courts have decided after Price Waterhouse that Title VII does not encompass discrimination on the basis of sexual orientation demonstrates, at a bare minimum, that Price Waterhouse did not clearly and directly overrule or abrogate Blum or hold that Title VII prohibits discrimination on the basis of sexual orientation. The fact that the Supreme Court recently denied the plaintiff's petition for a writ of certiorari in Evans suggests that the Supreme Court also does not discern any conflict between Price Waterhouse and Evans.

Contrary to Plaintiff's assertions, Evans does not clearly and directly conflict with Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). Glenn is not directly on point and does not squarely address whether sexual orientation discrimination is prohibited by Title VII. Instead, Glenn addressed the separate and distinct issue of whether discrimination against a transgendered individual because of her gender non-conformity is actionable sex discrimination. Indeed, Evans applied Glenn by reversing the dismissal of the plaintiff's gender non-conformity claim. Even if Glenn held that sexual orientation discrimination is prohibited by Title VII (which it did not), then Glenn – not Evans – would need to be disregarded under the prior

panel rule because any such holding in Glenn would be contrary to this Court's prior decision in Blum. In any event, the Eleventh Circuit evidently concluded that Evans does not conflict with Glenn because it denied the plaintiff's petition for rehearing en banc in Evans. (Evans v. Ga. Reg'l Hosp., Appeal No. 15-15234-BB) (11th Cir.) (Order of July 6, 2017).

Based on the foregoing, Plaintiff's contention that Title VII already prohibits discrimination on the basis of sexual orientation is circular and contrary to Evans and Blum. Moreover, the EEOC's position that Title VII prohibits discrimination on the basis of sexual orientation is not binding on this Court and is contrary to Evans and Blum.

Finally, Plaintiff's reliance on Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), which held that same-sex sexual harassment is actionable under Title VII, is inapposite. Evans concluded that Oncale is not clearly on point or contrary to Blum, and did not squarely address whether sexual orientation discrimination is prohibited by Title VII. Plaintiff may not re-litigate the correctness of Evans' holding on this point in this appeal. In any event, other circuits have had little difficulty distinguishing between same-sex sexual harassment that is actionable under Title VII pursuant to Oncale, and harassment based on sexual orientation, which is not actionable under Title VII. The fact that the Supreme Court recently

denied the plaintiff's petition for a writ of certiorari in Evans suggests that the Supreme Court also does not discern any conflict between Oncale and Evans.

ARGUMENT AND CITATION OF AUTHORITY

I. Under Binding Eleventh Circuit Precedent, The District Court Correctly Held That Plaintiff Cannot Assert A Viable Claim For Sex Discrimination Based On His Sexual Orientation

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. Undeterred, Plaintiff alleges a Title VII sex discrimination claim based upon his claim that he was terminated because of his sexual orientation. However, as the district court correctly held, Plaintiff’s claim is foreclosed by binding Eleventh Circuit precedent.

A. This Court Held In *Blum v. Gulf Oil Corp.* That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation

In Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979),² a former employee sued Gulf Oil Corp alleging that he was terminated due to (among other things) his sexual orientation. Gulf Oil presented evidence that the plaintiff was terminated for making personal phone calls related to his side business rather than due to his sexual orientation. Id. at 936-37. After a bench trial, the trial court concluded that the

² In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued on or before September 30, 1981.

plaintiff was terminated for legitimate, non-discriminatory reasons, mainly, his use of a phone for personal reasons. Id.

The plaintiff appealed to the former Fifth Circuit, which affirmed the trial court's judgment in favor of Gulf Oil on the plaintiff's sexual orientation claim. First, the former 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 former 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.

B. This Court Recently Reaffirmed That *Blum* Remains Binding Precedent And That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation In *Evans v. Ga. Reg'l Hosp.*

In Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255-57 (11th Cir. 2017), cert. denied, 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017), this Court recently reaffirmed that Blum remains binding precedent and that Title VII does not prohibit discrimination on the basis of sexual orientation.

In Evans, the plaintiff was employed with the hospital as a security officer. The plaintiff asserted that she was subjected to a hostile work environment and terminated because of her sexual orientation and because of her gender non-conformity. Evans, 850 F.3d at 1250-52. The plaintiff asserted that these claims were actionable under Title VII as discrimination because of her sex. Id. at 1252.

The district court dismissed the plaintiff's sexual orientation claim on the ground that Title VII was not intended to cover discrimination against homosexuals. Id. at 1252-53. The district court also dismissed the plaintiff's gender non-conformity claim on the ground that it was "just another way to claim discrimination based on sexual orientation." Id.

On appeal, the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's sexual orientation claim. The Eleventh Circuit stated as follows:

Evans 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 forecloses such an action. Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII") "Under our prior precedent rule, we are bound to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc, or by the Supreme Court." Offshore of the Palm Beaches, Inc. v. Lynch, 741 F.3d 1251, 1256 (11th Cir. 2014) (internal quotations omitted).

Evans, 850 F.3d at 1255.

The Eleventh Circuit in Evans then rejected various arguments as to why the Court should not follow Blum. First, the Eleventh Circuit rejected the plaintiff's argument that the above statement in Blum was mere dicta, concluding that it was a holding that directly addressed an issue raised on appeal. Id. The Eleventh Circuit also held that, at the very least, the statement in Blum that discharge for homosexuality is not prohibited by Title VII was an alternative ground for its

decision affirming the judgment of the district court, and that, as such, it was binding precedent. Id. at 1255-56.

In addition, the Eleventh Circuit in Evans rejected the plaintiff's contention that Blum was overruled or abrogated by the Supreme Court's subsequent decisions in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) and Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). In this regard, the Eleventh Circuit in Evans stated as follows:

The fact that claims for gender non-conformity and same-sex discrimination can be brought pursuant to Title VII does not permit us to depart from Blum. See Randall v. Scott, 610 F.3d 701, 707 (11th Cir. 2010) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point.") (citation omitted); N.L.R.B. v. Datapoint Corp., 642 F.2d 123, 129 (5th Cir. 1981) ("Without a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court. . ."). Price Waterhouse and Oncale are neither clearly on point nor contrary to Blum. These Supreme Court decisions do not squarely address whether sexual orientation discrimination is prohibited by Title VII.

Evans, 850 F.3d at 1256.

The Eleventh Circuit, however, reversed the district court's dismissal of the plaintiff's gender non-conformity claim. Id. at 1254. The Eleventh Circuit explained that "[d]iscrimination based on failure to conform to a gender stereotype is sex-based discrimination." Id. (citing Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)).

The Eleventh Circuit in Evans reiterated Glenn's holding that discrimination against a transgender individual because of gender non-conformity constitutes a viable sex discrimination claim under Title VII. Id. at 1254-55.³

C. Both The Eleventh Circuit And The United States Supreme Court Have Declined Further Review Of *Evans*

The Eleventh Circuit denied the plaintiff's petition for panel rehearing and for rehearing en banc in Evans on July 6, 2017. (Evans v. Ga. Reg'l Hosp., Appeal No. 15-15234-BB) (11th Cir.) (Order of July 6, 2017). The plaintiff then filed a petition for certiorari with the United States Supreme Court, which the Supreme Court recently denied on December 11, 2017. Evans v. Ga. Reg'l Hosp., 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017).

Based on the foregoing, Evans and Blum preclude Plaintiff from asserting that he was terminated because of his sexual orientation in violation of Title VII. Accordingly, the district court's dismissal of Plaintiff's Title VII sexual orientation claim should be summarily affirmed.

³ Circuit Judge William Pryor issued a concurring opinion agreeing in full with the majority opinion but emphasizing that claims of discrimination based on sexual orientation are distinct from claims of discrimination based on gender stereotypes. Evans, 850 F.3d at 1258-1261 (Pryor, J., concurring). Circuit Judge Rosenbaum wrote a separate opinion concurring in the reversal and remand of the plaintiff's gender non-conformity claim, but dissenting from the Court's holding that Title VII does not prohibit discrimination on the basis of sexual orientation. Id. at 1261-1273 (Rosenbaum, J., concurring in part and dissenting in part).

II. The Court Should Reject Plaintiff's Invitation To Disregard And Overrule *Evans*

Plaintiff urges the Court to disregard and “overrule” Evans because it was “wrongly decided.” (Brief of Appellant, pp. 2, 7, 20). Under the prior panel rule, however, this Court

may disregard the holding of a prior opinion only where that “holding is overruled by the Court sitting en banc or by the Supreme Court.” Smith v. GTE Corp., 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). To constitute an “overruling” for the purposes of this prior panel precedent rule, the Supreme Court decision “must be clearly on point.” Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 344 F.3d 1288, 1292 (11th Cir. 2003); see also Main Drug, Inc. v. AETNA U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007) (“Of course, we will not follow prior panel precedent that has been overruled by a Supreme Court decision, but without a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court.”) (quotation marks and citations omitted); United States v. Chubbuck, 252 F.3d 1300, 1305 n.7 (11th Cir. 2001) (“[T]he prior precedent rule would not apply if intervening on-point case law from either this Court en banc, the United States Supreme Court, or the Florida Supreme Court existed.”). In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that this intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel. See In re Provenzano, 215 F.3d 1233, 1235 (11th Cir. 2000) (“We would, of course, not only be authorized but also required to depart from [our prior decision] if an intervening Supreme Court decision actually overruled or conflicted with it.”); Chambers v. Thompson, 150 F.3d 1324, 1326 (11th Cir. 1998) (“We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to

the point of abrogation by a subsequent en banc or Supreme Court decision.”).

United States v. Kaley, 579 F.3d 1246, 1255-56 (11th Cir. 2009) (emphasis added).

Thus, a Supreme Court or Eleventh Circuit en banc decision cannot be relied upon to disregard a prior panel decision unless it is an intervening decision issued subsequent to the prior panel decision at issue. Kaley, 579 F.3d at 1255-56 (citing cases); United States v. Chafin, 808 F.3d 1263, 1274 (11th Cir. 2015) (“For a Supreme Court decision to ‘overrule’ a prior panel precedent, the intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel”) (citation and punctuation omitted) (emphasis added), cert denied, 136 S. Ct. 1391 (2016); Randall, 610 F.3d at 707 (“While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point.”) (citation and punctuation omitted) (emphasis added).

In this case, as discussed below, Plaintiff has failed to cite any intervening or subsequent Supreme Court or Eleventh Circuit en banc decision that is clearly and directly on point and which overrules or abrogates Evans. Moreover, the pre-existing cases relied on by Plaintiff do not clearly and directly conflict with Evans or address whether Title VII encompasses claims of discrimination on the basis of sexual orientation.

A. Plaintiff Has Failed To Identify Any Intervening Or Subsequent Supreme Court Or En Banc Eleventh Circuit Decision That Is Clearly And Directly On Point And That Overrules Or Abrogates Evans

Plaintiff has not identified any intervening or subsequent Supreme Court or en banc Eleventh Circuit decision that is clearly and directly on point and that has overruled or abrogated Evans. Instead, Plaintiff improperly attempts to re-litigate Evans and argue that Evans incorrectly construed or distinguished pre-existing Supreme Court (Price Waterhouse) and Eleventh Circuit (Glenn) precedent. Plaintiff, however, cannot do so under the clearly established prior panel rule. See, e.g., Wood v. Comm’r of Soc. Sec., 861 F.3d 1197 (11th Cir. 2017) (“To the extent Mr. Culbertson points to other circuits to argue [the prior panel decision] was wrongly decided, this does not empower us to ignore it”); Chubbuck, 252 F.3d at 1305 n.7 (“Under our prior precedent rule, a panel cannot overrule a prior one’s holding even though convinced it is wrong”); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1076 (11th Cir.) (“[T]he prior panel precedent rule is not dependent on a subsequent panel’s appraisal of the initial decision’s correctness. Nor is the application of the rule dependent on . . . wisdom of the judges involved in the prior decision”), cert. denied, 531 U.S. 957 (2000).

The district court’s dismissal of Plaintiff’s sexual orientation claim therefore should be summarily affirmed.

B. Evans Does Not Clearly And Directly Conflict With The Supreme Court Or Eleventh Circuit Decisions Cited By Plaintiff

Leaving aside Plaintiff's failure to cite any intervening or subsequent Supreme Court or en banc Eleventh Circuit decision clearly or directly on point that overrules or abrogates Evans, Plaintiff has not cited any Supreme Court or en banc Eleventh Circuit decision that is clearly and directly on point and which directly conflicts with Evans.

1. Price Waterhouse Is Not Clearly And Directly On Point And Does Not Overrule Or Abrogate Evans

Plaintiff asserts that the Court should disregard and overrule Evans because it conflicts with Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Plaintiff's contentions are meritless and were properly rejected by Evans.

In Price Waterhouse, a female senior manager was not invited to become a partner with an accounting firm. The plaintiff introduced evidence that various male partners made stereotypical comments about her when considering her candidacy. These comments included that the plaintiff was "macho," that she "overcompensated for being a woman," that she should take "a course at charm school," that certain partners objected to her swearing only "because it's a lady using foul language" and similar comments. Id. at 235. The partner who informed the plaintiff of the decision to place her candidacy on hold told her that, if she wanted to improve her chances for partnership in the future, she should "walk more femininely, talk more

femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry.” Id. at 235.

A plurality of four justices, joined by two concurring justices, held that such evidence that an employer took adverse action against an employee for failure to conform to a stereotype associated with the employee’s protected class was sufficient to establish a violation under Title VII. Price Waterhouse, 490 U.S. at 251; Id. at 258-261 (White, J., concurring); Id. at 302 (O’Connor, J., concurring). For example, “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.” Id. at 251.

Contrary to Plaintiff’s assertions (and the assertions of the dissenting judge in Evans), Price Waterhouse’s holding that an employer violates Title VII by making employment decisions because of gender stereotypes such as how a female should dress or wear her hair, what personality traits (such as “aggressiveness”) a female should have, or how a female should talk, is not clearly and directly on point nor contrary to Evans’ holding that Title VII does not prohibit discrimination on the basis of sexual orientation. See Evans, 850 F.3d at 1256 (concluding that Price Waterhouse is ‘neither clearly on point nor contrary to Blum’ and that Price

Waterhouse “do[es] not squarely address whether sexual orientation discrimination is prohibited by Title VII”).

Simply put, Price Waterhouse does not clearly and directly address whether sexual orientation discrimination is prohibited by Title VII, but rather merely addresses gender stereotypes relating to how one appears or behaves in the workplace. This conclusion is underscored by the fact that most circuit courts have held – notwithstanding Price Waterhouse – that Title VII does not encompass discrimination on the basis of sexual orientation. See, e.g., Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (citing and discussing Price Waterhouse, but holding that “Title VII does not proscribe harassment simply because of sexual orientation”); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (“Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII’”) (citing cases);⁴ Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290-292 (3d Cir. 2009) (discussing Price Waterhouse and distinguishing between harassment claims based on sexual orientation for which plaintiff may not recover, and harassment claims based on gender stereotyping (high voice and walking effeminately) for which plaintiff may recover); Bibby v. Phila. Coca Cola Bottling

⁴ In Zarda v. Altitude Express, Inc., 2017 U.S. App. LEXIS 13127 (2d Cir. May 25, 2017), the Second Circuit agreed to consider this issue en banc. That case is still pending.

Co., 260 F.3d 257, 261, 263-65 (3d Cir. 2001) (citing and discussing Price Waterhouse, but holding that “Title VII does not prohibit discrimination based on sexual orientation”), cert. denied, 534 U.S. 1155 (2002); Hopkins v. Baltimore Gas & Elect. Co., 77 F.3d 745, 751-52 (4th Cir. 1996) (discussing Price Waterhouse, but concluding that “Title VII does not prohibit conduct based on the employee’s sexual orientation” as opposed to “the fact that the employee is a man or a woman”), cert. denied, 519 U.S. 818 (1996); Brandon v. Sage Corp., 808 F.3d 266, 270 n.2 (5th Cir. 2015) (“Title VII in plain terms does not cover ‘sexual orientation’”); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763-66 (6th Cir. 2006) (rejecting argument that Price Waterhouse supports conclusion that Title VII encompasses sexual orientation), cert. denied, 551 U.S. 1104 (2007); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063-64 (9th Cir. 2002) (en banc) (“[A]n employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual orientation”), cert. denied, 538 U.S. 922 (2003); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (discussing Price Waterhouse, but holding that “Title VII’s protections ... do not extend to harassment due to a person’s sexuality”); but see Hively v. Ivy Tech. Cmty Coll. of Indiana, 853 F.3d 339, 340-41 (7th Cir. 2017) (en banc) (holding that discrimination on basis of sexual orientation is a form of sex discrimination under Title VII).

In a similar vein, Plaintiff contends that Evans incorrectly held that Blum remains good law because Price Waterhouse abrogated the case cited by Blum in support of its holding that discharge for homosexuality is not prohibited by Title VII. (Brief of Appellant, pp. 11-13). More specifically, Plaintiff points out that Blum cited to Smith v. Liberty Ins. Co., 569 F.2d 325 (5th Cir. 1978), which held that discrimination based on “effeminate” behavior was not prohibited by Title VII and stated in a footnote that the EEOC had ruled that adverse action against homosexuals is not cognizable under Title VII. Id. at 327 & n.1. (Id. at p. 12). Plaintiff points out that Smith’s holding regarding gender stereotyping has been abrogated by Price Waterhouse and that the EEOC now takes the position that Title VII encompasses sexual orientation. (Id. at pp. 12-13).

However, as previously discussed, Evans held that Blum is binding precedent in this Circuit, that Price Waterhouse is not clearly on point or contrary to Blum, and that Price Waterhouse did not squarely address whether sexual orientation discrimination is prohibited by Title VII. Evans, 850 F.3d at 1256. Plaintiff may not re-litigate in this appeal the correctness of Evans’ holding that Blum is binding Circuit precedent.

In any event, Smith also rejected the plaintiff’s claim that Title VII prohibits an employer from rejecting a job applicant based on his or her sexual preference. Smith, 569 F.2d at 326-27 & n.1. In doing so, Smith noted that the EEOC had taken

the position that Title VII does not prohibit adverse action against homosexuals. Id. at 327 n.1. Thus, contrary to Plaintiff's contentions, Price Waterhouse did not impact Smith's holding that Title VII does not prohibit an employer from making an employment decision based on the employee's or applicant's sexual orientation.

Nevertheless, even if Price Waterhouse somehow weakened or undermined the analysis employed in Blum as Plaintiff contends, it did not clearly and directly overrule or abrogate Blum's holding that Title VII does not prohibit discrimination on the basis of sexual orientation. In this regard, the Eleventh Circuit has held that a prior panel decision may not be disregarded simply because an intervening Supreme Court decision has merely weakened the prior panel decision. See, e.g., United States v. Washington, 2017 U.S. App. LEXIS 16723, at *5, 2017 WL 3822039 (11th Cir. Aug. 31, 2017) ("To conclude that we are not bound by a prior holding in light of a Supreme Court case, we must find that case is clearly on point and that it actually abrogate[s] or directly conflict[s] with, as opposed to merely weaken[s], the holding of the prior panel.") (punctuation and citation omitted); Chafin, 808 F.3d at 1274 ("For a Supreme Court decision to overrule a prior panel precedent, the intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.") (punctuation and citations omitted); Kaley, 579 F.3d at 1255 (same) (citation omitted); Chubbuck, 252 F.3d at 1305 n.7 ("We are not at liberty to disregard

binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court”) (quoting Fla. League of Professional Lobbyists v. Meggs, 87 F.3d 457, 462 (11th Cir. 1998)).

In any event, the Supreme Court evidently concluded that Evans does not conflict with Price Waterhouse because it very recently denied the plaintiff’s petition for a writ of certiorari in Evans. Evans v. Ga. Reg’l Hosp., 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017). Based on the foregoing, Price Waterhouse does not provide any basis for the Court to disregard Evans. The district court’s dismissal of Plaintiff’s sexual orientation claim therefore should be affirmed.

2. Evans Is Wholly Consistent With Glenn v. Brumby and In Fact Applied Glenn

Plaintiff also contends that Evans conflicts with Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (Brief of Appellant, pp. 13-15). However, Glenn is not directly on point and does not squarely address whether sexual orientation discrimination is prohibited by Title VII. Indeed, Glenn does not cite, much less discuss, Blum. Instead, Glenn addressed the separate and distinct issue of whether discrimination against a transgendered individual because of her gender non-conformity is actionable sex discrimination under the Equal Protection Clause, and held that it does. Id. at 1317-1320. As Evans correctly observed, a gender non-conformity claim “constitutes a separate, distinct avenue for relief under Title VII.” Evans, 850 F.3d at 1254-55. Thus, Evans does not conflict with Glenn, but rather properly

applied it by reversing the dismissal of the plaintiff's gender non-conformity claim.

Id.⁵

To the extent that Plaintiff contends that Glenn somehow held that sexual orientation discrimination is prohibited by Title VII, then Glenn – not Evans – would need to be disregarded under the prior panel rule because any such holding in Glenn would be contrary to this Court's prior decision in Blum. In any event, the Eleventh Circuit evidently concluded that Evans does not conflict with Glenn because it denied the plaintiff's petition for rehearing en banc in Evans. (Evans v. Ga. Reg'l Hosp., Appeal No. 15-15234-BB) (11th Cir.) (Order of July 6, 2017). According, Glenn does not provide any support for Plaintiff's contention that the Court should disregard and overrule Evans.

III. Plaintiff's Contention That Title VII Already Protects Employees Against Discrimination On The Basis Of Sexual Orientation Ignores Evans And Blum And Is Circular

Finally, Plaintiff summarily declares that Evans “was wrongly decided because Title VII *already* prohibits discrimination on the basis of sexual orientation – because it is discrimination on the basis of sex”). (Brief of Appellant, p. 19) (emphasis in original). Of course, this contention is comically circular. Evans and Blum held that Title VII does not prohibit discrimination on the basis of sexual

⁵ The County notes that Circuit Judge William Pryor was on the panel in both Glenn and Evans.

orientation, and Plaintiff has failed to demonstrate that the Court may overrule or disregard this binding Circuit precedent.

Plaintiff contends that Title VII already prohibits discrimination on the basis of sexual orientation because the EEOC changed course in 2015 and has now taken the position that Title VII encompasses sexual orientation. (Brief of Appellant, pp. 17-18). However, EEOC interpretations of Title VII are not binding on this Court and are entitled to deference “only to the extent that [they have] the power to persuade.” EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1031 (11th Cir. 2016) (quoting Christiansen v. Harris Cty., 529 U.S. 576, 587 (2000)). See also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Therefore, the Court may not disregard Evans and Blum based on the EEOC’s new non-binding and unpersuasive interpretation.

Plaintiff next contends that Title VII already prohibits discrimination on the basis of sexual orientation because the Supreme Court held in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) that same-sex sexual harassment is actionable under Title VII. (Brief of Appellant, p. 16). However, Oncale simply extended the Supreme Court’s previous rejection of any conclusive presumption that an employer will not discriminate against members of the same protected class. Id. at 78-79. The Court in Oncale also emphasized that a claim for same-sex

harassment did not require a showing that the harassing conduct was motivated by sexual desire. Id. at 80.

Therefore, contrary to Plaintiff's assertions, Oncale does not squarely address whether Title VII protects against discrimination on the basis of sexual orientation. Indeed, Evans concluded that Oncale did not squarely address whether sexual orientation discrimination is prohibited by Title VII. Evans, 850 F.3d at 1256. For the reasons previously discussed, Plaintiff may not re-litigate the correctness of Evans' holding on this point in this appeal.

In any event, other circuits have had little difficulty distinguishing between same-sex sexual harassment that is actionable under Title VII pursuant to Oncale, and harassment based on sexual orientation, which is not actionable under Title VII. See, e.g., Higgins, 194 F.3d 252, 258-260 (citing and discussing Oncale, but holding that "Title VII does not proscribe harassment simply because of sexual orientation"); Bibby, 260 F.3d at 261, 263-65 (citing and discussing Oncale, but holding that plaintiff's harassment claim was not actionable because "[h]is claim was, pure and simple, that he was discriminated against because of his sexual orientation"); Vickers, 453 F.3d at 762-66 (citing and discussing Oncale, but holding that plaintiff's harassment claim was not actionable because alleged harassment was based on his sexual orientation, not his sex); Medina, 413 F.3d at 1134-35 (citing and discussing Oncale, but holding that plaintiff could not assert hostile work

environment claim based on her heterosexuality). Accordingly, Oncale does not even remotely support Plaintiff's contention that Title VII already prohibits discrimination on the basis of sexual orientation.

Finally, Plaintiff argues that Congress's failed attempts to enact the Employment Non-Discrimination Act to prohibit employment discrimination on the basis of sexual orientation 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. (Brief of Appellant, pp. 18-19). This contention is irrelevant because the majority opinion in Evans did not mention, much less rely on, the fact that Congress repeatedly has failed to enact ENDA. However, as Judge Pryor cogently stated in his concurring opinion, this "illustrates that Congress is the appropriate branch in which to raise the arguments raised" by Plaintiff in this appeal. Evans, 850 F.3d at 1261 (Pryor, J., concurring).

Based on the foregoing, Title VII does not prohibit discrimination on the basis of sexual orientation, and the district court's dismissal of Plaintiff's sexual orientation claim therefor should be affirmed.

CONCLUSION

For all the reasons set forth herein, the Court is bound under the prior panel rule to follow Evans and Blum and hold that Title VII does not encompass claims of

discrimination on the basis of sexual orientation. Accordingly, the district court's dismissal of Plaintiff's sexual orientation claim should be affirmed.

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

I certify that this **BRIEF OF APPELLEE** complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This **BRIEF OF APPELLEE** contains 6,718 words and was prepared using Times New Roman fourteen-point typeface.

/s/ Jack R. Hancock

Jack R. Hancock

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **BRIEF OF APPELLEE** 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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