

**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,

BUCKLEY BEAL LLP

By: s/ Thomas J. Mew IV
Brian J. Sutherland
bsutherland@buckleybeal.com
Georgia Bar No. 105408
Thomas J. Mew IV
tmew@buckleybeal.com
Georgia Bar No. 503447
T. Brian Green
bgreen@buckleybeal.com
Georgia Bar No. 801098

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

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NORTHERN DISTRICT OF GEORGIA
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Plaintiff,)	CIVIL ACTION
)	File No. 1:16-CV-1460
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CLAYTON COUNTY,)	
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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.

s/ Thomas J. Mew
Georgia Bar No. 503447

BUCKLEY BEAL, LLP
1230 Peachtree Street NE, Suite 900
Atlanta, GA 30309
Phone: (404) 781-1100
Facsimile: (404) 781-1101

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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:

Jack Hancock, Esq.
Martin B. Heller, Esq.
William H. Buechner, Esq.
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339

s/ Thomas J. Mew IV
Georgia Bar No. 503447

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,

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

v.

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

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.