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 in 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,

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

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.

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

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 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:

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