SELECTED PASSAGES FROM REPORTED CASES INVOLVING LGBT TITLE VII PLAINTIFFS APRIL 2013 - JUNE 2014

JILLIAN T. WEISS

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DC CIRCUIT

PETER J. TERVEER, Plaintiff, v. JAMES H. BILLINGTON, Librarian, Library of Congress, Defendant.

Civil Action No. 12-1290 (CKK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2014 U.S. Dist. LEXIS 43193; 97 Empl. Prac. Dec. (CCH) P45,046

March 31, 2014, Decided
March 31, 2014, Filed

...Title VII prohibits an employer from discriminating "against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim.*See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated [*36] with their group."). Here, Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of

acceptable gender roles," Am. Compl. ¶ 55, that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC," *id.* ¶ 59, and that "his orientation as homosexual had removed him from Mech's preconceived definition of male," *id.* ¶ 13. As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief" as required by Federal Rule of Civil Procedure 8(a). Accordingly, the Court denies Defendant's Motion to Dismiss Plaintiff's sex discrimination claim (Count I) for failure to state a claim.

... Plaintiff responds that he sufficiently pled a claim of religious discrimination because he alleged facts showing that he was discriminated against because he failed to live up to his supervisor's religious expectations. The Court agrees with Plaintiff. HN13 Title VII seeks to protect employees not only from discrimination on the basis of their religious beliefs, but also from forced religious conformity or adverse treatment because they do "not hold or follow [their] employer's religious beliefs." *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033, 1038 (10th Cir. 1993); *see also Johnson v. Dong Moon Joo*, 2006 U.S. Dist. LEXIS 13022, 2006 WL 627154, *22 (D.D.C. March 12, 2006) (following*Shapolia* analysis); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) [*38] (adopting *Shapolia* analysis and holding that plaintiff "need only show that her perceived religious shortcomings (her unwillingness to strive for salvation as Ives understood it, for example) played a motivating role in her discharge."). HN14 In order to establish a *prima facie* case in actions where the plaintiff claims that he was discriminated against because he did not share certain religious beliefs held by his supervisors, the plaintiff must show

(1) that he was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the employee's job performance was satisfactory; and (3) *some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee's failure to hold or follow his or her employer's religious beliefs*.

Shapolia, 992 F.2d at 1038 (emphasis added). In light of the "low hurdle" a plaintiff alleging employment discrimination must overcome at the motion to dismiss stage, the Court finds that Plaintiff has alleged sufficient facts to establish a claim of religious discrimination for failure to follow his employer's religious beliefs. In his Complaint, Plaintiff alleges [*39] that prior to learning of Plaintiff's sexual orientation, Mech told Plaintiff that "putting you . . . closer to God is my effort to encourage you to save your worldly behind." *Id.*¶ 8. Plaintiff further alleges that after Mech's daughter learned of Plaintiff's sexual orientation, "at the beginning of almost every work-related conversation [with Plaintiff], Mech would engage in a religious lecture to the point where it became clear that Mech was targeting [Plaintiff] by imposing his conservative Catholic beliefs on [Plaintiff] throughout the workday." *Id.* ¶ 12. Plaintiff also alleges that "Mech confronted [Plaintiff] directly regarding his homosexuality and its non-conformance with Mech's conservative religious beliefs."*Id.* ¶¶ 18, 19. The Court finds that Plaintiff has sufficiently pled facts suggesting that the religious harassment he endured was not due exclusively to his homosexual status. Plaintiff's allegations show that Mech's religious proselytizing began before Mech learned of Plaintiff's sexual orientation. Moreover, a fact finder could infer from Plaintiff's

allegation that Mech repeatedly engaged in religious lectures targeted at imposing Mech's "conservative Catholic beliefs" [*40] on Plaintiff that religion (and not simply homosexuality) played a role in Defendant's employment decisions regarding Plaintiff and contributed to the hostility of the work environment. As a result, at this stage, this case is distinguishable from *Prowel* where the plaintiff alleged religious proselytizing focused exclusively on the plaintiff's sexual orientation.

In any event, *Prowel*'s holding is not controlling in this Circuit. HN15 Courts in other circuits have found that plaintiffs state a claim of religious discrimination in situations where employers have fired or otherwise punished an employee because the employee's personal activities or status—for example, divorcing or having an extramarital affair—failed to conform to the employer's religious beliefs. *See, e.g., Henegar v. Sears Roebuck and Co.*, 965 F.Supp. 833, 838 (N.D.W.Va. 1997) (living with a man while divorcing her husband); *Sarenpa v. Express Images Inc.*, 2005 U.S. Dist. LEXIS 40531, 2005 WL 3299455, *4 (D.Minn. 2005) (extramarital affair). The Court sees no reason to create an exception to these cases for employees who are targeted for religious harassment due to their status as a homosexual individual. Accordingly, looking at the allegations in Plaintiff's [*41] Complaint, the Court concludes that Plaintiff has alleged a set of facts that would entitle Plaintiff to relief. The Court denies Defendant's Motion to Dismiss Plaintiff's religious discrimination claim (Count II) for failure to state a claim.

... Defendant contends that since Plaintiff failed to put forth any factual allegations that would support his claim of sex or religious discrimination prohibited by Title VII, Plaintiff's opposition to Defendant's allegedly discriminatory conduct on June 25, 2010, is not sufficient to support a retaliation claim. Def.'s Mot. at 21. However, the Court found that Plaintiff's Complaint alleges facts sufficient to state a claim of sex-stereotyping and religious discrimination [*43] cognizable under Title VII. Consequently, the Court now finds that Plaintiff's June 25, 2010, meeting with Mech in which Plaintiff confronted Mech about his belief that Mech was discriminating against him based on "his religious beliefs and sexual stereotyping" constituted protected opposition conduct under Title VII.

...As an alternative to his Title VII sex discrimination claim,[9] Plaintiff also brings two counts alleging Defendant violated the Due Process clause and the Equal Protection clause of the Fifth Amendment by sex stereotyping Plaintiff. Defendant argues that these constitutional claims must be dismissed because HN21 the Supreme Court in *Brown v. General Services Administration*, 425 U.S. 820, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976) held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." Def.'s Mot. at 24 (citing *Brown*, 425 U.S. at 835 (1976)). The Court agrees. Here, Plaintiff is seeking to bring "parallel actions under both Title VII and other provisions of federal [*52] law to redress the same basic injury." *Ethnic Emps. of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1415, 243 U.S. App. D.C. 186 (D.C. Cir. 1985). This Circuit has specifically held that *Brown* preclusion applies when a federal employee seeks, as Plaintiff does, to bring *constitutional* claims that could be brought by federal employees under Title VII. *See Kizas v. Webster*, 707 F.2d 524, 541-543, 227 U.S. App. D.C. 327 (D.C. Cir. 1983) (holding that plaintiffs were precluded from pursuing sex and race discrimination claims directly under the Fifth Amendment because Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment). As the Court has found on the present record that Plaintiff has presented a cognizable Title VII claim of sex stereotyping and is permitting

Plaintiff's sex stereotyping claim to proceed under Title VII, the Court dismisses without prejudice Plaintiff's constitutional claims.

FIRST CIRCUIT

MALDONADO-CATALA, Plaintiff v. MUNICIPALITY OF NARANJITO, et al., Defendants.

CIVIL NO. 13-1561 (JAG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

2014 U.S. Dist. LEXIS 20737; 121 Fair Empl. Prac. Cas. (BNA) 1468

February 15, 2014, Decided
February 15, 2014, Filed

Though "it is a noxious practice, deserving of censure and opprobrium," discrimination on account of an employee's sexual orientation is not proscribed by Title VII. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999). Consequently, Defendants argue that Plaintiff's complaint fails to state a claim under Title VII because it is grounded on allegations of sexual harassment relating to Plaintiff's sexual preference. [*8] On this point, Defendants are right. To the extent that Plaintiff is pressing a Title VII claim *strictly* on the basis of sexual-orientation discrimination, that claim is foreclosed by Higgins.[2] "In its current form, Title VII does not provide a remedy to persons who have experienced harassment motivated solely by animus toward the plaintiff's sexual orientation." Id. at 75.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
2 Though neither party raises the issue, the Court also finds that the complaint fails to state a claim under a theory of "sex-stereotyping" as defined by Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). In Price Waterhouse, the Supreme Court held that "an individual who suffered adverse employment consequences because she did not match the social stereotypes associated with her protected group had an actionable claim under Title VII." Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999). In that case, it was evident that plaintiff's superiors discriminated against her because she did not display the typical "femininity" of a woman. Among other things, one partner suggested she was "macho" and another said she needed to take "a course at charm school." Price Waterhouse, 490 U.S. at 235. Here, [*9] however, the complaint is barren of any "examples of behavior that her employer or supervisor found to be stereotypically inappropriate." Rivera v. HFS Corp., CIV. 11-1116, 2012 U.S. Dist. LEXIS 82347, 2012 WL 2152072 (D.P.R. June 12, 2012)(Garcia-Gregory, J.). Rather, the complaint centers on sexually inappropriate jokes and comments relating to Plaintiff's sexual preference. As such, it is insufficient to state a claim under Title VII for sex-stereotyping.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

But this does not win the day for Defendants. As we noted above, Plaintiff's complaint survives if it contains sufficient factual allegations showing that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Oncale, 523 U.S. at 80. After careful consideration, the Court finds that Plaintiff's complaint contains allegations sufficient to state an actionable claim for sex-based discrimination under Title VII.

...According to the complaint, her co-workers joked about the fact that "she would change her sexual orientation with one good sexual encounter." (Docket No. 1, ¶ 19). The kicker is that the employees suggested "*they were the men* to help make that change come about." (Id.). So, regardless of whether the comments [*11] alluded to her sexual orientation, the complaint makes clear that Plaintiff also suffered unsolicited sexual advances from members of the opposite gender.

SECOND CIRCUIT

JOSEPH J. GIUDICE, Plaintiff-Appellant, -v- RED ROBIN INTERNATIONAL, INC., Defendant-Appellee.

13-1190-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2014 U.S. App. LEXIS 2688, *2

February 13, 2014, Decided

...[*2] As a preliminary matter, it is difficult to discern from Giudice's submissions on appeal whether he argues that his protected activity consisted of complaining to Red Robin about discrimination based on his sexual orientation or based on his sex. Notwithstanding that lack of clarity in Giudice's appellate papers, in the affidavit that he submitted to the district court he stated that he was "harassed solely because of the fact that [he is] **gay.**" "'The law is well-settled in this circuit and in all others to have reached the question that . . . [] **Title VII** does not prohibit harassment or discrimination because of sexual orientation.'" *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) [*3] (alteration omitted) (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)). This Court has not yet ruled on the specific question of whether a plaintiff may, under**Title VII,** maintain a claim of retaliation based on adverse employment action resulting from his complaints about sexual-orientation discrimination, although in *Kelly*, 716 F.3d at 16-17, we did hold that a plaintiff could not maintain a **Title VII** retaliation claim based on a mistaken belief that complaining about "paramour preference" was protected activity under the statute.

ELENA BENUSSI, Plaintiff, -against- UBS FINANCIAL SERVICES INC., Defendant.

12 Civ. 1261 (PAC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2014 U.S. Dist. LEXIS 18642; 121 Fair Empl. Prac. Cas. (BNA) 1214

February 13, 2014, Decided
February 13, 2014, Filed

..."A plaintiff may prevail on a claim for retaliation even when the underlying conduct complained of was not in fact unlawful 'so long as he can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated [the] law.'" *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir. 2002). Thus, "the plaintiff need not prove that her underlying complaint of discrimination had merit." *Lore*, 670 F.3d at 157.

...Here, Benussi reported that she was "verbally bashed" for being "an unmarried woman," and that the speaker remarked that she must be either a "dyke or a slut."[13] Benussi said that the incident had made her so uncomfortable that she did not want to work on the same floor as the person who made the comments. As a result of her report, her employer launched an investigation into these comments and repeatedly asked her to reveal the name of the person who made them. Indeed, UBS's HR representative allegedly said that "we don't want this hanging over our head." Thus, Benussi alleges that the comments were personally directed at her because of her gender, that she was uncomfortable [*25] working near the speaker as a result, and that her employer expressed serious concern about the alleged comments. Under these circumstances, a reasonable jury could conclude that Benussi reasonably believed that the comments were unlawful.

THIRD CIRCUIT

JANIS STACY, Plaintiff, v. LSI CORPORATION and AGERE SYSTEMS, INC., Defendants.

CIVIL ACTION NO. 10-4693

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2012 U.S. Dist. LEXIS 131457

September 12, 2012, Decided
September 13, 2012, Filed

In 1998, Lucent Technologies, which later became Agere Systems, hired Plaintiff. Stacy Decl. ¶ 2. When she was hired, Plaintiff had a traditional masculine appearance, wore male clothing, and went by the name "Jim." Id. ¶ 3. In 2002, however, Plaintiff was diagnosed with gender identity disorder ("GID"). Id. ¶ 4. Following her diagnosis with GID, Plaintiff underwent psychological counseling and began receiving hormone therapy. Id. ¶ 5.

In February 2005, Plaintiff revealed to Agere Human Resources Business Partner Christine Sostarecz that she suffered from GID and would be transitioning from male to female.

12 The Court employs the same [*19] analysis for Title VII and PHRA discrimination claims. See, e.g., Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 318-19 (3d Cir. 2008). Because the AHRA's provisions prohibiting gender-identity, sex, and disability discrimination are similar to the provisions in Title VII and the PHRA, the Court will also employ the McDonnell Douglas framework to Plaintiff's AHRA claims.13 Defendants concede for purposes of summary judgment that Plaintiff may establish a prima facie case of unlawful sex, disability, and gender-identity discrimination. Mot. Summ. J. 3, ECF No. 51.

JANIS STACY, Appellant v. LSI CORPORATION; AGERE SYSTEMS, INC.

No. 12-3756

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

544 Fed. Appx. 93; 2013 U.S. App. LEXIS 22885; 120 Fair Empl. Prac. Cas. (BNA) 1103; 97 Empl. Prac. Dec. (CCH) P44,956

October 29, 2013, Submitted Pursuant to Third Circuit LAR 34.1(a)
November 13, 2013, Filed

...Defendants do not dispute Stacy's *prima facie* case of sex, disability, or gender identity discrimination and Stacy does not dispute the District Court's finding that Defendants proffered a legitimate, non-discriminatory reason for her termination. [*97] Accordingly, the only issue presented on appeal is whether a reasonable jury could find that Defendants' articulated explanation for Stacy's termination was a pretext for discrimination.

SALVATORE RACHUNA, Plaintiff, vs BEST FITNESS CORP., BEST FITNESS, and B.F. OF ERIE, INC., Defendants.

Civil Action No. 1:13-cv-365

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2014 U.S. Dist. LEXIS 61674; 122 Fair Empl. Prac. Cas. (BNA) 1630

May 5, 2014, Decided
May 5, 2014, Filed

...Defendants argue that Count I (sexual discrimination) should be dismissed because it is unnecessarily duplicative of Count II (hostile work environment). They note that Count I alleges that Plaintiff "was subjected to sex discrimination as a result of the sexual harassment from Defendant's [sic] management and corporate staff." (Am. Compl. ¶ 52.) However, the Amended Complaint already contains a hostile work environment claim in Count II. Plaintiff has not responded to this argument.

Because the Amended Complaint alleges discrimination in the form of a sexually hostile work environment, the claim in Count I is duplicative of the claim asserted in Count II.[4]Therefore, the motion to dismiss Count I as duplicative will [*13] be granted.

... Defendants argue that, although Plaintiff alleges that Taylor's actions were motivated by a belief that he did not conform to the stereotype of a heterosexual male, his allegations are insufficient because he has not alleged that he was being harassed for being effeminate. Rather, they argue that his claims are essentially that he was offended by Taylor discussing sex-related topics with him, such as asking him about his personal sex life and encouraging him to have sex more often. However, Defendants cite no authority in support of this argument, only cases in which courts permitted claims to proceed when male plaintiffs proffered evidence that they were harassed for being effeminate and/or for exhibiting [*17] characteristics of the opposite gender. This does not mean that these are the only circumstances that can support a claim of same-sex harassment based on gender stereotyping... Plaintiff in this case, however, is making those very claims. He [*18] has not alleged that he is homosexual or that Taylor perceived him to be. Rather, he has alleged that his refusal to conform to a gender stereotype by participating in Taylor's behavior led to further incidents of Taylor's behavior. [] Defendants further argue that Plaintiff's allegations are undermined by the fact that he also alleges that Taylor acted inappropriately and made similar comments to female employees. Thus, they contend that Taylor could not have been discriminating against Plaintiff "based on" his sex.

... However, Plaintiff has not alleged that Taylor was sexually propositioning both men and women or that he was treating both men and women badly. Rather, he has alleged that Taylor's comments and behavior were heterosexual in nature but that he expected men, such as Plaintiff, to join in the lewd, promiscuous and predatory talk.[5] Plaintiff did not discuss his sex life, nor did he inappropriately touch or hit on employees or discuss club members in a sexual and vulgar manner. He did not agree or join in Taylor's discussion of an underage girl's body, and he intervened to break up an argument between Taylor and another employee who objected to Taylor's comment about a young girl's "ass." Plaintiff suggests that this act may have projected to Taylor that he was a more sensitive type of male (showing his "feminine side") and that such action only served to increase the severity and frequency of Taylor's actions. He has also alleged that, when he complained to the Chief Executive Officer, Dos Santos responded [*20] with

more male stereotyping, asking if Plaintiff had had sex with someone Taylor knew instead of acknowledging the inappropriateness of Taylor's comments.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
5 Remarkably, Defendants note that Plaintiff's former co-worker, Jennifer Silber, has also filed a complaint at Civil Action No. 1:13-cv-350, in which she alleges that Taylor subjected her to sexual harassment. (ECF No. 16 at 6 n.2.) Far from demonstrating that Taylor was an "equal opportunity harasser," this information supports Plaintiff's claim that Taylor talked about sexual matters and expected men to join in his behavior.

When the record has been developed, the parties can pursue this issue further. However, it cannot be resolved in the context of a motion to dismiss. Therefore, this argument is rejected.[6]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
6 The Court will not address Defendants' outrageous argument that, because Taylor allegedly told Plaintiff "you gotta get it in!" he was "attempting to encourage and support Plaintiff, not demean or tease him." (ECF No. 16 at 7.) The relevant inquiry is whether the victim indicated that the sexual remarks were unwelcome. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). Plaintiff has alleged that he indicated to Taylor [*21] that his comments were unwelcome.

... Defendants incorporate their brief in support of the first partial motion to dismiss (ECF No. 16 at 4 n.1) to argue that Plaintiff cannot establish that the discrimination was severe or pervasive [7] because he referred to only two instances. However, Defendants have not accurately recited the allegations of the Complaint, which stated that, "during day-to-day operations and at frequent meetings, Mr. Taylor would often make lewd, [*22] inappropriate and unwelcome sexual remarks directed at Plaintiff and to Plaintiff about various health club members and employees." (Compl. ¶ 21.)

...The cases that Defendant cites were decided on motions for summary judgment, not motions to dismiss. The Supreme Court has held that "the prima facie case under McDonnell Douglas ... is an evidentiary standard, not a pleading requirement." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). The Supreme Court cited Swierkiewicz approvingly in Twombly, 550 U.S. at 555-56, and rejected the contention that it "ran counter" to Twombly's plausibility standard. In re Insurance Brokerage Antitrust Litig., 618 F.3d 300, 319 n.17 (3d Cir. 2010). Thus, Plaintiff does not have to meet the prima facie case standard of McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), [*23] in order to survive a motion to dismiss for failure to state a claim upon which relief may be granted.

ANGELINA ROADCLOUD, Plaintiff, v. THE CITY OF PHILADELPHIA and TABATHA BALDWIN ADAMS, Defendants.

13-00777

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2014 U.S. Dist. LEXIS 769; 121 Fair Empl. Prac. Cas. (BNA) 550

January 6, 2014, Decided
January 6, 2014, Filed

...Plaintiff, "an openly **gay** female," alleges defendants discriminated against her on the basis of her sex. (2d. Am. Compl. ¶¶ 34, 85.) Under **Title VII,** sexual orientation is not a protected class and cannot be the basis of a cognizable claim. *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) [*9] (citations omitted). Nonetheless, discrimination on the basis of a plaintiff's failure to conform to expected gender stereotypes is discrimination on the basis of sex. The Third Circuit states in *Bibby* that a plaintiff may show that he or she was harassed by a member of the same sex by showing that the harasser was motivated by sexual desire, expressed a general hostility to the presence of one sex in the workplace, or acted to punish noncompliance with gender stereotypes. *Id.* at 264. *See also Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009)(noting that plaintiffs may raise a gender stereotyping claim under **Title VII** for punishment due to noncompliance with gender stereotypes); *Pagan v. Gonzalez*, 430 Fed.Appx. 170, 171-72 (3d Cir. 2011) (noting that while a discrimination claim based on a failure to conform to gender stereotyping is cognizable, a case based on sexual orientation discrimination is not); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

Plaintiff has sufficiently [*10] alleged defendants discriminated against her on the basis of her failure to conform to expected gender stereotypes. An employer that acts based upon the belief that women should not be aggressive, acts on the basis of gender. *Kay v. Independence Blue Cross*, 142 Fed.Appx. 48, 50 (3d Cir. 2005) (citing *Price Waterhouse*, 490 U.S. at 250). Hostile or paternalistic statements or acts based upon perceptions or expected qualities of womanhood are inherently based on sex or gender. *Brown-Baumbach v. B&B Auto., Inc.*, 437 Fed.Appx. 129, 134 (3d Cir. 2011) (quoting *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999)).

Plaintiff has alleged Adams' harassment focused on plaintiff appearance, specifically the signs of sexual conduct Adams believed plaintiff exhibited. (2d. Am. Compl. at ¶¶ 38, 41.) Adams made similar comments throughout 2011 and 2012 to plaintiff's supervisors and coworkers. (Id. at ¶¶ 55-56.) Conversely, Adams did not make similar comments about women that conformed to Adams' expectations of a female. (Id. at ¶ 50.)

The Second Amended Complaint alleges plaintiff was harassed because her outward exhibition of sexual conduct did not meet defendants' expectation of how a [*11] woman should look in the workplace or act in her private life. This is sufficient to allege defendants' discrimination against plaintiff was on the basis of her sex. The mere possibility that defendants' actions were motivated by plaintiff's sexual orientation, instead of her failure to conform with gender stereotypes, cannot

compel dismissal at this early stage of litigation. *Cf. Prowel*, 579 F.3d at 292 (Reversing trial court's grant of summary judgment where facts could support gender stereotyping discrimination as well as sexual orientation discrimination).

CHARNETTA GADLING-COLE, Plaintiff, v. WEST CHESTER UNIVERSITY, et al., Defendants.

Civil No. 11-0796 (JBS)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2013 U.S. Dist. LEXIS 123433

August 28, 2013, Decided
August 29, 2013, Filed

...The Plaintiff claims she was subjected to discriminatory treatment during her employment as an adjunct professor and throughout the hiring process for the assistant professor position in violation of **Title VII** and 42 U.S.C. § 1983. In particular, the Plaintiff claims that her religious beliefs prevented her from supporting and advocating on behalf of the **Lesbian, Gay, Bisexual, Transgender** and Queer ("LGBTQ") community and the Commonwealth Defendants unlawfully discriminated against her based on these religious beliefs.

...A jury could find that the search was aborted because the search committee refused to recommend Plaintiff because of her religious beliefs. There is evidence in the record from which the jury could find that the Dean would have supported the Plaintiff's candidacy if the search committee would have recommended her for the position. There is also evidence that the Plaintiff [*35] was treated differently by the faculty after she revealed her religious beliefs about the LGBTQ community. Further, the candidate who was advanced by the search committee was a member and supporter of the LGBTQ community and received more favorable treatment during the interview process. Consequently, a rational jury could conclude that the reason the search was cancelled was because the search committee religiously discriminated against the Plaintiff. [5]

5 There is also a material factual dispute whether Plaintiff was downgraded due to her apparent anti-**gay** animus - a legitimate concern in a public educational institution - or due to her practice of her religion, which taught that homosexuality is a sin. **Title VII** protects against discrimination based on religion, and not against discrimination based upon viewpoint. It will be Plaintiff's burden to demonstrate that her religious practice was at issue and was a factor in the decision to abort the selection process, as opposed to a legitimate concern that she harbored anti-

LGBTQ animus that made her unfit for university level teaching. Since Plaintiff has herself characterized her views as a religious practice, the Court must accept such [*36] a characterization in this summary judgment motion practice. The parties are invited to focus upon this issue of the scope of protection for religiously based views under **Title VII,** in light of concerns that a practice of a religion that preaches discrimination against a class or category of persons could scarcely seek to be protected by **Title VII.** Neither party has briefed this fundamental question of **Title VII's** protection against religious discrimination.

FOURTH CIRCUIT

TOMI BOONE FINKLE, Plaintiff v. HOWARD COUNTY, MARYLAND, Defendants

CIVIL No. JKB-13-3236

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

2013 U.S. Dist. LEXIS 186911

April 10, 2013, Decided
April 10, 2014, Filed

The Court next considers Defendant's argument that Plaintiff's claim is not a cognizable claim of discrimination on the basis of sex under Title VII. (ECF No. 4-1 at 3-4.) Here, Plaintiff has claimed that that her application to join the VMP was denied "because of her obvious transgendered status" (Compl. at ¶ 30) and therefore that Defendant "depriv[ed] the otherwise qualified Plaintiff of a position with the [HCPD's VMP] solely because of Plaintiff's sex, to wit, her gender identification and non-conforming gender conduct." (*Id.* at 1.)

In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), the Supreme Court held that because HN9 Title VII prohibits discrimination on the basis of sex, employers may not discriminate on the basis of an employee's (or [*17] prospective employee's) failure to conform to gender stereotypes. The Court explained that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251 (plurality opinion).

In the wake of *Price Waterhouse,* a number of sister courts have found that **Title VII** protects **transgender** employees who are discriminated against for failing to conform to gender stereotypes. For example, in *Smith v. City of Salem,* 378 F.3d 566, 574-75 (6th Cir. 2004), the Sixth Circuit explained that:

Price Waterhouse . . . does not make **Title VII** protection against sex stereotyping conditional or provide any reason to exclude **Title VII** coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different

from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. HN10 Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of [*18] the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to **Title VII's** prohibition of sex discrimination.

Similarly, in *Schroer v. Billington,* 577 F.Supp.2d 293, 308 (D.D.C. 2008), Judge Robertson concluded that:

[i]n refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated **Title VII's** prohibition on sex discrimination.

See also *Glenn v. Brumby,* 663 F.3d 1312, 1317 (11th Cir. 2011) (collecting cases) ("Accordingly, discrimination against a **transgender** individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. Indeed several circuits have so held. . . . These instances of discrimination against plaintiffs because they fail to act according to socially prescribed [*19] gender roles constitute discrimination under **Title VII** according to the rationale of *Price Waterhouse.*"); *cf.* *Hart v. Lew,* Civ. No. ELH-12-03482, 2013 U.S. Dist. LEXIS 135330, 2013 WL 5330581 at *15 (D. Md. Sept. 23, 2013) ("Defendant does not contend that plaintiff, as a transsexual, is not protected by **Title VII's** prohibition on sex discrimination, and so I will assume for purposes of this motion that plaintiff is within **Title VII's**aegis.").

However, in *Schroer,* Judge Robertson also cautioned that "when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected." 577 F.Supp.2d at 305 (collecting cases). Likewise, in *Etsitty v. Utah Transit Authority,* 502 F.3d 1215, 1222 (10th Cir. 2007), the court held that transsexuals are not a protected class under Title VII. In so holding, both the *Schroer* Court and the *Etsitty* Court drew on *pre-Price Waterhouse* cases, including *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1084-85 (7th Cir. 1984), *Sommers v. Budget Marketing, Inc.,* 667 F.2d 748, 749-750 (8th Cir. 1982), and *Holloway v. Arthur Andersen & Co.,* 566 F.2d 659, 662-63 (9th Cir. 1977). [*20] These cases held that Title VII's "prohibition on sex discrimination mean only that it is 'unlawful to discriminate against women because they are women and men because they are men.'" *Etsitty,* 502 F.3d at 1221 (quoting *Ulane,* 742 F.2d at 1085).

In light of *Price Waterhouse,* it is unclear what, if any, significance to ascribe to the conclusion that "transsexuals are not protected under Title VII *as transsexuals.*" *Etsitty,* 502 F.3d at 1222. Indeed, it would seem that any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse.* As Judge Robertson offered in *Schroer,* "[u]ltimately I do not think it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be

an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." 577 F.Supp.2d at 305. Further, in *Schwenk v. Hartford,* 204 F.3d 1187, 1201 (9th Cir. 2000), a unanimous panel of the Ninth Circuit held that "[t]he initial judicial [*21] approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse. . . .* [U]nder *Price Waterhouse,* HN11 "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—*and* [socially-constructed] gender [expectations]." *See also Smith,* 378 F.3d at 573 ("[T]he approach in *Holloway, Sommers,* and *Ulane . . .* has been eviscerated by *Price Waterhouse. . . .* [T]he Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.") Even in *Etsitty,* the court did not issue a contrary ruling. Rather, the court assumed without deciding that Title VII protects "transsexuals who act and appear as a member of the opposite sex." *Etsitty,* 502 F.3d at 1224.

Therefore, on the basis of the Supreme Court's holding in *Price Waterhouse,* and after careful consideration of its sister courts' reasoned opinions, this Court finds that Plaintiff's claim that she was discriminated against "because of her obvious transgendered status" is a cognizable claim of sex discrimination [*22] under Title VII. To hold otherwise would be "to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals." *Etsitty,* 502 F.3d at 1222 n.2 (citing *City of Salem,* 378 F.3d at 575).

Third, the Court considers whether Plaintiff has adequately pleaded her discrimination claim. As the Fourth Circuit has explained, HN12 "while a Title VII plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level."*Templeton v. First Tennessee Bank, N.A.* 424 Fed. Appx. 249, 250 (4th Cir. 2011).

Here, the Court finds that Plaintiff has alleged sufficient facts to state a claim of sex discrimination in employment that is plausible on its face. Although Plaintiff's complaint represents something of a close call, it sets forth sufficient allegations to allow the Court to "draw the reasonable inference" that her application to join the VMP was denied "because of her obvious transgendered status" and her failure to conform with gender norms. (Compl. at ¶ 30.)

Specifically, Plaintiff alleges that she does not conform to gender [*23] stereotypes in that she is "obvious[ly] transgender[]." (Compl. at ¶ 6.) In her opposition to Defendant's motion to dismiss, she further explains that she is a "6'3", 220 pound, broad-shouldered [individual] with C cup breasts, shoulder length blond hair" and that on December 7, 2011, the day of her final interview with the HCPD, she was wearing a skirt. (ECF No. 7 at 14 n.1.)

She further alleges that she was "well qualified and otherwise suitable for appointment" to the VMP. (Compl. at ¶ 38.) In fact, according to her complaint, Plaintiff was the Commander of "TrotSAR, a horse mounted search and rescue organization in Crownsville, Maryland" and, in that capacity, helped the HCPD "develop[] and implement[]" the VMP. (*Id.* at ¶¶ 15, 20.)

In September 2011, Plaintiff applied to join the VMP as an APO and passed the initial "horse and rider skills test." (*Id.* at ¶¶ 21, 22, 23.) However, after an in-person panel interview at HCPD headquarters, which was the final step in the selection process, she was informed that she "did

not make the cut." (*Id.* at ¶¶ 24, 27.) Plaintiff alleges that "[o]n information and belief, [HCPD] Chief McMahon[, whom Plaintiff met immediately prior to her interview,] [*24] ordered Lt. Black and the other members of the selection panel to deny a position to [Plaintiff] because of her obvious transgender status." (*Id.* at ¶ 30.)

Plaintiff buttresses the plausibility of her claim by further alleging that, when she asked Black to explain the HCPD's decision, he provided pretextual reasons.[3] In particular, he explained that the HCPD "would not accept any retired police officer for the position" and later added that she was "overqualified" and "lived too far away." (*Id.* at ¶¶ 27, 28.) However, Plaintiff later learned that (1) "another retired police officer was indeed selected for the [VMP]" and (2) "at least two persons selected lived on the Eastern Shore of Maryland, at a greater distance from Howard County than [she did]." (*Id.* at ¶ 29.)

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3 At this stage in the proceedings, the Plaintiff need not plead a *McDonnell Douglas* prima facie case. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 at 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing Swierkiewicz *v. Sorema N. A.,* 534 U.S. 506, 508, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)), *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). However, even outside of the*McDonnell Douglas* paradigm, an allegation that someone has offered a pretextual reason can be probative. In particular, [*25] here, Plaintiff's allegation that Defendant offered only pretextual reasons for not hiring her makes her claim of discrimination more plausible.

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On the basis of these allegations, the Court finds that Plaintiff's claim that she suffered unlawful discrimination is plausible and therefore is sufficiently well pleaded to survive the present motion to dismiss. Therefore, the Court will not dismiss Plaintiff's complaint (ECF No. 1).

SYDNEY S. HART, Plaintiff, v. JACOB J. LEW, Secretary, U.S. Department of the Treasury, Defendant.

Civil Action No. ELH-12-03482

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

973 F. Supp. 2d 561; 2013 U.S. Dist. LEXIS 135330; 97 Empl. Prac. Dec. (CCH) P44,920

September 23, 2013, Decided
September 23, 2013, Filed

...As noted, Title VII provides: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual . . . because of

such individual's race, color, religion, sex, or national origin." [**45] 42 U.S.C. § 2000e-2(a)(1). As the statutory language makes clear, Title VII only provides a civil remedy to individuals who were discriminated against on the basis of certain enumerated characteristics, one of which is "sex." *See id.* Plaintiff seems to allege that she was discriminated against based on her sex, because she is a transsexual, and because she failed to conform to gender norms. Defendant does not contend that plaintiff, as a transsexual, is not protected by Title VII's prohibition on sex discrimination, and so I will assume for purposes of this motion that plaintiff is within Title VII's aegis. [13]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

13 Courts have disagreed about whether discrimination against transsexuals is discrimination on the basis of "sex" and thus whether a transsexual may state a claim for relief under **Title VII** when she alleges that she was discriminated against because of her transsexuality. *See generally* Jason Lee, *Lost in Transition: The Challenges of Remedying **Transgender** Employment Discrimination Under **Title VII***, 35 Harv. J. L. & Gender 423, 430 (2012); *compare Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) *with Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984).

...Plaintiff has alleged facts sufficient to state a claim of sex discrimination in employment that is plausible on its face. Her allegations allow the Court "to draw the reasonable inference" that she was discharged because of her sex, her status as a transsexual, and/or her failure to conform with gender norms. *See Iqbal*, 556 U.S. at 680.

Hart's Complaint is replete with allegations of incidents in which her supervisors made improper remarks or took improper [*581] actions based on sex. [14] Further, she alleges that these incidents were motivated by animus or discomfort with plaintiff's status as a transsexual [**50] or with her status as a female. For example, plaintiff alleges that Hansen made several inappropriate remarks regarding plaintiff's transition from male to female. In particular, plaintiff alleges that Hansen commented on her appearance, which led another manager to advise Hansen to "[not] even go there," *id.* ¶ 60; "set a tone for the workgroup" that prompted plaintiff to request EEO sensitivity training for the workgroup, *id.* ¶ 61; criticized plaintiff's skirt length, *id.* ¶ 62, 95; made false accusations, *id.* ¶ 83; and was otherwise hostile and disrespectful toward plaintiff, *id.* ¶ 63. Additionally, plaintiff alleges that Tobias failed to take appropriate disciplinary action after plaintiff reported that a coworker had made inappropriate remarks about Hart's prior EEO complaints and her sex. *Id.* ¶ 108; *see id.* ¶¶ 82, 85.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

14 As noted, plaintiff is barred from premising a stand-alone claim of discrimination on these or other incidents. However, as plaintiff recognizes, *see* Opp. at 2 n.1, she may still use these acts as background evidence to support her claim that her termination was discriminatory and/or retaliatory. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S. Ct. 2061, 153 L. Ed. 2d 106, (2002).

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Moreover, [**51] plaintiff alleges that her supervisors attempted to impede her gender transition in at least three ways. First, plaintiff alleges that even after she started Hormone Replacement Therapy, her supervisors repeatedly denied her access to the women's restroom, and in doing so referred to her "male genitalia." Compl. ¶¶ 45, 48. While the restroom dispute was ongoing, Hendricks issued a letter of admonishment to Hart, which plaintiff suggests had more to do with discomfort with her requests for restroom access than with actual misbehavior. *Id.* ¶¶ 49-50. Second, although Hansen did not request medical documentation for plaintiff's use of sick leave unrelated to her gender transition, *id.* ¶ 64, plaintiff alleges that Hansen requested medical documentation for plaintiff's proposed use of sick leave in connection with her sex change surgery. *Id.* ¶ 68. Third, plaintiff alleges that, just prior to her sex change surgery, Hansen refused to accommodate her request for a telephone workload review despite his regular practice of conducting telephone reviews with other revenue agents. *Id.* ¶ 70.

Plaintiff has also alleged that she was treated less favorably after her gender reassignment surgery. For [**52] example, plaintiff alleges that Tobias and Hansen decreased her ratings on performance reviews from an average of 4.2 to an average of 3.2 after she returned to work following her surgery, *id.* ¶ 79, and that "the severity and frequency of disciplinary action from IRS Management" increased after she began her transition from male to female. *Id.* ¶ 115.

Defendant does not appear to seriously contest that plaintiff has stated a claim for sex discrimination sufficient to survive a 12(b)(6) motion. Defendant's Motion, styled alternatively as a motion to dismiss or for summary judgment, speaks almost entirely in the language of summary judgment. For example, the Motion makes extensive references to the administrative record, *see, e.g.*, Memo at 11; argues that plaintiff has failed to make out a *prima facie* case under the *McDonnell Douglas* proof scheme, *see, e.g., id.* at 13; and asserts that plaintiff cannot show that the Department's nondiscriminatory reasons for terminating her employment were pretextual. *Id.* at 14. However, as discussed above, the Court generally does not refer to matters outside of the pleadings in resolving a motion to dismiss, nor does it resolve factual [*582] disputes. Moreover, [**53] and of critical import here, plaintiff is not required by Rule 8(a) to make out a *prima facie* case at this stage. Put another way, the *McDonnell Douglas* burden-shifting approach, central to defendant's argument, does not apply at the motion to dismiss stage.

Defendant will have the opportunity to rebut plaintiff's contentions and to proffer legitimate, nondiscriminatory reasons for its termination of plaintiff's employment, such as the deficiencies and inadequacies of her performance. *See* Memo at 11 (arguing that "the Agency proposed the removal of Plaintiff based on 14 specifications of failing to follow management directives, two specifications of exhibiting unprofessional behavior, three specifications of failing to follow proper leave procedures, and 15 specifications of being AWOL"); *see also McDonnell Douglas*, 411 U.S. at 802. And, I may ultimately be persuaded by evidence supporting defendant's explanation. However, to survive a motion to dismiss, a plaintiff need only show that she was terminated "under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. In light of Hart's allegations that her supervisors harbored animus and hostility [**54] regarding her appearance, dress, sex, and gender transition, I conclude that she has presented allegations sufficient to withstand a motion to dismiss. Accordingly, I will deny defendant's Motion as it relates to plaintiff's claim in Count I that her termination was the product of sex discrimination.

LEANNA A. MUIR v. APPLIED INTEGRATED TECHNOLOGIES, INC.

Civil Action No. DKC 13-0808

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

2013 U.S. Dist. LEXIS 167680; 120 Fair Empl. Prac. Cas. (BNA) 1754

November 26, 2013, Filed

...Plaintiff has submitted an affidavit pursuant to Rule 56(d) indicating [*25] that Defendant's motion for summary judgment is premature and that discovery is necessary before she can adequately respond to the motion. (ECF No. 17-1).

...Plaintiff's affidavit identifies discovery needs relevant to the central issue of this case: whether Defendant was terminated because of a failure to maintain a security [*28] clearance, or whether this reason was merely a pretext by Defendant, hiding the real reason: impermissible discrimination on the basis of Plaintiff's sex. Additionally, even if Plaintiff's employment with DIA was terminated on DIA's accord, there would still be an issue of whether Defendant's subsequent search for a replacement position was purposefully less thorough because of Plaintiff's transgender status. Therefore, Defendant's motion for summary judgment is premature and will be denied.

RAYMOND R. HENDERSON, Plaintiff, v. LABOR FINDERS OF VIRGINIA, INC., et al., Defendants.

Civil Action No. 3:12cv600

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

2013 U.S. Dist. LEXIS 47753

April 1, 2013, Decided
April 2, 2013, Filed

As an initial observation, this action presents a tension between two well-settled principles of law. First, there is no question that "Title VII does not afford a cause of action for discrimination based on sexual orientation." Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 143 (4th Cir. 1996). At the same time, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their [gender]

group." Price Waterhouse v. Hopkins, 490 U.S. 228, 250, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion). [3]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

3 Although there does not appear to be direct precedent from the Fourth Circuit, the overwhelming majority of Courts of Appeal have applied Price Waterhouse to permit recovery, under Title VII, for a male employee who is discriminated against for failing to comply with accepted gender norms. See e.g., Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) ("[I]ndividual employees who face adverse employment actions as a result of their employer's animus [*14] toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII."); Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."); Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001) ("[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."); Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 874 (9th Cir. 2001) (recognizing a Title VII claim where "the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[A] man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.").

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Of course, it is often difficult to draw the distinction between discrimination on the basis of gender [*15] stereotyping and discrimination on the basis of sexual orientation. After all, "sex stereotyping is central to all discrimination: Discrimination involves generalizing from the characteristics of a group to those of an individual, making assumptions about an individual because of that person's gender, assumptions that may or may not be true." Centola v. Potter, 183 F. Supp. 2d 403, 408-09 (D. Mass. 2002). "Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality. A homosexual male exhibiting an attraction toward other males in the workplace would not be behaving as a man would stereotypically be expected to behave." Howell v. North Central College, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004). The distinction is further complicated by a trend of advice encouraging homosexual plaintiffs who are discriminated against based on their sexual orientation to bring **Title VII**claims under a gender-stereotyping theory. See e.g., Kristin Bovalino, How the Effeminate Male Can Maximize His Odds of Winning **Title VII** Litigation, 53 Syracuse L. Rev. 1117, 1134 (2003) ("[**G]ay** plaintiffs bringing claims under **Title VII** should [*16] emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality.").

Further muddling the analysis is the fact that, as a result of the well-documented relationship between perceptions of sexual orientation and gender norms, gender-loaded language can easily be used to refer to perceived sexual orientation and vice versa. See e.g., Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000) ("Curtis called him a 'bitch' which, according to Gibson, means a 'woman,' or a 'faggot.'"); Doe v. City of Belleville, 119 F.3d 563, 593 n.27 (7th

Cir. 1997) ("Indeed, a homophobic epithet like "fag," for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation."). Amidst all of this, the Court must be cognizant that Title VII does not necessarily prohibit "any form sexually tinged teasing" and the plaintiff cannot recover where the situation alleged is just "gross, vulgar, male horseplay in a male workplace." English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 847-48 (E.D. Va. 2002). With those principles in mind, the Court turns to the case at hand.

... Throughout his Second Amended Complaint, Henderson alleges a number of specific instances of his being selected for a work assignment reluctantly and only when no one else was available, which he alleges was inconsistent with the expected assignment system. In addition, he alleges several instances of the decision-making supervisors at Labor Finders commenting that Henderson was a "faggot," or a "woman," or "not a man." Henderson alleges that this indicates discrimination on the basis of sex. Of course, while a plaintiff must allege specific facts to support his claim, "intent may be pleaded [*19] generally (which is to say, in a conclusory fashion)." Burks v. Raemisch, 555 F.3d 592, 594 (7th Cir. 2009); see also Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). As discussed above, a Title VII claim for discrimination based on sex can be based on discrimination against an employee for failing to comply with sexual stereotypes. [4]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
4 Henderson is a heterosexual male. (Second Amend. Compl. at ¶ 206). Thus, this action does not present the problem of attempting to bootstrap discrimination on the basis of sexual orientation into a **Title VII**claim under the notion that a sexual attraction to another male does not comply with gender norms regarding appropriate "male" behavior. That claim would be barred by unequivocal precedent. Rather, Henderson's claim is that both the obviously gendered epithets (e.g. "bitch" and "woman") as well as those more traditionally associated with sexual orientation (e.g. "faggot," "homo," and "**gay**") were all intended to denote accusations of effeminacy.

FIFTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff - Appellee, v. **BOH BROTHERS** CONSTRUCTION COMPANY, L.L.C., Defendant - Appellant.

No. 11-30770

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

731 F.3d 444; 2013 U.S. App. LEXIS 19867; 120 Fair Empl. Prac. Cas. (BNA) 15

September 27, 2013, Filed

...On appeal, Boh Brothers argues that (1) the EEOC cannot, as a matter of law, rely on gender-stereotyping evidence to establish a same-sex harassment claim, and (2) even if it could, the evidence here was insufficient to sustain the [**15] jury verdict. As explained below, both of these arguments fail.

...The *Oncale* court charted three evidentiary paths for plaintiffs to make this showing in the context of a same-sex harassment claim: (1) a plaintiff may show that the harasser was homosexual and motivated by sexual desire; (2) a plaintiff may show that the harassment was framed "in such sex-specific [**20] and derogatory terms . . . as to make it clear that the harasser [was] motivated by general hostility to the presence" of a particular gender in the workplace; and (3) a plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id*. Boh Brothers argues that these three routes are the *exclusive* paths to success on a Title VII same-sex harassment claim. Our sister circuits uniformly disagree.[6] Every circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature. Considering that the Court used "for example" and "[w]hatever evidentiary route the [*456] pplaintiff chooses to follow" in its discussion of those categories, we agree. *See id*. at 80-81.

In [**22] sum, HN13 nothing in *Oncale* overturns or otherwise upsets the Court's holding in *Price Waterhouse*: a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping.[7] Thus, the EEOC may rely on evidence that Wolfe viewed Woods as insufficiently masculine to prove its Title VII claim.[8]

2.

Boh Brothers further argues that, even if the EEOC's sex-stereotyping theory is cognizable in this context, the evidence is insufficient to support the jury's finding that Wolfe harassed Woods "because of . . . sex." [**24] We disagree.

HN14 In conducting this intent-based inquiry, we focus on the alleged harasser's subjective perception of the victim. Thus, even an employer's wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim. *See, e.g., Black v. Pan Am. Labs., L.L.C.*, 646 F.3d 254, 260 (5th Cir. 2011) (affirming a jury verdict in favor of a female sexual-harassment plaintiff who introduced evidence that decision-makers made sex-based comments—that "women [are] a detriment to the company," women "get hired on, get married, and/or get pregnant and they leave," and that the plaintiff did not need to worry about her sales quota because "it shouldn't matter to you, you're not the breadwinner anyway"—without requiring the plaintiff to show that her harasser's obviously sexist perceptions were true); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (holding that a Muslim man's national-origin discrimination claim survived summary judgment even though his harassers did not know his country of origin) (collecting cases).[9] We do not require a plaintiff to [*457] prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective [**25] truth; here, for example, that Woods was not, in fact, "manly."[10] Rather, in considering the *motivation* behind a harasser's behavior, we look to evidence of the harasser's subjective view of the victim.[11]

Applying these principles here, and drawing all [**27] reasonable inferences in the light most favorable to the verdict, there is enough evidence to support the jury's conclusion that Wolfe harassed Woods because of sex. Specifically, the EEOC offered evidence that Wolfe, the crew superintendent, thought that Woods was not a manly-enough man and taunted him tirelessly. Wolfe called Woods sex-based epithets like "fa--ot," "pu--y," and "princess," often "two to three times" per day.[12] Wolfe himself admitted that these epithets were directed at Woods's masculinity:

In addition to this name-calling, Wolfe mocked Woods with several other sexualized acts. For example, Woods testified that Wolfe would approach him from behind [**31] and "hump" him two to three times per week (which equates to more than 60 instances of simulated anal sex), that Wolfe exposed his genitals to Woods (sometimes while smiling and waving) about ten times, and that Wolfe suggested that he would put his penis in Woods's mouth.[13]

Viewing the record as a whole, a jury could view Wolfe's behavior as an attempt to denigrate Woods because—at least in Wolfe's view—Woods fell outside of Wolfe's manly-man stereotype.[14] Thus, we [*460] cannot say that no reasonable juror could have found that Woods suffered harassment because of his sex. Having reached this conclusion, we turn to the second critical [**32] question on appeal: whether the alleged abuse was sufficiently severe or pervasive to support Title VII liability.

SIXTH CIRCUIT

ANGELA MINK, Plaintiff, v. PASSPORT HEALTH COMMUNICATIONS, INC., Defendant.

Case No. 3:12-cv-00446

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2013 U.S. Dist. LEXIS 109570; 119 Fair Empl. Prac. Cas. (BNA) 955

August 5, 2013, Filed

...Similarly, Mink's Complaint alleged that Shaw "regularly" made inappropriate comments to her of a sexual nature, including "same sex advances."

...A more difficult question is whether, based on the evidence, Mink actually engaged in activity protected against retaliation by **Title VII.** HN10 As the Sixth Circuit has construed **Title VII,** "sexual orientation is not a prohibited basis for discriminatory acts." *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516, 519 (6th Cir. 2011) (quoting *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006)). Thus, a claim premised on sexual orientation discrimination

alone does not state a claim upon which relief may be granted.*Gilbert*, 432 F. App'x at 519. For example, **Title VII** does not protect [*31] an employee from harassing conduct where the charged conduct "is more properly viewed as harassment based on [the employee's] perceived homosexuality, rather than based on gender non-conformity." *Gilbert* (quoting *Gilbert*, 432 F. App'x at 519-20). *Vickers*, *Gilbert*, and cases applying them have dealt with the issue of heterosexuals discriminating against homosexuals or perceived homosexuals, where the aggrieved employee did not make any allegation that his or her workplace appearance and/or "gender non-conformity" played any role in the discrimination. *See, e.g., Gilbert*, 432 F. App'x at 519 (no protection for openly **gay** employee referred to as a "faggot," because, based on complaint, "[f]or all we know, Gilbert fits every male 'stereotype' save one — sexual orientation — and that does not suffice to obtain relief under **Title VII**"); *Vickers*, 453 F.3d at 759 (security guard harassed at work for being a "fag" and "**gay**" not protected by **Title VII,** where plaintiff did not allege "non-conforming behavior observed at work or affecting his job performance").

On the other hand, the Supreme Court and the Sixth Circuit have found that, HN11 under appropriate circumstances, Title VII forbids same-sex [*32] sexual harassment. *SeeOncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *Wasek v. Arrow Energy Servs. Inc.*, 682 F.3d 463, 468 (6th Cir. 2012). As set forth in *Wasek*, a case that post-dates *Vickers* and *Gilbert*, "a trier of fact may infer that harassment occurred because of sex when the plaintiff can produce (1) 'credible evidence that the harasser was homosexual,' (2) evidence that 'make[s] clear that the harasser is motivated by general hostility to the presence of [the same sex] in the workplace,' or (3) 'comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'" *Id.* (quoting *Oncale*, 523 U.S. at 79). This approach reflects the Supreme Court's finding in *Oncale* that an employee could maintain a Title VII sexual harassment claim by showing, for example, that a same-sex supervisor made unwanted sexual advances on the employee based on the employee's gender — *i.e.*, because they were same sex. *Oncale*, 523 U.S. at 80-81 ("[T]he challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume that those proposals would not have been made [*33] to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.")

Furthermore, in *Wasek*, the Sixth Circuit outlined a crucial distinction: HN12 Title VII can protect a plaintiff from retaliation for reporting potential same-sex harassment, even though the conduct of which the plaintiff complained was not actually actionable harassment under the law. To obtain protection against retaliation under Title VII, a plaintiff simply must have had a "reasonable and good faith belief" that the harassing conduct she was reporting constituted a violation of Title VII. *Wasek*, 682 F.3d at 469. Thus, the operative question is whether an employee alleging same-sex harassment "could have had a reasonable, good faith belief that [s]he was being sexually harassed." *Id.* [6]

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6 Notably, in *Vickers*, the appellant only addressed the viability of his Title VII discrimination claim on appeal, but did not address the viability of his Title VII retaliation claim. 453 F.3d at 761 n.1. Thus, the Sixth Circuit found that the appellant had waived the right to challenge dismissal of the retaliation claim [*34] and, therefore, the court did not address the potential merits of that argument on appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

For example, in *Wasek*, an employee alleged that his male colleague often harassed him by simulating same-sex acts and making unwanted verbal sexual advances, and that his employer retaliated against him (the plaintiff) for complaining about this harassment. *Id.* at 465-467. Although the Sixth Circuit agreed with the district court that the plaintiff could not establish a same-sex *discrimination* claim under Title VII because he had failed to show that the harassing supervisor was homosexual, [7] the Sixth Circuit held that the plaintiff nevertheless had engaged in protected activity for purposes of his *retaliation* claim. The court found that (1) it was not an "unreasonable mistake of law" for Wasek to believe that the supervisor's same-sex harassment might have constituted actionable harassment under Title VII; and (2) Wasek had a reasonable, good faith belief that the supervisor's conduct amounted to sexual harassment, given that Wasek had suffered unwanted sexual touching and communications in the workplace on multiple occasions. *Id.* at 469-70. Thus, the court concluded that "it was reasonable for [*35] Wasek to believe that he was the victim of sexual harassment, even if that belief was ultimately at odds with the law. Thus, Wasek's complaints about sexual harassment were protected activity." *Id.* [8]

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7 The court found that, of the three methods of showing unlawful same-sex sexual harassment outlined in *Oncale*, only the first — proceeding under the theory that a same-sex supervisor was homosexual — was available to the plaintiff under the factual circumstances presented. *Id.* at 467-68. The court found that the record did not establish that the supervisor was homosexual. *Id.* at 468.8 Although the court found that Wasek's complaints constituted protected activity, it nevertheless affirmed the district court's dismissal of Wasek's retaliation claim for failure to establish the requisite causal connection. *Wasek*, 682 F.3d at 471-72.

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Here, although it is a close question, the court finds that there is sufficient evidence from which a rational factfinder could conclude that Mink believed that Shaw's conduct amounted to actionable same-sex sexual harassment under **Title VII.** Shaw was openly homosexual at the time of the investigation. According to Mink, to that point, Shaw had engaged in repeated [*36] instances of same-sex harassment by making sexually charged and/or suggestive comments to Mink, such as suggesting that Mink should "switch sides," that Mink would make a good "lipstick **lesbian**," and that Shaw knew "ladies who would like you." Shaw suggested that Mink should abandon her boyfriend and join the**lesbian** "team." These comments arguably were premised on Mink's gender as a female and either implicitly or explicitly suggested that Mink should engage in sexual activity with Shaw's female friends, if not Shaw. Mink told Shaw to stop multiple times, but Shaw persisted. Having been (allegedly) subjected to this harassing conduct, including unwanted suggestions of sexual activity premised on Mink's gender as a female, there is at least a question of fact as to whether Mink held a reasonable, good faith belief that she was being sexually harassed, notwithstanding the fact that this belief ultimately may have been wrong under the law. *See Wasek*, 682 F.3d at 470. Thus, although PHC argues that Mink could not have maintained a **Title VII** discrimination claim against PHC — indeed, Mink never brought suit to allege discrimination — Mink may still have been protected against retaliation [*37] by **Title VII.**

SONIA M. GRAHAM, PLAINTIFF, v. CITY OF HOPKINSVILLE, KENTUCKY, et al., DEFENDANTS.

CIVIL ACTION NO. 5:12-CV-23

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION

2013 U.S. Dist. LEXIS 69007

May 15, 2013, Decided
May 15, 2013, Filed

...Count II of Graham's amended complaint asserts claims [*18] under both Title VII and the KCRA [5] for sexual harassment through a hostile work environment.

...Defendants first argue that Graham cannot show she was engaged in protected activity...Graham argues that the personality conflicts of which she complained "may" have been "brought upon in part by her Hispanic ethnicity" or the fact that she "was not a **lesbian** as several of her supervisors were." Thus, she argues, her complaints about personality conflicts were essentially complaints of discrimination. First, Graham offers no support for her allegations, and the Court can find none in the record. Second, any claim under **Title VII** or the KCRA based on Graham's heterosexual orientation is not actionable. *See Vickers*, 453 F.3d at 762 (**Title VII)** *and Roberson v. Brightpoint Servs., LLC*, 2008 U.S. Dist. LEXIS 23020, 2008 WL 793636, *4 (W.D. Ky. Mar. 24, 2008) (KCRA).

SEVENTH CIRCUIT

LYDIA E. VEGA, Plaintiff, v. CHICAGO PARK DISTRICT, Defendant.

No. 13-CV-451

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

958 F. Supp. 2d 943; 2013 U.S. Dist. LEXIS 104097; 119 Fair Empl. Prac. Cas. (BNA) 553; 97 Empl. Prac. Dec. (CCH) P44,875

July 25, 2013, Decided
July 25, 2013, Filed

...Vega is an openly gay Hispanic female who worked for Park for twenty-two years before her termination on September 10, 2012, for allegedly falsifying work hours on her timesheet.

...Vega claims Park discriminated against her because her physical appearance does not conform to the female stereotype. She further claims her unconventional appearance factored into Park's decision to investigate and terminate her employment. Vega puts forward two occasions as evidence. First, the investigator's comment that Vega "looks like a guy." Second, the questions Park's attorney asked Vega about the length and style of her hair and the style of her dress.

The workplace comments in the instant case do not rise to the level of those in *Price Waterhouse. See id.* at 235 (sex stereotyping found where female plaintiff denied partnership and employer relied on gender stereotyped comments as motivating factor in decision, including comments that plaintiff was "macho," "overcompensated for being a woman," and [**32] was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"). However, *Price Waterhouse*dealt with requirements for a plaintiff to *prove* a prima facie case, which is not the pleading standard at the motion to dismiss stage. Vega is only required to plead enough facts for a plausible claim, with reasonable inferences drawn in her favor.

Standing alone, the comment by the investigator would not create an inference that Park investigated and terminated Vega because of her noncompliance with the female stereotype. As pointed out by Park, the investigation had already commenced by the time the investigator made the comment. It is the questions by Park's attorney at the post-termination hearing that presents more probative evidence that Vega's unconventional physical characteristics possibly played at least some role in the decision to terminate her. There is, in fact, little explanation as to why else the attorney asked the questions.

Park argues that Vega has failed to create an inference of causation between her alleged instances of sex stereotyping and the decision to investigate then terminate her. By providing [**33] at least two instances of stereotypical comments and questions, Vega's claim exceeds the speculative level. She has put forward at least some evidence to allow her to explore the claim further. [5] *See Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 U.S. Dist. Lexis 57680, *11 (N.D. Ind. Aug. 3, 2007) ("[W]hether [defendant] acted with a stereotypical motivation needn't be determined at [the motion to dismiss] stage.... [Plaintiff's] factual allegations supporting her claim she was terminated because of her failure to comply with male stereotypes supports a plausible claim she suffered discrimination because of her sex."); *see also Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 981 (W.D. Wis. 2003) (whether supervisor's decision to not recommend plaintiff was based on sex stereotypes under Title VII action was a question for the jury).

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5 It should be noted that moving forward Vega must produce evidence showing those responsible for terminating her employment considered her nonconformity with the female stereotype in their decision (illegitimate reason), rather than strictly the reasons given in her termination letter (legitimate reasons).

EIGHTH CIRCUIT

DOROTHY A. JOHNSON, Plaintiff, vs. ERIC E. SHINSEKI, Secretary, Department of Veterans Affairs, Defendant.

No. 1:12-CV-00187SNLJ

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, SOUTHEASTERN DIVISION

2013 U.S. Dist. LEXIS 67561

May 13, 2013, Decided
May 13, 2013, Filed

...Title VII provides that "[i]t shall be an unlawful employment practice ... to discriminate against any individual ... because of ... sex." 42 U.S.C. § 2000e-2(a)(1). Plaintiff claims she was discriminated against because of her sexual orientation. Specifically, she alleges that she was not promoted because she is a **lesbian**. But **Title VII** does not mention "sexual orientation," and the Eighth Circuit has held that "**Title VII** does not prohibit discrimination against homosexuals." *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989). [*5] The *Williamson* decision was at least in part affected by the United States Supreme Court's decision in *Oncale*, in which that Court unanimously rejected a*per se* rule that same-sex sexual harassment was non-cognizable under **Title VII.** *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *see also Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 864 n.3 (8th Cir. 1999) (reversing district court's dismissal of a same-sex harassment case in which the district court had relied on *Williamson*, and observing that *Williamson* was a pre-*Oncale* case). However, *Oncale* did not change the requirement that plaintiffs demonstrate that the discrimination or harassment took place "because...of sex." *See Schmedding*, 187 F.3d at 865.

Few courts have addressed situations like plaintiff's, in which she alleges only that she was not promoted because of her sexual orientation. Plaintiff does not allege harassment of any kind, by any individual or group. Although the Eighth Circuit does not appear to have opined on the matter of whether *Oncale* suggests a different result from that required by*Williamson* under these circumstances, other Circuits have stated that *Oncale* did not change the "well-settled [*6] precedent that 'sex' refers to membership in a class delineated by gender." *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *see also Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001). Although there may be a Title VII claim in cases that involve same-sex harassment, "Title VII does not proscribe harassment simply because of sexual orientation." *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (citing *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-52 & n. 3 (4th Cir. 1996); *Williamson*, 876 F.2d at 70). Indeed, "Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Bibby*, 260 F.3d 257, 261 (citing, *e.g.*, Employment Nondiscrimination Act of 1996, S.2056, 104th Cong. (1996);

Employment Non Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)). It is thus clear that non-harassment, discrimination claims may not be made on the basis of sexual orientation, as well. *See Williamson*, 876 F.2d at 70; *see also Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("sexual orientation is not a prohibited [*7] basis for discriminatory acts under Title VII").

As a result, because plaintiff is plainly making a Title VII claim on the basis of her sexual orientation, a characteristic not protected by Title VII, plaintiffs complaint must be dismissed.

SHARON MARIE ROBERTSON, Plaintiff, vs. SIOUXLAND COMMUNITY HEALTH CENTER and MICHELLE STEPHAN, Defendants, MICHELLE STEPHAN, Counterclaimant, vs. SHARON MARIE ROBERTSON, Counterclaim Defendant,

No. C 13-4008-MWB

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

938 F. Supp. 2d 831; 2013 U.S. Dist. LEXIS 51378; 118 Fair Empl. Prac. Cas. (BNA) 401

April 10, 2013, Decided
April 10, 2013, Filed

In [**2] this action, the female former human resources director for a medical practice alleges that the medical practice and its female chief executive officer discriminated against and harassed her because of her sex and/or her sexual orientation and retaliated against her for resisting a sexually hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and the Iowa Civil Rights Act (ICRA), IOWA CODE CH. 216,...

...The defendants argue that it is well-settled that Title VII's prohibitions against discrimination and harassment based on sex do not include discrimination based on sexual orientation. Thus, they contend that Robertson's Title VII claims based on sexual orientation in Count I must be dismissed. Robertson acknowledges that, under the current state of federal law, discrimination based on sexual orientation generally is not covered by Title VII, so that her causes of action based on sexual orientation discrimination in Count I can proceed only under the ICRA, IOWA CODE § 216.6(1)(a).

Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire . . . or otherwise to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e–2(a)(1). Although courts have recognized that "[g]ender stereotyping can violate **Title VII** when it influences employment decisions," *seeHunter v. United Parcel Serv., Inc.,* 697 F.3d 697, 702 (8th Cir. 2012) (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)), and the Supreme [**23] Court has recognized

that **Title VII** may protect against "same-sex harassment," if it is shown to be "because of sex," *see Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998), the Eighth Circuit Court of Appeals, like other courts, has concluded that "**Title VII** does not prohibit discrimination against homosexuals." *Williamson v. A.G. Edwards and Sons, Inc.,* 876 F.2d 69, 70 (8th Cir. 1989); *accord Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 762 (6th Cir. 2006)(concluding that, under **Title VII,** "sexual orientation is not a prohibited basis for discriminatory acts"); *Hamm v. Weyauwega Milk Prods., Inc.,* 332 F.3d 1058, 1066 (7th Cir. 2003) (concluding that a claim of harassment on the basis of sexual orientation cannot give rise to a **Title VII** retaliation claim); *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257, 261 (3d Cir. 2001) ("**Title VII** does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would [*842] have extended **Title VII** to cover sexual orientation."). Robertson does not assert that she is alleging harassment because of sex arising from rumors that falsely labeled her a **lesbian**in an effort to debase [**24] her femininity. *Cf. Schmedding v. Tnemec Co., Inc.,* 187 F.3d 862, 865 (8th Cir. 1999) (considering a male plaintiff's claim alleging that he was falsely labeled a homosexual to debase his masculinity). Rather, she acknowledges that she *is* a **lesbian** and she alleges that she was harassed and discriminated against *both*because of her sex (female) *and* because of her sexual orientation (**lesbian**). **Title VII** has not been construed to permit the latter claim.

Therefore, the part of the defendants' motion to dismiss seeking dismissal of Title VII claims in Count I based on sexual orientation is granted. On the other hand, the ICRA expressly prohibits discrimination based on "sexual orientation," *see* IOWA CODE § 216.6(1)(a),[6] so that Robertson's claims of discrimination and harassment based on sexual orientation may proceed under state law.

NINTH CIRCUIT

RACHEL A PRICE, et al., Plaintiffs, v. EQUILON ENTERPRISES LLC, d/b/a SHELL OIL PRODUCTS US, a Delaware Limited Liability Company, Defendant.

CASE NO. C11-1553-JCC

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2014 U.S. Dist. LEXIS 20611; 121 Fair Empl. Prac. Cas. (BNA) 1462

February 18, 2014, Decided
February 18, 2014, Filed

... To the extent Plaintiffs' claims regarding the denial of those promotions rest on discrimination due to either gender or gender nonconformity, the Court declines to grant summary judgment on those claims. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (holding that Title VII bars discrimination on the basis of sex stereotypes, which may manifest in a manner similar to sexual orientation discrimination) (en banc).

LEE JOHNSON, Plaintiff v. PSI PIZZA, INC., t/a Domino's Pizza and MICHAEL J. NOLAN, Defendants

CIVIL ACTION NO. 3:11-1698

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

2014 U.S. Dist. LEXIS 4188

January 14, 2014, Decided
January 14, 2014, Filed

...When the plaintiff was in Brazil, he alleges that defendant Nolan, on at least one occasion, commented to workers that he was in Brazil "molesting little boys." However, upon his return to the United States, the plaintiff immediately sought employment with the defendant and did not seek employment anywhere else. The plaintiff returned to the employ of defendant PSI with defendant Nolan as his supervisor. At that time, [*8] the plaintiff made no attempt to address the issue of sexual harassment with management.

The plaintiff testified at his deposition that when he returned from Brazil on a previous occasion in 2005 or 2006, he became roommates with a co-worker, Robert Magor. In his complaint, the plaintiff alleges that defendant Nolan would frequently harass the two about this asking questions such as "Since [plaintiff] moved in, 'Who dresses as the woman?', 'Who takes it up the ass?'" and "Do you share the same bed?" The plaintiff testified that these comments took place in a three to four month period in 2008, with the comment regarding sharing a bed having occurred in the Winter/Spring of 2008. Although the plaintiff testified that defendant Nolan would "continually" make these comments, even after Mr. Magor transferred to another store in 2008, he could not testify as to when these comments were specifically made. Mr. Magor testified that all events witnessed by him occurred in 2008, prior to the end of March, including an event when Mr. Magor and the plaintiff were allegedly asked by defendant Nolan to compare penises.

Despite his claims of continuous sexual harassment by defendant Nolan, after the [*9] harassment allegedly began, the plaintiff testified that he went golfing with defendant Nolan on ten or more occasions. In addition, in September of 2009, the plaintiff testified that he attended a baseball game with defendant Nolan in Philadelphia.

The plaintiff further alleges that, both before and after Brazil, defendant Nolan repeatedly subjected him to vivid descriptions of his sexual encounters with random females, descriptions of homosexual activity, and accusations that the plaintiff is "gay" and "molests little boys." The plaintiff testified that these comments occurred in the Winter/Spring of 2008.

The plaintiff alleges that defendant Nolan would brag "When I was younger" and would make reference to "sexual encounters" saying he would "kill [his] wife to get [another woman]," but

was no more descriptive. The plaintiff testified at his deposition that he does not know the exact date(s) for this conduct, but believes that it occurred in "2008 and 2009."

...Here, initially, the plaintiff has not established that any of the actions taken by defendant Nolan were intentional discrimination based upon the plaintiff's sex. Moreover, the plaintiff has alleged that he was subjected to abusive language, some of which was of a sexual nature, but indicates that he was never subjected to any physical contact. He alleges [*17] that defendant Nolan repeatedly bragged about his own random sexual encounters and made references to the plaintiff and a co-worker being **gay.** Taken individually and together, these allegations do not rise to the level of being so severe and pervasive that they adversely altered the terms and conditions of plaintiff's employment. While conducting profane or sexual conversation at work may be boorish and uncouth, it does not rise to the level of creating a hostile workplace environment. Compare Benette v. Cinemark U.S.A., Inc., 295 F.Supp.2d 243, 248 (W.D.N.Y. 2003) (supervisor's explicit discussions of bodies of plaintiff and other female coworkers, repeated use of word "fuck," and questions about plaintiff's sexual relationships did not rise to level of creating hostile environment); also compare Donaldson v. Norfolk Cty. South. Ry., Co., 2011 U.S. Dist. LEXIS 90572, 2011 WL 3568843, at *10 (Aug. 15, 2011 M.D.Pa.) (repeated instances of graffiti describing sexually explicit conduct of plaintiffs being posted in workplace, without evidence that it was created because of plaintiffs' sex, insufficient to maintain **Title VII** hostile work environment claim).

In light of the above, and the failure of the plaintiff to [*18] file any opposition to the motion, the court finds that the defendants are entitled to summary judgment with respect to the plaintiff's hostile work environment claims.

TENTH CIRCUIT

RICKYE B. HENDERSON, Plaintiff, vs. OKLAHOMA ENVIRONMENTAL MANAGEMENT AUTHORITY, Defendants.

NO. CIV-12-1321-HE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

2013 U.S. Dist. LEXIS 153264

October 25, 2013, Decided
October 25, 2013, Filed

...As noted above, a plaintiff seeking to make out a prima facie [*16] showing of retaliation under Title VII must show that (1) he engaged in protected opposition to discrimination, (2) that he was subjected to an adverse employment action, and (3) that a causal connection exists between the protected activity and the adverse action. Defendant challenges the first element,

arguing that plaintiff did not object to a practice made actionable by the anti-discrimination statutes. The court agrees.

Plaintiff's evidence is that he complained to Griesel on multiple occasions about abusive comments of a sexual nature from Derieg. The comments he objected to were to what he viewed as "**gay** stuff." Plaintiff's deposition testimony described his arguably sex-related complaints to Griesel this way [Doc. #19-4, dep. pp. 74-5]:
Q. What did you complain about specifically?

A. Okay. Well, Danny – I don't know if this is just something they do out there or whatever. But they'd be – they'd be talking about a lot of **gay** stuff, man. You know, and telling each other to blow each other. And, you know, he felt like he could talk to me like that.

And I told David – I mean not David but Danny. I told Danny. I said "Hey, man, I don't appreciate a person telling me to, you know, do [*17] that and telling me, you know, I look, you know, like a woman and I act like a woman, you know, I can't take, you know, criticism and just all kind of stuff, man."

And I told him. I said, "Hey, man, I'm not comfortable with it, man, with you talking like that on **gay** stuff.

. . .

I told David Griesel, I said "Hey, man," I said, "I'd appreciate it if you'd talk to Danny, you know, about him making them comments, man, in a sexual way." I said, "Man, I'm 100 percent man. I'm married. And some of the things that, you know, he – he's talking about, man, that's disrespectful to me. You know, it's really sexual harassment."
Such comments, if made, surely constitute crude and obnoxious behavior, but that does not make them actionable "sexual harassment" within the meaning of **Title VII,** or a basis for a retaliation claim.

Opposition to an employer's conduct is protected by Title VII only if it is opposition to a practice made unlawful by Title VII. Petersen v. Utah Dep't. of Corr., 301 F.3d 1182, 1188 (10th Cir. 2002). Title VII, however, does not protect against sexual orientation discrimination. Larson v. United Air Lines, 482 F. App'x 344, 351 (10th Cir. 2012). It prohibits only conduct that falls [*18] within the definition of discrimination based on sex or gender. Therefore, in circumstances like those existing here, where there is no evidence suggesting a basis for same sex activity constituting discrimination based on "sex" (per discussion of Oncale above), plaintiff's complaints did not constitute objections to conduct prohibited by Title VII. His complaints were therefore not protected activity within the meaning of the statute.[9] Defendant's motion will be granted as to plaintiff's sex-based retaliation claim.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
9 *It is true that a plaintiff may maintain, and potentially prevail on, a claim for retaliation even though the underlying conduct is ultimately determined not to have violated Title VII. Dick v. Phone Directories Co.,397 F.3d 1256, 1267 (10th Cir. 2005). Here, however, unlike Dick (which also involved a same sex situation), there is no evidence offered which might arguably establish sex discrimination by any of the evidentiary avenues outlined in Oncale.*

ELEVENTH CIRCUIT

SANIYA PARRIS, Plaintiff, v. KEYSTONE FOODS, LLC, Defendant.

Case No.: 4:12-CV-777-VEH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION

959 F. Supp. 2d 1291; 2013 U.S. Dist. LEXIS 111036

August 7, 2013, Decided
August 7, 2013, Filed

...She alleged that Equity violated Title VII of the Civil Rights Act of 1964 by terminating her "because of her sex (gender nonconformity) and/or in retaliation for her having complained of unlawful workplace termination."

...More generally, Ms. Parris has not offered any factual evidence from which a fact-finder could infer discriminatory intent behind her termination. She devotes much time in her deposition testimony to describing what she perceived as the discriminatory workplace environment she faced during her employment. She identifies the following actions and comments she encountered during her employment with Equity:
• Even after she changed her name to "Saniya," some co-workers continued to call her "K'Shun" or "Andrew." *Id.* at 29.

• She once overheard a co-worker tell someone that she was "not a real girl." *Id.*

• She was once told by a co-worker that Tyler Smith, her supervisor for a time, had told someone else that she referred to herself as "K'Shun" but "that her real name [was] Andrew." *Id.* at 30.

• She believed that Mr. Smith had divulged her former legal name to her co-workers. *Id.* at 67.

• She was once told by a co-worker that there was a rumor that she had stated that she would not have a sex change operation because she was afraid of the pain. *Id.* at 29.

• She was once told by a co-worker that she could get in trouble for using the women's [**32] restroom. *Id.* at 32.

• Mr. Smith brought her into a meeting where he discussed co-worker accusations that she was inappropriately hugging others in the workplace. *Id.* at 34.

• On another occasion, Ms. Hale spoke to her about inappropriately touching a co-worker. *Id.* at 36-37.

• A co-worker referred to her as "shehim" once, "dude" more than twice, [*1308] and "nigga" once or twice. Another co-worker consistently called her "A." *Id.* at 68.

• A co-worker once cursed her and pushed her face during an argument. *Id.* at 46-47.

• A co-worker began to treat her more rudely once he learned of her former legal name. *Id.* at 53-54.

• Two co-workers switched the ticket labels on the meat vats in order to confuse her and thus damage her job performance. *Id.* at 54-55.

• In a meeting over her inadequate job performance, Mr. Smith referred vaguely to her girlish "mannerisms" and mentioned that she "tr[ied] to act like a girl." *Id.* at 59.

Discriminatory comments made by an employer or workplace decision-maker can qualify as direct evidence of discrimination. *See Miles v. M.N.C. Corp.*, 750 F.2d 867, 873-76 (11th Cir. 1985) (holding that a racial slur made by a person in charge of making employee evaluations and suggestions [**33] for rehiring constitutes direct evidence of discrimination). In such cases, the *McDonnell Douglas* framework is unnecessary. *Id.* at 875 (footnote omitted). But, when such statements are made by an actor uninvolved in the claimed discriminatory action, they are irrelevant as direct evidence. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("[R]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination.") (citing *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 924 (11th Cir. 1990)); *see also Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring) ("Stray remarks in the work place . . . unrelated to the decisional process itself [cannot] suffice to satisfy the plaintiff's burden.") (internal citation omitted).

Even if Ms. Parris wanted to use the above statements as circumstantial evidence of discriminatory intent, she would still have to plausibly impute them to those responsible for her termination. As Equity shows, she has not done so. Many of the comments qualify as hearsay (if not double hearsay) and are thus unreliable. Most are attributed to co-workers who had no authority over her. [**34] Those ascribed to Tyler Smith, her supervisor for a limited period of time, are arguably discriminatory. She does not assert, however, that he had anything to do with her termination. In fact, according to her deposition testimony, he had left the company by the time she was discharged. Doc. 21-1 at 19.

Ms. Parris highlights two exchanges she had with Ms. Hale, her Human Resources Manager: (1) when she presented an internal complaint to Ms. Hale, Ms. Hale allegedly told her that she should disqualify herself from her current position and move elsewhere; and (2) when she complained about harassment on another occasion, Ms. Hale allegedly opined that she was only complaining because she had been recently suspended for a disciplinary violation. *Id.* at 60, 58. She did not complain to the company hotline about these incidents, nor does she have any contemporaneous documentation that might substantiate them. *Id.* at 60. Even if Ms. Parris's description of these interactions is entirely accurate, however, it simply does not follow from them that Ms. Hale or anyone else in management possessed discriminatory intent in terminating her. Ms. Parris might very well have been treated unkindly during [**35] her time with Equity. But "[u]nfair treatment, absent [*1309] discrimination based on race, sex, or national origin, is not an unlawful employment practice under Title VII." *Coutu*, 47 F.3d at 1074.

JENNIFER CHAVEZ, Plaintiff, v. CREDIT NATION AUTO SALES, INC, formerly known as SYNERGY MOTOR COMPANY, Defendant.

CIVIL ACTION NO. 1:13-CV-00312-WSD-JCF

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

2013 U.S. Dist. LEXIS 117020

April 29, 2013, Decided
April 29, 2013, Filed

...Plaintiff further argues that, even if the Court finds that she did not timely file her charge, the Court should equitably toll the statute of limitations period because EEOC personnel prevented her from being able to file a charge because they misinformed her about her rights. (Doc. 10 at 12-14). Specifically, she alleges that she tried to file a charge the day after she was terminated, but that EEOC personnel told her that she could not file a charge of sex discrimination based on being transgender. (*Id.* at 13-14; *see also* Doc. 10-2).

"**Title VII's** timely-filing requirement is non-jurisdictional, so it may be subject to equitable tolling." *Bourne v. Sch. Bd.,* No. 12-11402, 508 Fed. Appx. 907, 2013 U.S. App. LEXIS 2266, at *4-5 (11th Cir. Feb. 1, 2013). "A court may toll a statute of [*18] limitations only if it finds that an inequitable event prevented the plaintiff from filing a timely action,*Justice v. United States,* 6 F.3d 1474, 1479 (11th Cir. 1993), and the plaintiff has the burden in establishing the grounds for equitable tolling, *Bost v. Fed. Express Corp.,* 372 F.3d 1233, 1242 (11th Cir. 2004)." *Patel v. Ga. Dep't of Behavioral Health & Devel.,* No. 12-14160, 517 Fed. Appx. 750, 2013 U.S. App. LEXIS 7913, at *3 (11th Cir. Apr. 22, 2013)(unpublished decision). "Equitable tolling is an extraordinary remedy which should be extended only sparingly." *Bost,* 372 F.3d at 1242 (quotation omitted). The Eleventh Circuit has "recognized three distinct situations in which the **Title VII** limitation periods may be equitably tolled:

(1) during the pendency of an action against the same parties and involving the same cause of action in a state court which had jurisdiction over the subject matter of the suit but was the wrong forum under state law; (2) when the defendant concealed facts that support the plaintiff's cause of action, until such time as the plaintiff knew or should have known of these facts; and (3) when the EEOC misleads a complainant about the nature of his rights under **Title VII.**

Jones v. Wynne, 266 Fed. Appx. 903, 906 (11th Cir. 2008) [*19] (unpublished decision) (citing *Chappell v. Emco Mach. Works Co.,* 601 F.2d 1295, 1302-03 (5th Cir. 1979))[5]. This case implicates the third scenario, i.e., the EEOC allegedly mislead Plaintiff by informing her that she could not file a charge alleging that she had been discriminated against on the basis of sex because she is **transgender**.

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5 Decisions of the Fifth Circuit handed down before Oct. 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

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In considering whether Plaintiff has shown that the EEOC mislead her about the nature of her rights under **Title VII,** the undersigned notes that case law concerning the protections afforded by **Title VII** to **transgender** or transsexual individuals has evolved. Although the Eleventh Circuit has not explicitly addressed whether ***Title VII*** prohibits discrimination against **transgender** or transsexual individuals, the court has recently held that "discrimination against a **transgender** individual because of her gender non-conformity is sex discrimination, whether it's described as being on the basis of sex or gender," and "constitutes sex-based discrimination under the Equal Protection Clause" [*20] of the Fourteenth Amendment. *Glenn v. Brumby,* 663 F.3d 1312, 1316-17 (11th Cir. 2011). In reaching that decision, the court acknowledged that, prior to the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), "several courts concluded that **Title VII** afforded no protection to**transgender** victims of sex discrimination." *Glenn,* 663 F.3d at 1318 n.5 (listing cases). However, in *Price Waterhouse,* the Court held "that **Title VII** barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." *Id.* at 1316.[6] Following the *Price Waterhouse* decision, several circuits and district courts have held that "discrimination against a **transgender** individual because of her gender non-conformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Id.* at 1317 (listing cases).

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6 *Price Waterhouse* did not involve a transgender individual, but rather, a woman who alleged that her employer did not promote her to partner because she did not conform to gender-based stereotypes about women, e.g., she was too aggressive, she used profanity, and she should "walk more [*21] femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."490 U.S. at 234-35.

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The parties acknowledge that in April 2012, shortly before Plaintiff filed her April 25, 2012 charge with the EEOC, the EEOC issued a decision in *Macy v. Holder,* in which it concluded that discrimination against a **transgender** individual is discrimination on the basis of sex in violation of **Title VII.** It is not clear whether that decision represents a change in the EEOC's interpretation of **Title VII's** protections, nor is it clear whether, in 2010, the EEOC, as a matter of policy, considered claims of **transgender** individuals to be actionable under **Title VII** or to what extent.[7] Therefore, it is unknown whether the individuals with whom Plaintiff allegedly communicated in 2010 acted pursuant to EEOC policy, or whether they acted pursuant to a misunderstanding of policy. Furthermore, regardless of the EEOC's interpretation, it appears that as of 2010, many courts had recognized that**Title VII** protected discrimination against **transgender** or transsexual individuals who claimed that their employer discriminated against them for failing to conform to sex-based stereotypes. [*22] Thus, if EEOC personnel in

fact prohibited Plaintiff from filing a charge of discrimination based on her status as a **transgender** individual, they may have mislead her concerning her rights, sufficient to trigger equitable tolling of the 180-day statute of limitations.

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7 The undersigned notes that in the EEOC's May 7, 2012 letter to Plaintiff notifying her that her April 2012 charge was being dismissed as untimely, the EEOC refers to "the new interpretation of the law," but does not elaborate on that reference. (*See* Doc. 6-4).

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Turning to the evidence bearing on the issue of equitable tolling, Plaintiff has offered her own declaration testimony that in January 2010 and in September 2010, she went to the EEOC and provided information and documents concerning her discrimination claim, but on both occasions EEOC personnel told her that she could not file a charge of discrimination based on sex because she is transgender. (*See* Doc. 10-2).[8] Defendant challenges this evidence as "self-serving and not credible" (*see* Doc. 14 at 3), but the undersigned notes that in a December 19, 2012 letter, the EEOC indicated "A review of our records revealed that Ms. Chavez visited the Atlanta District Office [*23] on January 12, 2010, to file a charge of employment discrimination against Credit Nation," but that a charge "was not filed at that time." (*See* Doc. 10-1 at 18). That letter lends credence to Plaintiff's assertion that she went to the EEOC the day after she was terminated.

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8 Plaintiff also presents declarations of a family member and friends who testified that Plaintiff told her in 2010 that she had gone to the EEOC to file a claim. (*See* Docs. 10-3 through 10-5). The undersigned agrees with Defendant that that testimony is hearsay, and should not be considered for the truth of the matter asserted, i.e., that Plaintiff in fact went to the EEOC, but it does evidence Plaintiff's contemporaneous understanding that she needed to pursue her administrative remedies through the EEOC.

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If credited, Plaintiff's testimony tends to show that Plaintiff attempted to exhaust her administrative remedies in a timely manner, but was thwarted by the EEOC, one of the circumstances that would warrant the application of equitable tolling to the statute of limitations in this case. *See, e.g., Smith v. Baldwin Cnty. Comm'n,* No. 09-0616-CG-M, 2010 U.S. Dist. LEXIS 52845, at *7-10 (S.D. Ala. Mar. 26, 2010) (finding [*24] that statute of limitations was equitably tolled where an EEOC investigator provided plaintiff "with misinformation which resulted in Plaintiff's failure to raise a claim of retaliation against Defendant," i.e., he incorrectly told the plaintiff she did not have a retaliation claim),*adopted by* 2010 U.S. Dist. LEXIS 64520 (S.D. Ala. June 25, 2010). However, on the state of the record and at this stage of the litigation, the undersigned is reluctant to find that the limitations period should be equitably tolled. Although the Court may "consider facts outside the pleadings and resolve factual disputes" related to exhaustion, that is only the case so long as, among other things, "the parties have sufficient opportunity to develop a record.'" *Tillery,* 402 Fed. Appx. at 424. It does not appear that the parties have had a full opportunity to develop the record, particularly with respect to

Plaintiff's interactions with the EEOC which she alleges prevented her from filing a charge during the 180-day period.

Rather than trying to determine whether Plaintiff's presentation at this stage definitively shows that equitable tolling applies, the undersigned finds that the better approach is to allow [*25] the parties to engage in discovery concerning Plaintiff's efforts to exhaust her administrative remedies. Then, if appropriate, the parties may ask the Court to revisit this issue with a more fully developed record. *See, e.g., Bradley v. DeKalb Cnty.,* No. 1:10-CV-0218-TWT-GGB, 2010 U.S. Dist. LEXIS 118467, at *11 (N.D. Ga. May 17, 2010)(recommending that motion to dismiss be denied because "[a]t this stage of the proceedings, the parties have not had a sufficient opportunity to develop the record for the court, on a motion to dismiss, to resolve a factual dispute regarding exhaustion of administrative remedies"), *adopted by* 2010 U.S. Dist. LEXIS 118449 (N.D. Ga. Nov. 4, 2010); *see also Page v. Postmaster Gen.,* 493 Fed. Appx. 994, 998 (11th Cir. 2012) (unpublished decision) (vacating grant of motion to dismiss plaintiff's complaint as time-barred, and remanding "to hold an evidentiary hearing or to allow the case to proceed so that the record may be more fully developed" on the issue of equitable tolling); *Linton v. Rowan-Cabarrus Comm. College,* No. 1:10CV404, 2013 U.S. Dist. LEXIS 45403, at *14 (M.D. N.C. Mar. 29, 2013) (denying motion to dismiss because "Plaintiff has plausibly alleged [*26] sufficient facts to reasonably invoke the doctrine of equitable tolling," but noting that "Defendants may raise this issue after discovery on a motion for summary judgment").