PROGRAM MATERIALS
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The Expansion of Title VII: Where is the Line?

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Expansion of Title VII: Where is the Line?

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February 2, 2022

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Agenda

- Background on employment law in the United States
- Overview of Title VII and the construction of other federal and state discrimination statutes
- Federal court interpretations of Title VII related to claims of associational discrimination
- Application of associational discrimination to all protected classes
- Types of associations that Title VII does not protect
- Key Takeaways

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Background on Employment Law in the United States

- Local
- State
- Federal

The Result: Challenging landscape for employers, particularly if operating in multiple jurisdictions

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Background on Key Federal Discrimination Statute: Title VII

- Title VII of the Civil Rights Act of 1964, 42. U.S.C. 2000(e), et. seq.
- Under Title VII, it is an “unlawful employment practice for an employer…to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such ***individual's*** race, color, religion, sex, or national origin”
- Race, color, religion, sex (which includes pregnancy), and national origin are known as “protected” characteristics, category or class
- Title VII does ***not*** expressly prohibit discrimination based on an employee’s association with another individual based on that person’s protected characteristic
  - Not all federal and state discrimination laws are structured this way

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American with Disabilities Act Expressly Prohibits Associational Discrimination

- Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112, *et. seq.*
- The ADA prohibits discrimination based on an employee's own disability, perceived disability *or a* known relationship or association with a disabled person
- Under the ADA, "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"
- Under subsection (B)(4), "discriminate against a qualified individual" includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of ***the known disability of an individual with whom the qualified individual is known to have a relationship or association***"

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California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12926

- California's FEHA prohibits discrimination based on race, national origin, religion, age, disability, sex and gender, among other protected categories
- California's FEHA (like the ADA) also provides an express cause of action for discrimination based on association with individuals in a category protected by the Act.
- Under § 12926, the protected categories includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

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Historic Federal District Court Interpretations of Title VII

- *Ripp v. Dobbs House, Inc.*, 366 F.Supp. 205 (N.D. Ala. 1973)
  - District Court in *Ripp* did not recognize plaintiff's claim for discrimination based on his association with his African-American co-workers
  - The court in *Ripp* held that the plaintiff could not state a claim for discrimination under Title VII because did not allege he was discriminated against because he was white
  - The *Ripp* court found defendant's alleged discriminatory employment practices resulted in disparate treatment of black employees, not plaintiff, and therefore plaintiff's claim was not actionable

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Historic Federal District Court Interpretations of Title VII - Continued

- *Adams v. Governor's Committee on Postsecondary Educ.*, 1981 WL 27101 (N.D. Ga. Sept. 3, 1981)
  - The district court in *Adams* did not recognize plaintiff's claim for discrimination as a result of being terminated for being married to a black woman
  - The court in *Adams* found because Plaintiff alleged he was discriminated against because of his wife's race and not his own, he did not state a cause of action under Title VII
  - The *Adams* court held that the word "individual" as used in Title VII made it "clear" that an employer could not discriminate because of *that employee's* race, not the race of another individual
  - The district courts in *Ripps* and *Adams* took a restrictive reading of Title VII

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Federal Circuit Courts Begin to Read Title VII More Broadly

- *Parr v. Woodman of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986)*
  - Plaintiff in *Parr* alleged he was not hired because of his marriage to a black woman
  - Applying a more liberal construction to Title VII, the 11th Circuit Court Appeals held where a plaintiff claims discrimination based upon an interracial marriage or association, they allege, by definition, that they have been discriminated against because of *their* race.
  - The court reasoned that if an employee suffers and adverse action because their employer disapproves of the relationship between themself and another individual of a different race, the employee's race was as much a factor in the decision to take the adverse action
  - Unlike the *Ripp* and *Adams* courts, the *Parr* court found there was no material difference whether a plaintiff alleges in their complaint that they have been discriminated against because of their race

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Federal Appeals Courts Begin to Read Title VII More Broadly - Continued

- *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998), *vacated in part on other grounds*, 182 F.3d 333 (5th Cir. 1999)
  - Plaintiff in *Deffenbaugh-Williams* alleged she was discharged from her employment because she was dating a black man
  - The Fifth Circuit Court of Appeals found that when read "as a whole," Title VII prohibits discrimination based on an individual's relationship or association with someone of a different race
  - The *Deffenbaigh-Williams* court held that a reasonable juror could find that plaintiff "was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person"

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Federal Appeals Courts Begin to Read Title VII More Broadly – Continued (2)

- *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988 (6th Cir. 1999)
  - Plaintiff in *Tetro* alleged his employer discriminated against him because he had a bi-racial daughter
  - Broadly construing Title VII and relying on *Parr*, the Sixth Circuit in *Tetro* held plaintiff stated a claim for discrimination on the basis of his own race where he alleged he was discharged because his child was biracial, even though the root animus for the discrimination was a prejudice against the biracial child
  - The *Tetro* court also relied on past guidance from the Equal Employment Opportunity Commission, which consistently held that an employer who takes adverse action against an employee (or potential employee) because of an interracial association violates Title VII.

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Federal Appeals Courts Begin to Read Title VII More Broadly – Continued (3)

- *Holcomb v. Iona Coll.*, 531 F.3d 130, 139 (2d Cir. 2008)
  - Plaintiff in *Holcomb* alleged Defendants' termination of his employment as an assistant coach of the basketball team was motivated by his marriage to a black woman
  - The second circuit in *Holcomb* rejected the restrictive reading of the *Ripp* and *Adams* courts, and found where an employee is subjected to adverse action because an employer disapproves of an interracial association, the employee suffers discrimination because of the employee's *own race*
  - The *Holcomb Court* held an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race

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Federal Appeals Courts Begin to Read Title VII More Broadly – Continued (4)

- *Kengerski v. Harper*, 6 F.4th 531 (3d Cir. 2021)
  - Plaintiff in *Kengerski* alleged defendants retaliated against him because his grand-niece was bi-racial
  - Following the second, fifth, sixth, and eleventh circuits, the Third Circuit Court of Appeals in *Kengerski* similarly held "associational discrimination is well grounded in the text of Title VII."
  - The *Kengerski* court found when you "discriminate against an employee because of his association with someone of a different race, you are in effect discriminating against him 'because [of his] race' in violation of Title VII."
  - Notably, the court in *Kengerski* held that the associational discrimination theory is not limited to close or substantial relationships

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Does Title VII's Protection Against Associational Discrimination Apply to All Protected Classes?

- Each case we cited dealt with **interracial associations** between an employee and third party
- *Ripp* involved a white employee's association with his African Amernican co-worker
- *Adams, Parr, Deffenbaugh-Williams, and Holcolmb* dealt with an employee' association with an interracial relationship
- *Kengerski* and *Tetro* involved an employee's relationship with their interracial family member
- Does Title VII protect against discrimination due to associations with individuals of a different protected characteristic?

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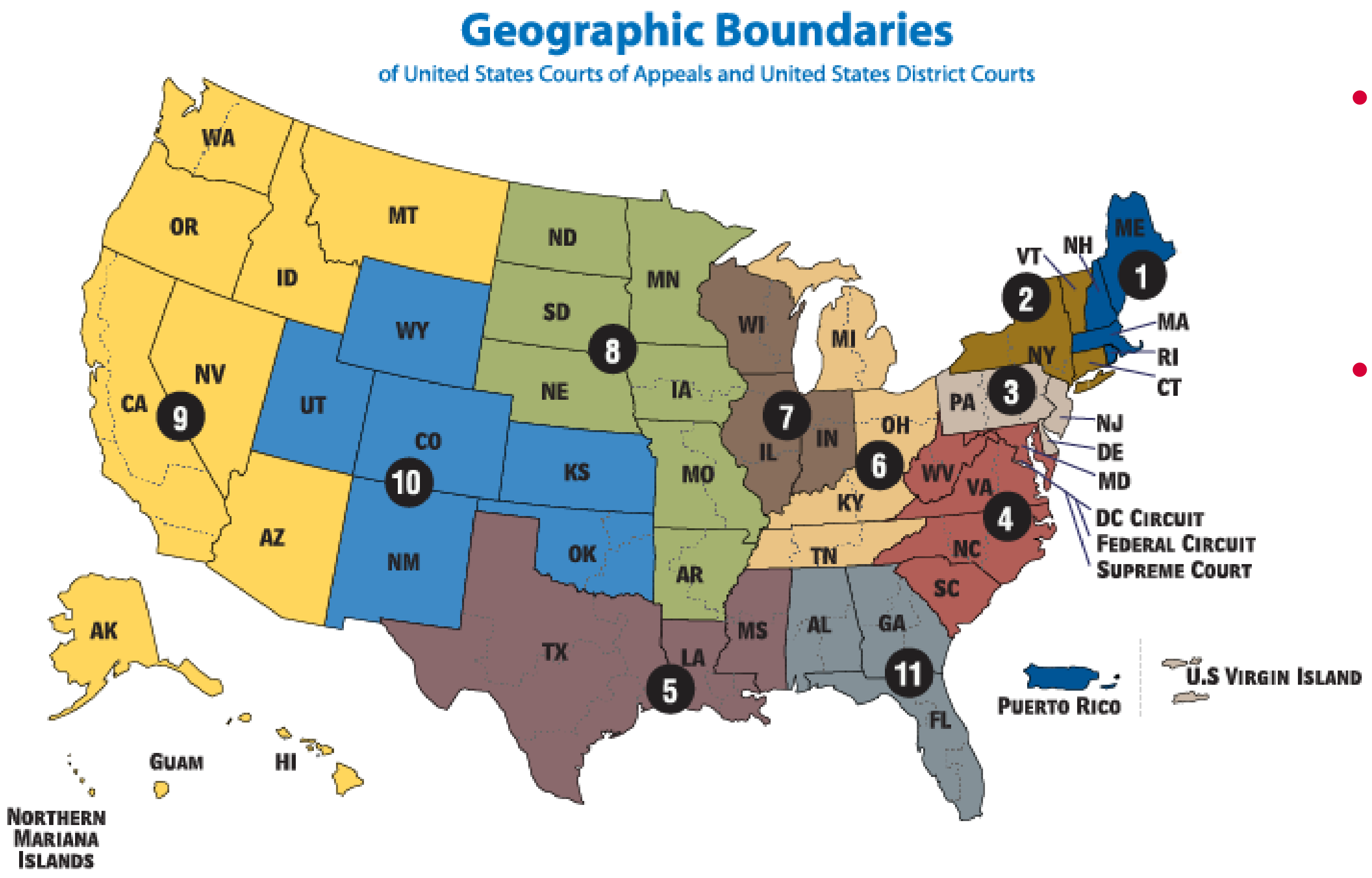
The Answer: For Now, It Depends on the Jurisdiction



- In the Second and Seventh Circuits, Title VII's prohibition on associational discrimination applies to all protected classes
- In the Tenth Circuit, while district courts have recognized race based associational discrimination under Title VII, courts have not extended such protection to discrimination based on am employee' association with individuals of other protected classes

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Title VII's Prohibition on Associational Discrimination Applies to All Protected Classes in the Second Circuit

- In the Second Circuit, the court of appeals in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) addressed whether Title VII protection extended to an employee's association with a person of the same sex
- The *Zarda* court held the prohibition on associational discrimination applies with equal force to all classes protected by Title VII, including sex.
- Relying on the United States Supreme Court in *Price Waterhouse v. Hopkins*, 409 U.S. 243 (1989), the court in *Zarda* found Title VII on its face treats each of the enumerated categories exactly the same such that principles accounted with respect to ex discrimination apply with equal force to discrimination based on race religion, or national origin, and vice versa

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Title VII's Prohibition on Associational Discrimination Applies to All Protected Classes in the Seventh Circuit

- Similarly, the Seventh Circuit Court of Appeals in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) addressed whether Title VII extended to an employee's association with a person of the same sex
- The *Hively* court found Title VII's protection against race based associational discrimination prohibits discrimination on the basis of the national origin, color, religion, or sex of the associate.
- The court in *Hively* found the text of Title VII draws no distinction for this purpose among the different varieties of discrimination it addresses, and no matter the category involved, the essence of the claim is that the plaintiff would not be suffering the adverse action had his sex, race, color, national origin, or religion been different

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Associational Discrimination May Not Extend to All Protected Classes in the Tenth Circuit

- District courts in the Tenth Circuit do *not* appear to recognize a claim for national origin based associational discrimination
- In *Salzar v. City of Commerce City*, 2012 WL 1520124 (D. Colo. May 1, 2012), plaintiff brought a claim alleging she was terminated based on her Hispanic surname from her husband, her hiring of a Native American employee, and advocacy for a Hispanic employee
- The district court in *Salzar* noted that case law from the Tenth Circuit supporting a Title VII claim for national origin discrimination based on association – as opposed to direct discrimination of the charging party, is "minimal, at best"
- The *Salzar* court ultimately granted the employer summary judgment because the relationships alleged by plaintiff were insufficient to state claim for national-origin discrimination based on association

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District Court in the Tenth Circuit Re-Affirms that Title VII Does Not Cover National Origin-Based Associational Discrimination

- Eight years later, plaintiff in *Cano-Rodriguez v. Adams School District No. 14*, 2020 WL 6049531 (D. Colo. Apr. 22, 2020) alleged discrimination based on his association with other Hispanic and non-native born Hispanic faculty, staff members, parents and students
- Recommending plaintiff's national-origin based association discrimination claim be dismissed, the court in *Cano-Rodriguez* reaffirmed that associational national origin discrimination claims have not generally been accepted in the Tenth Circuit

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Where is the Line?

- Not all relationships or associations, whether formed inside or outside the workplace, fall under Title VII's protections
- District courts across the United States have confronted and held that associations fall *outside* the scope of Title VII in the following situations:
  - A male employee protesting discrimination against females
  - An employee associating with and advocating for race-relating messaging
  - An employee being co-workers with a colleague of a different race
  - An employee's acquaintance with a customer
  - An employee's friendly acquittance with no active involvement

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Gallo v W.B. Mason Co., Inc., 2010 WL 4721064 (D. Mass Nov. 25 2010)

- Plaintiff alleged he witnessed his supervisor verbally harass several female employees
- Plaintiff alleged that he made repeated attempts to stop harassment and was terminated based on his reporting and resisting alleged discrimination
- Plaintiff brought a claim for gender-based associational discrimination
- The district court in *Gallo* held plaintiff failed to state a claim because he did not actually associate with any females, but rather that plaintiff only protested discrimination against female employees

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Frith v. Whole Foods Market, Inc., 517 F.Supp.3d 60 (D. Mass 2021)

- Plaintiffs in *Frith* began demonstrating their support for the Black Lives Matter ("BLM") movement in the wake of George Floyd's murder by wearing face masks and other attire with BLM messaging to work
- Whole Foods Market disciplined the plaintiffs for violating defendant's dress code
- The district court in *Frith* dismissed plaintiff's claim for associational discrimination, holding Title VII does not prohibit an employer from taking an adverse action against employees for wearing clothing that is merely associated with individuals of a particular race
- Defendant did not take any adverse action against white employees for associating with African American employees

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Chalmers v. City of New York, 2021 WL 4226181 (S.D.N.Y. Sept. 16, 2021)

- Plaintiffs, who were white, brought a claim under Title VII for racial discrimination, alleging that they were paid less than their minority co-workers that were performing a similar job
- Plaintiffs in *Chalmers* argued that they suffered discrimination because of their association with their colleagues, who were members of a protected class
- The court in *Chalmers* rejected plaintiffs' argument, holding that an employee suffers associational discrimination where the employer disapproves of interracial association and takes an adverse action on that basis
- Because the plaintiffs did not have a relationship beyond that of working with their minority colleagues, the *Chlamers* court held that their associational discrimination claim failed
- The court in *Chalmers* found that while a "romantic interpersonal relationship" was not required, plaintiffs were required to have a relationship with their minority counterparts—personal, social, professional, or otherwise—that went beyond the bounds of merely working together

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Robinett v. First Nat. Bank of Wichita, 1989 WL 21158 (D. Kans. Feb. 1, 1989)

- Plaintiff in *Robinett* brought a claim for associational discrimination due to her association with a black co-worker
- The court in *Robinett* found there must be more than a mere work-related friendship
- The *Robinett* court granted defendant's motion for summary judgment, holding the only association that plaintiff alleged was that of co-workers who was supportive of and had a good friendship with her colleague

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Equal Employment Opportunity, Commission v. L&W Supply Corporation, 2008 WL 11339622 (D. Ariz. Feb. 12, 2008)

- An employee brought a claim for discrimination based off his association with a colleague of a different race
- The district court in *L&W Supply Corporation* held plaintiff's workplace relationship with a colleague of a different race was not sufficient to maintain a claim for associational discrimination
- The *L&W Supply Corporation* court distinguished plaintiff's claim from *Chacon v. Ochs*, 780 F.Supp. 680 (C.D. Cal. 1991), which found Title VII protections applied to discrimination based on an interracial marriage

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Baker v. Wilmington Trust Co., 320 F.Supp.2d 196 (D. Del. 2004)

- Plaintiffs brought a claim for retaliation alleging that he was terminated for resisting defendant's suggestion to treat customer differently based on the customers' race
- Plaintiffs also claimed they were discriminated against for associating with customers, who were of a foreign national origin
- The district court held an acquaintance with customers was insufficient to establish a claim for associational discrimination
- The *Baker* court held plaintiffs needed a more "significant relationship" to maintain a claim for associational discrimination

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Zielonka v. Temple University, 2001 WL 1231746 (E.D. Pa. Oct. 12, 2001)

- Plaintiff brought a claim for associational discrimination based on his relationship with an African American professor for whom plaintiff voted in an academic election
- The *Zielonka* court held plaintiff's relationship of a friendly acquaintance and supportive voter in an academic election was insufficient to establish a claim for associational discrimination
- The court in *Zielonka* found there needed to be a more "substantial relationship" for plaintiff to maintain a claim of associational discrimination

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Summary of Title VII's Protection on Associational Discrimination at the Federal Circuit Court Level

- Courts across the United States have analyzed claims for associational discrimination under Title VII differently
- For example, the Second, Third, Fifth, Sixth, Seventh, Ninth and Eleventh Circuit Court of Appeals have recognized a claim for associational discrimination
- The First, Fourth, Eighth, and Tenth Circuit Court of Appeals have not directly confronted the issue or expressly recognized a claim for associational discrimination

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5 specific takeaways based on a survey of the case law cited: Takeaway (1)

Associations with family members or romantic relationships have thus far been covered by Title VII in jurisdictions that recognize raced-based associational discrimination

Takeaway (2)

The employer's location may determine whether Title VII prohibits discrimination based on an employee's association with individuals of all protected classes

- Second and Seventh Circuits recognize Title VII does not distinguish between raced-based associational discrimination and other forms of associational discrimination
- District courts in the Tenth Circuit do not appear to recognize national-origin based discrimination

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Takeaway (3)

Protesting alleged discrimination against a co-worker may be a protected association under Title VII

The First Circuit Court of Appeals (encompassing Maine, Massachusetts, Rhode Island, New Hampshire, Puerto Rico) will have to resolve an apparent conflict within the district courts

- *Frith* court found plaintiffs could maintain a claim under Title VII if an adverse action was taken against them for advocating on behalf of a co-worker who had been subjected to discrimination
- *Gallo* court, however, found plaintiff failed to state a claim because he only protested discrimination against female employees

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Takeaway (4)

An employee's interpersonal relationship with a third-party may be protected, depending on jurisdiction (e.g., co-worker, friend)

- In the Third Circuit, does a plaintiff still need to have a "significant relationship" or "substantial relationship" with a non-family member to maintain a claim for associational discrimination?
  - Depends on how broad a district court interprets the *Kengerski* decision
  - Does *Kengerski's* statement that associational discrimination claims are not limited to "close or substantial relationships" apply only to the employee's relationship with their family members, which was specifically at issue, or co-workers or customers
- In the Ninth Circuit, at least one district court has not recognized a claim for discrimination under Title VII based on a plaintiff's association with a co-worker of a different race
- In the Tenth Circuit, another district court held a plaintiff could not maintain a claim for discrimination based on a workplace relationship with a colleague

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Takeaway (5)

Title VII's prohibition on associational discrimination likely does not extend to an employee's support of a social cause, even if that social cause is associated with a particular race or protected class (e.g., "me too" movement)

Similarly, Title VII's prohibition on associational discrimination does not extend to work committees or employee-led work groups, even if the committee or group is associated with a particular race or protected class

- Employers must be aware of the social causes or work groups of which their employees are a part, and ensure there is no disruption to the workplace or violation of any employee policy as a result of such association

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Practitioner Takeaways

- Employment law practitioners should be aware of this developing area of discrimination law and know the status of the law in the jurisdictions they practice in and monitor developments, as this issue could one day be ripe for a Supreme Court case.
- Further, in jurisdictions where the claim is recognized, practitioners should be aware of the scope of the protection including:
  - Does Title VII's ban on associational discrimination apply to all protected classes or only raced-based discrimination claims?
  - Does Title VII's ban on associational discrimination protect only relationships or associations with a family member or romantic partner, or does the scope of Title VII extend to co-workers, acquaintances, and friends?

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Employer Takeaways

- Employers should be aware of the possibility of associational discrimination claim, as they are a relatively newer category of claims
- Employers should continue to train their human resources and/or management on how to handle association-based issues
  - The goal should always be promoting a respectful workplace for all employees and consistent treatment
- Employers should review their employee handbooks to confirm their policies, including anti-discrimination, anti-harassment, prohibition on retaliation, and equal employment opportunity policies, are up to date and compliant with this development in the law

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Resources

Third Circuit Expansion of Title VII: Where Is the Line?, by Stephanie Kaplan and Oliver Katz, published in the *Legal Intelligencer*, October, 26, 2021

Oliver Katz, left, and Stephanie Gantman Kaplan, right, of Blank Rome. Courtesy photos

COMMENTARY

Third Circuit Expansion of Title VII: Where Is the Line?

It is common knowledge that Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of an employee's protected characteristic, such as race, color, religion, sex and national origin.

October 26, 2021 at 11:21 AM

8 minute read

Employment Law

By Stephanie Gantman Kaplan and Oliver R. Katz

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KeyCite negative history or citing references available
Disapproved of by Parr v. Woodmen of the World Life Ins. Co., 11th Cir.(Ga.), June 17, 1986

1981 WL 27101
United States District Court, N.D. Georgia.

ADAMS
v.
GOVERNOR'S COMMITTEE ON POSTSECONDARY EDUCATION, ET AL.

No. C80-624A.
|
Sep. 3, 1981.

Attorneys and Law Firms

Bland C. Marles, Allentown, Pa., and Allan L. Galbraith, Atlanta, Ga., for plaintiff.

Gary R. Hurst, Assistant Attorney General of Georgia, and Jerry Drew, Pennsylvania Department of Justice, for defendants.

Opinion

EVANS, District Judge: -

***1** The abovecaptioned case was tried to the Court without a jury on June 15 through June 18, 1981. Plaintiff seeks relief under Title VII, 42 U.S.C. § 2000e, et seq., 42 U.S.C. §§1981 and 1983.

Basically, Plaintiff contends he was terminated from his job with the Governor's Committee on Postsecondary Education because he, a white male, was then married to a black woman. He seeks injunctive relief and damages.

The Court finds the pertinent facts to be as follows:

FINDINGS OF FACT

Plaintiff Albert Adams, a white man, was employed by Defendant Governor's Committee on Postsecondary Education (hereinafter "Defendant Committee") from July 1, 1975 to December 8, 1975 as Senior Planner. At all times relevant hereto, Plaintiff and Ms. Shirley Dale Adams, a black women, held themselves out as husband and wife. The two were not formally married but had exchanged vows in a private ceremony. Ms. Adams did not accompany her husband to Atlanta when he moved to take the job; she remained in Baltimore, Maryland where she was employed by Essex Community College. Pursuant to the regulations promulgated for the Georgia State Merit System, an individual hired as Senior Planner is required to satisfactorily complete a six-month working test period before becoming certified as a permanent employee. Plaintiff's employment was terminated prior to the completion of his working test period.

Defendant Committee, formerly known as the Georgia Postsecondary Education Commission, is a state commission created by Executive Order dated April 23, 1974. Its responsibilities are to develop a long-range state master plan for postsecondary education and administer the Titles I, VI-A, VII-A federal grant programs. Defendant Leonard, a white resident of Georgia, was employed by Defendant Committee as Executive Director, at all times relevant hereto. It was his responsibility as chief administrative officer to coordinate the general work of the staff employed by Defendant Committee, which included a Senior Planner, Planner and secretary. He had the authority to hire and terminate the professional and secretarial employees with the advice and consent of the Defendant Committee.

Plaintiff came to the agency with impressive credentials. Defendant Leonard considered him well qualified for the position of Senior Planner at the time he hired him. However, the evidence at the trial revealed that during the period of Plaintiff's employment, Defendant Leonard gradually lost confidence in him. The Court finds that this was not due to either the race of Plaintiff's wife nor, as stated by Defendant Leonard, due to any significant shortcomings in Plaintiff's work. Rather, the Court finds that the basic reason was strong differences in the personalities of the two individuals and Defendant Leonard's resulting loss of confidence in Plaintiff. The Court does find that Defendant Leonard's discovery of the race of Plaintiff's wife was a negative factor in his overall assessment of Plaintiff. However, the Court further finds that this was an insignificant factor which did not consciously or materially affect Defendant Leonard's decision to terminate Plaintiff's employment.

***2** The evidence showed without dispute that although Plaintiff began work in July, 1975, no one at the

Defendant agency including Defendant Leonard, knew Plaintiff was married to a black woman until September 13, 1975. On that date, both Defendant Leonard and Plaintiff were on a business trip to Washington, D.C. Plaintiff had arranged for Ms. Adams to meet him and Defendant Leonard for cocktails at a hotel. The meeting, according to both Plaintiff and Defendant Leonard was cordial, though it lasted for twenty minutes instead of longer as Plaintiff had expected. During the meeting, Defendant Leonard encouraged Plaintiff's wife to move to Atlanta and stated that he would assist her in finding employment in Atlanta if she did so. However, Ms. Adams indicated that she had no desire to move to Atlanta but rather would stay in Baltimore and keep her teaching position at Essex Community College. When he returned to Atlanta, Defendant Leonard mentioned to another employee at the agency that Plaintiff's wife was black but made no other comment.

Both prior to and following the Washington trip, Plaintiff and Defendant Leonard lunched together occasionally and achieved some degree of social friendship. Both testified that on one occasion in August, 1975, the two had discussed group sex and marijuana at lunch. Each testified that the discussion centered around the other's involvement in such activities, but not his (each denied ever having been involved in such activities). The Court infers that regardless of the precise content of the discussion, Defendant Leonard formed a negative impression of Plaintiff as a result of the lunch discussion. This negative impression was confirmed in Defendant Leonard's mind by what he perceived to be Plaintiff's inappropriate socializing with female personnel at other state agencies.

On another occasion which was subsequent to the aforementioned Washington trip, Plaintiff was invited to dinner at Defendant Leonard's home. Defendant Leonard was leaving on a business trip that evening and since his own automobile was not working, he asked Plaintiff to drive him to the airport after dinner. Plaintiff did and after dropping Defendant off, he returned to Defendant Leonard's home to inquire of his wife if he could do anything for her while her husband was away. Defendant Leonard interpreted this as a sexual overture to his wife, which he found offensive.

Considerable testimony was offered concerning Defendant Leonard's conclusion that Plaintiff's work was substandard. Most of this evidence did not seem convincing. For example, Defendant Leonard testified that he had received complaints from persons in other agencies. However, he was unable to name those persons who had spoken unfavorably of Plaintiff's work performance.

In summary, the Court finds that Defendant Leonard's reason for terminating Plaintiff's employment was his loss of confidence in Plaintiff, which was brought about primarily by the fact that the two are dramatically different types of individuals. Defendant Leonard on the one hand struck the Court as being one comfortable with notions of tradition, order, and structure; Plaintiff appeared to be one more apt to associate himself with challenge to convention and experimentation. In characterizing these individuals in this manner, the Court does not intend to cast either in a negative light. The point is that Plaintiff and Defendant Leonard were ill-fitted to the relationship of business subordinate and superior.

***3** Plaintiff was informed of Defendant Leonard's decision not to hire him as a permanent employee on December 5, 1975. When Plaintiff failed to submit a letter of resignation, his employment was terminated. The reasons given for his termination were "inadequate work performance, unprofessional behavior and unstable behavior, and personality conflict." (Defendant's Exhibit 12). In a sealed letter sent to a member of the Governor's Committee by Plaintiff prior to that (but which was not opened until after the filing of suit herein), Plaintiff had charged that Defendant Leonard was mentally ill.

Shortly after Plaintiff's dismissal, Ms. Adams phoned to tell him of her failure to procure a sensitive position as a chemist which involved chemical analysis relative to criminal cases for Anne Arundel County, Maryland. Because of the nature of the position, an investigation into her background and that of Plaintiff had been initiated. In the course of the investigation Defendant Leonard had been questioned about Plaintiff and Ms. Adams by an investigator from the Fulton County District Attorney's Office. The statements made by Defendant Leonard to the investigator were unfavorable of Mr. Adams. Ms. Adams was subsequently rejected for the position. According to Plaintiff, it was at this point he decided that Defendant Leonard's actions toward him had been motivated by racial bias. This suit followed.

CONCLUSIONS OF LAW

Plaintiff Albert Adams brought this action against Defendant Governor's Committee on Postsecondary Education, his former employer, and Defendant Robert J. Leonard, his former immediate superior under the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., 42 U.S.C. § 1981, and 42 U.S.C. §1983 alleging that Defendants discriminated against him on the basis of his marital relationship with Ms. Shirley Dale Adams, a black woman.

Title VII makes it unlawful for an employer to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin." Plaintiff does not contend that he has been discriminated against because of "his" race or because of his color, religion, sex or national origin. He contends that he has been discriminated against because of the race of his wife.

The words "such individual's" as used in the statute make it clear that an employer cannot lawfully discriminate against an employee because of *that employee's* race. Neither the language of the statute nor its legislative history supports a cause of action for discrimination against a person because of his relationship to persons of another race. See Ripp v. Dobbs House, Inc., 366 F.Supp. 205, 6 FEP Cases 566 (N.D. Ala. 1973). The Court finds that Plaintiff has failed to state a claim of relief cognizable under Title VII.

***4** As an alternative ground for relief Plaintiff contends that Defendants violated 42 U.S.C. §1981, which proscribes racial discrimination in employment. Plaintiff's pleadings state a claim of discriminatory treatment cognizable under Section 1981. "It is settled that the nature of discrimination in this case -- taking adverse action against a white person because of his association with blacks -- falls under §1981." Fiedler v. Marumsco School, 631 F.2d 1144, 1150 (4th Cir. 1980) citing Faraca v. Clements, 506 F.2d 956, 10 FEP Cases 725 (5th Cir.), cert. denied, 422 U.S. 1006, 10 FEP Cases 1177 (1975).

Having decided, as a matter of fact, that the reason for Plaintiff's discharge was not his relationship to Ms. Shirley Dale Adams, but another reason unrelated to considerations of race discrimination, the conclusion follows that there is no violation of 42 U.S.C. §1981. Similarly, there is no violation of 42 U.S.C. §1983, which protects against deprivation of federally guaranteed rights under color of state law.

For the foregoing reasons, the Clerk is hereby DIRECTED to enter final judgment in favor of Defendants, with costs cast on Plaintiff.

In accordance with the foregoing, Plaintiff's Motion for Award of Attorney's Fees is DENIED.

SO ORDERED, this 2 day of September, 1981.

All Citations

Not Reported in F.Supp., 1981 WL 27101, 26 Fair Empl.Prac.Cas. (BNA) 1348

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Tiede v. CorTrust Bank, N.A., S.D., April 16, 2008

320 F.Supp.2d 196
United States District Court, D. Delaware.

Susan BAKER, Regina Debevec, and Roseanne Zarebicki Plaintiffs,
v.
WILMINGTON TRUST COMPANY Defendant.

No. CIV.A. 01–819 KAJ.
|
June 4, 2004.

Synopsis
Background: Employees, former tellers at retail bank, brought suit against former employer under Title VII and Delaware law, alleging they were terminated in retaliation for their resistance to suggestion that they treat customers differently based on race. Employer moved for summary judgment.

Holdings: The District Court, Jordan, J., held that:

tellers failed to establish prima facie case of unlawful retaliation under Title VII;

tellers could not be subjected to associational discrimination under Title VII based on their mere acquaintance with customers of Indian descent; and

tellers' termination did not violate Delaware public policy, so as to fall within exception to at-will employment for breach of covenant of good faith and fair dealing.

Motion granted.

Procedural Posture(s): Motion for Summary Judgment.

Attorneys and Law Firms

***197** Mark L. Reardon, Esquire, Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, DE, for Plaintiffs.

Sheldon N. Sandler, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, DE, for Defendant.

MEMORANDUM OPINION

JORDAN, District Judge.

I. INTRODUCTION
Plaintiffs Susan B. Baker ("Baker"), Regina M. DeBevec ("DeBevec"), and Roseanne K. Zarebicki ("Zarebicki") (collectively the "Plaintiffs") brought suit against Wilmington Trust Company ("WTC") pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* ("Title VII"), 42 U.S.C. §§ 1981 and 1981a, and Delaware law on December 10, 2001. (D.I.1.) Plaintiffs allege that WTC terminated their employment in retaliation for their resistance to what they claim was a suggestion by WTC to treat customers differently based on the customer's race. (*Id.*) Presently before me is a motion by WTC for summary judgment (D.I. 25; the "Motion"). I have jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1367. For the reasons that follow, the Motion will be granted.

II. BACKGROUND[1]
WTC is Delaware's largest retail bank, and operates a branch system that covers the state. (D.I. 26 at 1.) DeBevec began her employment with WTC as a bank teller on July 17, 1972, and on or about 1978, she was promoted to Head Teller at the Claymont branch. (D.I. 33 at 2) Baker began her employment with WTC as a bank teller on February 5, 1990, and on or about late 1998 or early 1999 she was promoted to Assistant Head Teller at the Claymont branch. (*Id.* at 3.) Zarebicki ***198** began her employment with WTC on September 21, 1965, and she was promoted to Head Teller at the Branmar branch in 1992. (*Id.* at 4.)

In August 1999, DeBevec advised WTC that she was unable to reconcile a shortage of approximately $2,600 in her cash drawer, and William Gula ("Gula"), a WTC security officer, began an investigation of the matter. (D.I. 26 at 1.) During the course of the investigation, Gula determined from DeBevec's work papers that she had deviated from a WTC policy that required commercial[2] customers who wished to cash checks made payable to their businesses to first deposit the checks into their WTC accounts. Such customers could then write a check against the deposit account.[3] (*Id.* at 2.) WTC claims its "policy of requiring commercial customers to deposit checks and to then write a check in order to receive cash back was an essential component of [its] ability to track and report large cash transactions, as required by the federal Bank Secrecy Act ("BSA")." (D.I. 26 at 2.)

Specifically, DeBevec's teller materials showed that she regularly cashed checks totaling over $10,000 for each of the businesses of two Indian–Americans known as "Nick" and "Pepi" Patel (collectively the "Patels"). (*Id.* at 5; D.I. 33 at 2.) The Patels were regular customers of WTC, and the proprietors of several businesses, including Balaji, Inc. ("Balaji") and Nirali, Inc. ("Nirali"). Both Balaji and Nirali operated liquor stores, and each of those liquor stores offered check-cashing services to its customers. (D.I. 33 at 5.) Those services allowed the liquor store customers to endorse their payroll checks to Balaji or Nirali "in exchange for cash in the amount of the paycheck."[4] (*Id.* at 6.) The Patels "would then present the checks to [WTC] in exchange for cash to replenish the liquor stores' respective cash supplies." (*Id.*)

WTC ultimately determined that five tellers cashed checks for the Patels, in violation of the bank's two-step deposit and check-issuance policy and in violation of the BSA, which requires that a Currency Transaction Report ("CTR") be filed when over $10,000 in cash is paid out on related accounts in a business day. (D.I. 26 at 5–6.) The tellers involved with the Patel transactions included DeBevec, Baker, Zarebicki, Criselda Jones ("Jones"), Baker's predecessor as the back-up head teller at the Claymont branch, and Jeanette Preston ("Preston"), the back-up head teller at the Branmar branch. (*Id.*) WTC claims that "[a]fter interviewing these tellers individually, and in light of the serious nature of the tellers' violations of [WTC] policy and of the BSA, [it] concluded that DeBevec, Baker, and Zarebicki should be terminated."[5] (*Id.* at 8.)

***199** DeBevec's employment was terminated on September 13, 1999, and Zarebicki's and Baker's employment was terminated on September 16, 1999. (*Id.*) According to WTC, Preston was not fired since the amount of her transactions did not reach or exceed the $10,000 limit, and therefore she had not violated the BSA and "had not placed WTC at the same risk as had the other tellers." (D.I. 33 at 8.) WTC claims that Jones was not terminated because she was no longer involved with the Patels' transactions, and to the extent that she violated WTC policy, she did so "unwittingly at the direction of DeBevec." (*Id.*)

The Plaintiffs offer several reasons for their belief that their firing was pretextual. First, Plaintiffs claim that cashing payroll checks endorsed to businesses such as the Patels was the "precise type of transaction [that] had been conducted for years at [WTC] by a number of other customers at [WTC]." (*Id.*) Second, Plaintiffs assert that none of the Plaintiffs were ever reprimanded for failure to follow WTC policies and that each had received positive performance evaluations.[6] (*Id.* at 2–4.) Third, Plaintiffs state that the WTC teller manual speaks to checks made payable to a corporation, *see* supra n. 3, but does not reference the situation where checks are initially payable to an individual who then endorses the check, as occurred with the Patel transactions. (*Id.* at 8.) Fourth, Plaintiffs claim that the training given by WTC with respect to the BSA was inadequate. (*Id.* at 12.) Fifth, Plaintiffs allege that in their final meeting with WTC's Compliance Officer, "the Plaintiffs were admonished that they had been taken by 'con men' ... involved 'shady goings on' ... who were trying to find a weak link ... and that with names like 'Nirali' and 'Balaji' ... 'they should have known better.' " (*Id.* at 15.)

Furthermore, Plaintiffs point out that the Patels were notified as early as October 1, 1999 to "make other banking arrangements." (D.I. 27 at A56.) Plaintiffs allege that this was done long before the completion of Gula's investigation, which did not extend beyond the scope of the Patel transactions, "and even though nobody had any reason to suspect the Patels of any criminal activity or other wrongdoing." (D.I. 33 at 16.) Plaintiffs also note that, on October 20, 1999, WTC bank officials met with the Patels and that WTC's General Counsel indicated that the Patels were not at fault for not following WTC's policy.[7] (*Id.*) Plaintiffs point out that this meeting, however, did not cause WTC to reconsider its decision to terminate the Patels' accounts. (*Id.*)

On December 10, 1999 the Plaintiffs filed a charge of discrimination with the Delaware Department of Labor and the Equal Opportunity Commission alleging discrimination on the basis of age, and retaliation for opposing a discriminatory employment practice. (D.I. 33 at 1.) Thereafter, the Department of Labor and the EEOC issued Plaintiffs a "right to sue letter." (*Id.*) On December 10, 2001, Plaintiffs filed a complaint with this court alleging that Plaintiffs' termination from WTC was "retaliation for [their] resistance to WTC's suggestions to treat customers differently based on the customer's race" (D.I. 1 at ¶ 17, ¶ 24, ¶ 31), and thus violated Title VII and 42 U.S.C. §§ 1981 and 1981a,[8] and breached the covenant of good ***200** faith and fair dealing implied in their employment contracts under Delaware law. (*Id.* at ¶¶ 33–40.) Plaintiffs seek a declaratory judgment, a permanent injunction, damages, attorney's fees and costs. (D.I.1.)

III. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c) (2003). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *Goodman v. Mead Johnson & Co.,* 534 F.2d 566, 573 (3d Cir.1976). However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to:

> do more than simply show that there is some metaphysical doubt as to the material facts ... In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.' ... Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial.'

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Accordingly, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

IV. DISCUSSION

A. PLAINTIFFS' TITLE VII CLAIM

The anti-retaliation section of Title VII states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e–3(a). To establish a prima facie case of discriminatory retaliation under Title VII, a plaintiff must show "(1) that she engaged in a protected activity; (2) that the employer took adverse action against her; and (3) a causal link exists between the protected activity and the employer's adverse action." *Kachmar v. SunGard Data Sys., Inc.,* 109 F.3d 173, 177 (3d Cir.1997). Whether Plaintiff has established a prima facie case of retaliation is a question of law for the court. *See Id.*

In the present case, WTC contends that Plaintiffs did not engage "in a protected activity," and have therefore not satisfied the first element necessary to establish a prima facie case of retaliation because Plaintiffs did not "oppose[ ] any practice made an unlawful employment practice." (D.I. 26 at 16) (quoting 42 U.S.C. § 2000e–3(a)). In other words, WTC asserts that Plaintiffs did not oppose any practice made an unlawful employment practice by Title VII, but that, instead, Plaintiffs are alleging that they were retaliated against for opposing WTC's supposedly discriminatory treatment of certain customers. (*Id.* at 17; *See* D.I. 1 at ¶ 17, ¶ 24, ¶ 31.)

In support of its position that Plaintiffs have not opposed an unlawful employment practice, WTC cites *Lamb–Bowman v. Delaware* ***201** *State Univ.,* 152 F.Supp.2d 553 (D.Del.2001). (D.I. 26 at 17.) In *Lamb–Bowman* the plaintiff, who was the defendant university's head women's basketball coach, complained to the athletic director about the disparity between the men's and women's athletic programs. *Id.* at 554. After the university informed the plaintiff that she wouldn't be reappointed, plaintiff brought claims for sex discrimination and retaliation under Title VII. *Id.* at 557. In granting summary judgment for the defendant, the court found that, while the plaintiff had alleged retaliation by the defendants "because she complained of disparities between the women's and men's athletic programs, a potential violation of Title IX," she did not oppose an unlawful employment practice, and thus had failed to state a claim under Title VII. *Id.* at 561. Similarly, WTC argues that even accepting the Plaintiffs' assertion that WTC wanted them to treat customers unfairly, such improper behavior towards customers is not an unlawful employment practice under Title VII. Thus, Plaintiffs did not oppose an unlawful employment practice and have therefore not satisfied the first element of a prima facie case of retaliation. (D.I. 26 at 17.)

In response, Plaintiffs distinguish *Lamb–Bowman* by saying that the plaintiff in that case opposed violations to Title IX, which were entirely unrelated to employment practices. In the case at bar, Plaintiffs argue that:

> each of the Plaintiffs were terminated because they failed, or in essence refused, to adopt management's discriminatory view of Indian customers and because they did not, they lost their jobs. By requiring the Plaintiffs to treat the Patels differently than [C]aucasian American customers engaged in the same transactions, [WTC] was requiring the Plaintiffs to discriminate against the Indian customers as a condition of their own employment, and was therefore engaged in an employment practice motivated by a prohibited bias against those of foreign national origin.

(D.I. 33 at 20.) In support of this claim, Plaintiffs argue that in *Moyo v. Gomez,* 40 F.3d 982 (9th Cir.1994), the plaintiff, a prison employee, alleged that he was discharged because he refused to carry out or otherwise protested his employer's policy of denying showers to black inmates after work shifts. *Id.* at 985. The Ninth Circuit stated that if plaintiff could prove his allegation, "he has stated a retaliation claim based on an unlawful employment practice—i.e., the alleged practice of requiring [plaintiff], as a condition of his employment, to discriminate against black inmates." The Ninth Circuit further stated that under 42 U.S.C. § 2000e–3(a), "requiring an employee to discriminate is itself an unlawful employment practice." *Id.*

Even if I were to adopt the Ninth Circuit's interpretation of 42 U.S.C. § 2000e–3(a) that "requiring an employee to discriminate is itself an unlawful employment practice," the Plaintiffs have not proffered any evidence from which a reasonable fact finder could conclude that WTC did, in fact, require its employees to discriminate against persons of Indian descent. The only evidence that Plaintiffs have submitted are a very limited number of offhand comments allegedly made by WTC personnel.

For example, Plaintiffs allege that "on the occasion of her firing, [Baker] was admonished by an agent and employee of WTC for not maintaining the appropriate level of suspicions with regard to the Patel family because of their being of Indian descent, indicating they were all 'con men.' Also, on a prior occasion her supervisor spoke disparagingly to at least one other head teller about business customers of Indian descent, suggesting that these customers ***202** were inherently untrustworthy." (D.I. 1 at ¶ 16.)

Plaintiffs allege that when DeBevec was fired, she "was admonished by an agent and employee of WTC for not maintaining the appropriate level of suspicions with regard to the Patel family because of their being of Indian descent. Also, during a prior telephone conversation WTC's compliance officer stated to [DeBevec] that 'those damn Indians are always trying to get something for nothing.' " (D.I. 1 at ¶ 23.)[9]

"On the occasion of [Zarebicki's] firing," Plaintiffs allege that she "was admonished by an agent and employee of WTC for not maintaining the appropriate level of suspicion with regard to the Patel family because of their being of Indian descent and was criticized for 'not being suspicious of the Indians who came in to cash their checks.' " (D.I. 1 at ¶ 30.)

Far from establishing that Plaintiffs were required by WTC to discriminate against the Patels because of the Patels' race or national origin, those alleged remarks do not even establish that WTC actually discriminated against the Patels, or Indians in general. *See Faragher v. Boca Raton,* 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) ("offhand comments ... and isolated incidents (unless extremely serious) will not amount to discriminat[ion]"). Moreover, there is no basis for Plaintiffs' conclusory allegation that WTC was biased against the Patels because "[t]he Patels' accounts were the only ones terminated," "even though [WTC] had readily available evidence that other Caucasian American businesses were engaged in the same transactions." (D.I. 33 at 17.) By Plaintiffs' own admissions, the other Caucasian businesses that Plaintiffs refer to involved a much lower volume of checks and never came close to presenting the amount in a business day that would have triggered a CTR. (D.I. 27 at A 174–175, 274.)

Because Plaintiffs claims about WTC's alleged bias against the Patels are conclusory and without a sound evidentiary basis, Plaintiffs have failed to show that they were terminated for engaging in a protected activity. Accordingly, Plaintiffs have failed to establish a prima facie case of unlawful retaliation.

B. PLAINTIFFS' ASSOCIATIONAL DISCRIMINATION CLAIM

Under Title VII, it is unlawful to discharge an employee or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e–2(a). Plaintiffs claim for the first time in the Answering Brief that they were discriminated against under this statute "because of their association with the Patels, who were of a foreign national origin." (D.I. 33 at 21) (citing *Gresham v. Waffle House, Inc.,* 586 F.Supp. 1442 (N.D.Ga.1984)). In *Gresham,* the plaintiff, a white female, filed a complaint under Title VII, 42 U.S.C. § 2000e–2(a), alleging that she was discharged by her employer because of her interracial marriage to a black man. *Id.* at 1445. In holding that the claim was actionable under Title VII, the Northern District of Georgia held that the defendant's disapproval of a social relationship between a white woman and black man was as much a result of the plaintiff's race as that of her husband. *Id.*

***203** Here, Plaintiffs associational discrimination claim is not well founded because it is based on their acquaintance as bank tellers with the Patels as customers, and the courts have recognized that associational discrimination claims must have as their basis a much more significant relationship. *See* *Zielonka v. Temple Univ.,* No. Civ. A. 99–5693, 2001 WL 1231746 at *6 (E.D.Pa. Oct. 12, 2001) (holding that plaintiff's "friendly acquaintance" with another professor who was allegedly discriminated against was insufficient for a Title VII claim), *Robinett v. First Nat'l Bank of Wichita,* Civ. A. No. 87–2561–S, 1989 WL 21158 at *2 (D.Kan. Feb. 1, 1989) (holding that "good friendship" of a white plaintiff with a black coworker was insufficient to establish the type of relationship necessary to support a cause of action for associational discrimination).

In fact, in the cases that Plaintiffs rely on, such as *Gresham,* 586 F.Supp. 1442, *Holiday v. Belle's Restaurant,* 409 F.Supp. 904 (W.D.Pa 1976), *Whitney v. Greater New York Corp. of Seventh–Day Adventists,* 401 F.Supp. 1363 (S.D.N.Y.1975), *Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888 (11th Cir.1986); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.,* 173 F.3d 988 (6th Cir.1999), there was a spousal relationship or other family relationship between the plaintiff and the person of a protected class that gave rise to the associational discrimination claim. No such relationship exists in this case.

In any event, there is absolutely no evidence that WTC discriminated against Plaintiffs on the basis of race. Plaintiffs claims are merely conclusory and such allegations are insufficient to withstand a motion for summary judgment. *See* *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505.

C. PLAINTIFFS' BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM

Under Delaware law, employees are generally deemed "employees at will," meaning that they can be terminated without cause, regardless of the employer's motive. *E.I. DuPont de Nemours v. Pressman,* 679 A.2d 436, 437 (Del.1996). An exception to the at-will presumption has been carved out when there is a breach of the covenant of good faith and fair dealing, but for this exception to apply, a plaintiff must establish that he or she falls into one of four exclusive categories. *Id.* at 441–44. The four categories are: (1) where the termination violated public policy; (2) where the employer misrepresented an important fact and the employee relied on that fact to either accept a new position or remain in a present one; (3) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation earned through the employee's past service; and (4) where the employer falsified or manipulated employment records to create fictitious grounds for termination. *See* *Reed v. Agilent Techs., Inc.,* 174 F.Supp.2d 176, 191 (D.Del.2001).

Plaintiffs argue that their termination violated the first of the four categories because like the " 'clear and firmly rooted public policy to deter, prevent, and punish sexual harassment in the work place,' " "it is certainly reasonable to conclude the Delaware Courts would find the type of discrimination involved in this case a violation of 'clear and firmly rooted policy' as well." (D.I. 33 at 24) (citing *Schuster v. Derocili,* 775 A.2d 1029, 1037 (Del.2001)). However, the Plaintiffs cannot bootstrap their conclusory claim about WTC's discrimination toward customers into a public policy claim about discrimination against employees. Plaintiffs were ***204** not terminated on the basis of national origin. Moreover, as previously discussed, Plaintiffs have not established that they were required to discriminate against the Patels on the basis of the Patels' national origin. Thus, the argument that they were terminated for failing to do so is specious.

The unrebutted evidence is that, in violation of Federal law and explicit bank policy, the Plaintiffs paid out millions of dollars, over the course of four years, to customers whose requests for cash were or should have been known to the Plaintiffs to be unlawful. No rational fact finder, based on the evidence of record in this case, could conclude that the Plaintiffs lost their job for the reasons Plaintiffs claim.

V. CONCLUSION
For the reasons set forth herein, the Motion (D.I.25) will be granted. An appropriate order will issue.

ORDER

For the reasons set forth in the Memorandum Opinion issued in this case today,

IT IS HEREBY ORDERED that defendant Wilmington Trust Company's motion for summary judgment (D.I.25) is GRANTED.

All Citations

320 F.Supp.2d 196

Footnotes

1 The following rendition of the background information for my decision is cast in the light most favorable to the nonmoving party, Plaintiffs, and does to constitute findings of fact.

2 An individual WTC customer could present a check for payment in cash without having to deposit the check in his account. (D.I. 26 at 2.)

3 WTC's manual stated that "a check payable to a ... company ... may NOT be cashed at any time. They may only be deposited into an account which credits the payee." (D.I. 27 at A2.)

4 WTC claims that the Patels' customers were charged a two percent fee for cashing their checks at the liquor stores. (D.I. 26 at 4.)

5 WTC asserts that an investigation revealed that:

> Plaintiffs had cashed checks for the Patels without requiring a deposit on approximately 550 separate business days over a four-year period. When these transactions were aggregated across branches and for the Patel-related businesses, the transaction exceeded $10,000 per day on 481 days, resulting in 481 unfiled CTRs. As a result, the Plaintiffs paid out to the Patels over 15 million dollars in cash during the four year period from 1996 to 1999 without complying with the BSA or Bank policy.

(D.I. 26 at 10.)

6 In fact, just months prior to DeBevec's termination, she was described by her manager as "one of the best if not the best technical head tellers in the branch system." (D.I. 33 at 3.)

7 The General Counsel is represented as stating, "it was the tellers faults for not following policy, not [the Patels]." (D.I. 27 at A66.)

8 Although Plaintiffs claim a violation of 42 U.S.C. §§ 1981 and 1981a, their entire argument is premised on Title VII. (*See* D.I. 33.)

9 The telephone conversation that Plaintiffs refer to took place in the late 1980's. (D.I. 27 at A125–126.) Since Plaintiffs continued to cash checks for the Patels after this statement was allegedly made and throughout the '80's and '90's, it does not follow that Plaintiffs were required to discriminate against the Patels on the basis of their national origin.

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Howard v. Steris Corp., M.D.Ala., August 17, 2012

531 F.3d 127
United States Court of Appeals,
Second Circuit.

Patrick S. BRADY, Plaintiff–Appellee,
v.
WAL–MART STORES, INC., Yem Hung Chin, Defendants–Appellants,
James Bowen, Defendant.

Docket No. 06–5486–cv.
|
Argued: Feb. 20, 2008.
|
Decided: July 2, 2008.

Synopsis

Background: Former employee sued large retail employer, claiming constructive discharge in violation of Americans with Disabilities Act (ADA) and New York Human Relations Law (NYHRL). Following entry of judgment on jury verdict in favor of employee, 2005 WL 1521407, the United States District Court for the Eastern District of New York, 455 F.Supp.2d 157, denied employer's motion for judgment as a matter of law. Employer appealed.

Holdings: The Court of Appeals, Guido Calabresi, Circuit Judge, held that:

sufficient evidence existed that employee was in fact disabled, or was perceived to be so, as required to establish prima facie case of ADA discrimination;

sufficient evidence existed that employee's transfer from pharmacy to parking lot constituted an adverse employment action, as required to establish a prima facie case of ADA discrimination;

district court did not abuse its discretion in admitting consent decree; and

sufficient evidence existed that employer discriminated against employee in the face of perceived risk that its actions would violate federal law, as required to justify award of punitive damages.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict.

Attorneys and Law Firms

***129** Douglas H. Wigdor, Thompson Wigdor & Gilly LLP, New York, N.Y., for Appellee.

James F. Bennett, Dowd Bennett LLP, St. Louis, MO (Megan S. Heinsz, Dowd Bennett LLP, St. Louis, MO, Joel L. Finger, I. Michael Kessell, Littler Mendelson, P.C., New York, N.Y., on the brief), for Appellants.

Barbara L. Sloan (Ronald C. Cooper, Gen. Counsel, Lorraine C. Davis, Acting Assoc. Gen. Counsel, Vincent J. Blackwood, Ass't Gen. Counsel, on the brief), Office of General Counsel, EEOC, Washington, D.C., for Amicus Curiae EEOC in Support of Appellee.

Before: KEARSE, CALABRESI, and KATZMANN, Circuit Judges.

Opinion

GUIDO CALABRESI, Circuit Judge:

Plaintiff–Appellee Patrick S. Brady filed suit in the United States District Court for the Eastern District of New York (Orenstein, *M.J.*) against his former employer, ***130** Wal–Mart Stores, Inc., and his former boss, Yem Hung Chin (collectively, "Appellants"), alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.,* and New York Human Rights Law, N.Y. Exec. Law § 290 *et seq.* The jury returned a mixed verdict, finding for Appellee on some claims and Appellants on others, and awarding Appellee compensatory, economic, punitive, and nominal damages. The district court struck the economic damages award, reduced the punitive damages award to the statutory cap, and ordered that a new trial be held if Appellee did not accept a remittitur of the compensatory damages award, *Brady v. Wal–Mart Stores, Inc.,* 455 F.Supp.2d 157, 218 (E.D.N.Y.2006), which he did.

I. Background
"When an appeal comes to us after a jury verdict, we view the facts of the case in the light most favorable to the prevailing party." *Kosmynka v. Polaris Indus.,* 462 F.3d 74, 77 (2d Cir.2006). Those facts are as follows.

Appellee Patrick Brady was, at the time pertinent to this suit, a nineteen-year-old man with cerebral palsy. A witness testified that "[j]ust by looking at him, you could tell he had a disability." His disability manifested itself in noticeably slower walking, walking with a shuffle and limp, recognizably slower and quieter speech, not looking directly at people when talking to them, weaker vision, and a poor sense of direction. Brady himself testified that, "It basically affects everything I do." His father testified that, "It affects everything he does, his whole life, everything about him" and that "[i]t affects ... his driving, the school work, his working ability, his eating, his walking, his seeing. Everything involved in each one of those aspects and so much more." And his mother testified that, "It's just everything he does.... [I]t's really ... life-changing.... I mean, the way he walks, the way he sits, his mannerisms. The way he thinks. I mean, he learns differently. His eyes—it's just—it touches everything. The way he eats. I mean, he had auto/motor problems [sic], just the way—his posture."

In 2002, after having worked for about two years in a local pharmacy receiving prescriptions and dispensing prescription drugs without incident, Brady applied for a job in the pharmacy department of the Wal–Mart store in Centereach, New York. The part-time pharmacy job which he sought was classified as a "Salesfloor Associate" position. As part of the application, he was asked to sign a document entitled Job Description, which was generic to all Salesfloor Associate positions, and thereby to certify that he "ha[d] the ability to perform the essential functions of th[is] position either with or without a reasonable accommodation." The job functions listed included, "[f]requently pick up, lift, carry, and place items of varying sizes, weighing up to and greater than 50 pounds, while moving up and down a ladder." Brady marked that he had the ability to perform the listed tasks "either with or without a reasonable accommodation." Following two interviews and a drug test, he was hired and told when to report to work.

Upon beginning work, he was given a vest with "pharmacy" on it, and he was instructed to stock merchandise and dispense prescriptions. He very quickly perceived that Appellant Chin, his boss, was unhappy with his performance. He testified that "she was kind of short with me. She knew there was something wrong with me.... [She was s]hort, as if she wasn't happy with me. She didn't appear to like me, the fact that I was hired for the pharmacy.... She told me to speed it up, ***131** you know, as if I was working slow, to speed it up a little bit." Chin testified that she thought that Brady was too slow and that he appeared to have difficulty matching customers' names with their prescriptions. She also testified that she was "completely alarmed at that time, and [she] knew there was something wrong." She thought to herself, "forget it, this is ridiculous .... [O]kay, forget it, this is not working.... I need to take control back." She thought Brady's performance was "absolutely awful," and she "wanted [him] away from [her] prescriptions." Although Wal–Mart had an institutional "coaching policy," she never approached Brady about participating in it, because "I really didn't think it kind of applied. I didn't know how to teach him to find names better...." Brady testified that he never handed out the wrong prescription, was never unable to find a prescription in the bin, and never required assistance from Chin or any other co-worker to perform his job.

At the end of his first shift, Brady requested his schedule for the upcoming week. Chin told him that she would call him with his schedule. She did not, and when Brady's mother suggested that he go to the store and ask about his schedule, he told her that, "I don't think [Chin] wants me there." He did go into the store, and Chin told him that "she had been meaning to call [him] about [his] schedule but she hadn't gotten around to it." She then asked him if he would be willing to work in another department because she really needed to hire a pharmacy technician, rather than a pharmacy assistant. Brady believed this to be a lie because no one had previously mentioned that the pharmacy needed to hire a technician. Brady worked two more days in the pharmacy without incident. At the end of the second day, he again asked about his schedule for the coming week and was again told that Chin would call him. Again, she did not. When Brady went back to the store, another pharmacist told him that he would remind Chin to call him. Once again, she did not. When he returned to the store the next day, Chin "seemed visibly annoyed to see [him], as if she didn't want anything to do with [him]." Chin told him to go to the personnel department.

The personnel manager told Brady that the only available job was collecting shopping carts and garbage in the parking lot. Brady felt that this job was "degrading" because "it really doesn't involve any skill or knowledge and ... I felt that they put people out there that couldn't possibly do anything else." The parking lot job had a different uniform, and Brady understood it to be a demotion. He also testified that, because of his disability, he was less suited to it than he was to working in the pharmacy.

After Brady's transfer to the parking lot, his father came to the store and spoke with the assistant store manager, telling him that he hoped his son's disability had not played any role in the transfer. The assistant manager promised to investigate, and later James Bowen, the store manager, called Brady's father and, according to Brady's father, told him "that he didn't think that [Brady] had a fair chance at this job; that [Chin] didn't give him a fair chance and she didn't handle it the right way.... And he told me what Ms. Chin had said, that [Brady] wasn't fit for the job. And then she said that, 'I'll put him back in the pharmacy, but if we get sued, it's on you.' " Bowen also stated that new employees were typically given a training period and that Brady should have been given more time to learn the job.[1]

***132** Bowen then called Brady into his office. He told Brady about Chin's complaints, but Brady replied that he had two years of experience at another pharmacy without problems. Bowen asked Brady if he was happy with the parking lot job, and Brady replied that he was not. Brady was then transferred to the food department, where he was asked to stock shelves and zone merchandise. Bowen walked Brady to the food department, but gave him no training or instruction, nor did he provide him a uniform. Brady was not offered the option of returning to the pharmacy. At the end of the day, Brady was given a work schedule for the next week that conflicted with his community college schedule, a schedule he had noted on Wal–Mart's availability forms. Frustrated, Brady called the store the next day and quit.

Brady testified that, after quitting, he became depressed and, for the first time, sought psychiatric help. He and his parents testified that he lost self-confidence, withdrew from his family, became angry, and lost interest in his community college studies.

He subsequently brought this suit, alleging a number of counts of discrimination under the ADA and New York Human Rights Law. Specifically, he alleged that Wal–Mart took the following discriminatory actions: (1) transferring him from the pharmacy to the parking lot; (2) transferring him from the parking lot to the food department; (3) creating a hostile work environment; (4) failing reasonably to accommodate his disability; and (5) constructively discharging him. He also claimed that Wal–Mart made prohibited pre-employment disability inquiries, and he alleged intentional infliction of emotional distress.

The jury returned a mixed verdict. It found that Brady was disabled and/or was regarded as disabled within the meaning of the ADA and that Wal–Mart discriminated against him on the basis of his disability by transferring him from the pharmacy to the parking lot. It also found that Wal–Mart subjected him to a hostile work environment. Moreover, it found that Wal–Mart failed reasonably to accommodate him and that Wal–Mart had made an impermissible pre-employment inquiry in its job description. It found that Chin aided and abetted in the discrimination but that Bowen—who was a defendant below—did not. The jury, however, also found that Brady was not constructively discharged, and that he had not been subjected to intentional infliction of emotional distress.

Based on these findings, the jury awarded Brady $2.5 million in compensatory damages, $9,114 in economic damages, $5 million in punitive damages, and $2 in nominal damages. The district court apportioned all of the compensatory damages to the state law claim and all of the punitive damages to the ADA claim. The court struck the economic damages award because Brady did not prevail on his constructive discharge claim. And, pursuant to 42 U.S.C. § 1981a(b)(3)(D), the punitive damages award was reduced to the statutory cap of $300,000. Appellants filed a Rule 50(b) motion for judgment as a matter of law and a Rule 59 motion for a new trial. The court denied those motions except that it ordered that a new trial on the issue of compensatory damages be held unless Brady accepted a remittitur of the compensatory damages award from $2.5 ***133** million to $600,000. *Brady v. Wal–Mart Stores, Inc.,* 455 F.Supp.2d at 217–18. Brady accepted the remittitur. This appeal followed.

II. Discussion

The appeal involves seven issues: (1) whether Appellants waived their right to move for judgment as a matter of law post-verdict by failing properly to move for judgment as a matter of law at the close of all of the evidence; (2) whether the district court erred in not granting Appellants judgment as a matter of law on Appellee's disability discrimination claims; (3) whether the district court erred in not granting Appellants judgment as a matter of law on Appellee's failure-to-accommodate claim; (4) whether the district court improperly admitted into evidence a nationwide consent decree and, if so, whether a new trial should be granted; (5) whether the district court erred in not granting Appellants judgment as a matter of law on Appellee's claim that Appellants made an impermissible pre-employment inquiry; (6) whether the district court erred in not granting Appellants judgment as a matter of law on Appellee's claim for punitive damages; and (7) whether the district court erred in its ruling on Appellants' application for remittitur of damages. We deal with each issue in turn.

A. Waiver

A prerequisite for a motion for judgment as a matter of law post-verdict is that the movant had also moved for judgment as a matter of law "at the close of all of the evidence." Fed.R.Civ.P. 50(a), (b) (1995). Appellee asserts that Appellants failed to meet this requirement because, although they moved for judgment as a matter of law at the close of Appellee's case, they did not so move at the close of all the evidence. On the final day of testimony, immediately before the first witness was called, however, Appellants' counsel renewed his Rule 50 motion, saying, "I assume you don't need me to raise [it] in any kind of detail." The court replied, "No. Your 50(a) motion is denied without prejudice to renewing it, if appropriate, *after the verdict.*" (emphasis added).

We have held that where the trial judge has indicated that renewing a previously made motion for judgment as a matter of law at the close of all the evidence was not necessary, and where the opposing party could not reasonably have thought that the motion was dropped, then judgment as a matter of law may be sought post-verdict. *See Am. Protein Corp. v. AB Volvo,* 844 F.2d 56, 61–62 (2d Cir.1988); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.,* 842 F.2d 578, 587 n. 3 (2d Cir.1987). Both were clearly so here; accordingly, Appellants' Rule 50(b) motion was not barred.

B. Disability Discrimination Claims

This Court reviews *de novo* a district court's denial of a motion for judgment as a matter of law. *Wolf v. Yamin,* 295 F.3d 303, 308 (2d Cir.2002). Such a motion "may only be granted if there exists 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture,' or the evidence in favor of the movant is so overwhelming 'that reasonable and fair minded [persons] could not arrive at a verdict against [it].' " *Luciano v. Olsten Corp.,* 110 F.3d 210, 214 (2d Cir.1997) (alterations in original) (quoting *Cruz v. Local Union No. 3,* 34 F.3d 1148, 1154 (2d Cir.1994)). In reviewing such a motion, this Court " 'must give deference to all credibility determinations and reasonable inferences of the jury,' and may not weigh the credibility of witnesses or otherwise consider the weight of the evidence." *Caruolo v. John Crane,* ***134** *Inc.,* 226 F.3d 46, 51 (2d Cir.2000) (quoting *Galdieri–Ambrosini v. Nat'l Realty & Dev. Corp.,* 136 F.3d 276, 289 (2d Cir.1998)).

In order to establish a prima facie case of discrimination under the ADA, a plaintiff must show (a) that his employer is subject to the ADA; (b) that he is disabled within the meaning of the ADA or perceived to be so by his employer; (c) that he was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (d) that he suffered an adverse employment action because of his disability. *Jacques v. DiMarzio, Inc.,* 386 F.3d 192, 198 (2d Cir.2004). Appellants contend that Brady did not demonstrate that he was disabled within the meaning of the ADA or was perceived to be so. And they also claim that he did not show that he suffered an adverse employment action because of his (alleged) disability.

The evidence presented, including descriptions of Brady's cerebral palsy, was sufficient to permit the jury to find that he was in fact disabled under the ADA. *See* 42 U.S.C. 12102(2)(A). In addition, we think the record amply supports the conclusion that he was perceived to be disabled. *See* 42 U.S.C. § 12102(2)(C) (defining disability so as to include certain types of impairments or "being regarded as having such an impairment"). Chin herself testified that she regarded Brady to be slow and that she "knew there was something wrong" with him. Brady's father testified that the store manager told him that Chin said that Brady "wasn't fit for the job."

We also find that there was sufficient evidence for the jury to conclude that Brady's transfer from the pharmacy to the parking lot constituted an adverse employment action. Although this transfer did not affect his wages or benefits, it resulted in a "less distinguished title" and "significantly diminished material responsibilities," and therefore constituted an adverse employment action. *Patrolmen's Benevolent Ass'n of N.Y. v. City of New York,* 310 F.3d 43, 51 (2d Cir.2002) (internal quotation marks omitted); *see also de la Cruz v. N.Y. City Human Res. Admin. Dep't of Soc. Servs.,* 82 F.3d 16, 21 (2d Cir.1996). We cannot agree with Appellants that the short duration of Appellee's transfer to the parking is a proper basis for finding, as a matter of law, that there no adverse employment action occurred. This is especially so in light of the fact that Brady was not transferred back to the pharmacy, but rather to the food department, which, although perhaps preferable to the parking lot, could still rationally have been found by the jury to be worse than the pharmacy.

Because we find that Appellee presented sufficient evidence for the jury to find a specific adverse employment action, we need not reach his alternative claim that Appellants created a hostile work environment.

C. Failure to Accommodate Claim

Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A); *accord* 29 C.F.R. § 1630.9(a). Appellants argue that, because Brady never requested an accommodation and testified that he did not think he needed one, the district court should have granted judgment as a matter of law on the failure to accommodate claim. Appellants also argue that Brady did not ***135** demonstrate the existence of an accommodation that would have enabled him to perform his job.

"[G]*enerally,* it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." *Graves v. Finch Pruyn & Co.,* 457 F.3d 181, 184 (2d Cir.2006) (emphasis added) (internal quotation marks omitted). Over the defense's objections, Judge Orenstein charged the jury that, if "Wal–Mart knew or had reason to know that Mr. Brady had a disability, or perceived that made it difficult [*sic*] to perform his job as a sales associate in the pharmacy, or perceived that he had such a disability," then it had an obligation to offer a reasonable accommodation.

We have not had occasion in the past to determine when the "general [ ]" rule announced in *Graves* might be inapplicable. Appellee relies on district court cases to argue that the employer is obligated to provide a reasonable accommodation when it perceives the employee to be disabled, whether or not the employee has asked for an accommodation. In *Felix v. New York City Transit Authority,* 154 F.Supp.2d 640 (S.D.N.Y.2001), the district court wrote that,

> Application of this general rule [that a request for accommodation is a prerequisite to liability for failure to accommodate] is not warranted, however, where the disability is obvious or otherwise known to the employer without notice from the employee. The notice requirement is rooted in common sense. Obviously, an employer who acts or fails to act without knowledge of a disability cannot be said to have discriminated based on that disability. Moreover, the notice requirement prevents an employee from keeping her disability a secret and suing later for failure to accommodate. These concerns are not relevant when an employer has independent knowledge of an employee's disability. The rule requiring a request for accommodation [does not apply] in such circumstances.

Id. at 657 (internal citations omitted); *accord Glozman v. Retail, Wholesale & Chain Store Food Employees Union Local 338,* 204 F.Supp.2d 615, 623 (S.D.N.Y.2002). This view is consistent with the statutory and regulatory language, which speaks of accommodating "known" disabilities, not just disabilities for which accommodation has been requested. Indeed, a situation in which an employer perceives an employee to be disabled but the employee does not so perceive himself presents an even stronger case for mitigating the requirement that the employee seek accommodation. In such situations, the disability is obviously known to the employer, while the employee, because he does not consider himself to be disabled, is in no position to ask for an accommodation. A requirement that such an employee ask for accommodation would be tantamount to nullifying the statutory mandate of accommodation for one entire class of disabled (as that term is used in the ADA) employees. We therefore hold that an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled.

But what does accommodation mean, if the employee does not request specific accommodation? We have held that the ADA contemplates that employers will engage in "an 'interactive process' [with their employees and in that way] work together to assess whether an employee's disability can be reasonably accommodated." *Jackan v. N.Y. State Dep't of Labor,* 205 F.3d 562, 566 (2d Cir.2000). In this case, it was reasonable for the jury to find that Brady ***136** was disabled and/or that Appellants perceived him to be disabled. Accordingly, Wal–Mart was obligated to engage in the aforementioned interactive process. Wal–Mart failed to engage in this process, and therefore the district court was correct in declining to grant judgment as a matter of law on the failure to accommodate claim.

D. Consent Decree

At the time of Brady's employment and throughout this litigation, Wal–Mart was subject to a nationwide consent decree pursuant to *EEOC v. Wal–Mart Stores, Inc.,* No. S99 CIV 0414, 2001 WL 1904140 (E.D.Cal. Dec.17, 2001). The consent decree required Wal–Mart, *inter alia,* not to engage in any employment practice that would violate the ADA, to train Wal–Mart employees in ADA compliance, and to formulate accurate job descriptions that are consistent with actual job requirements. *Id.* The district court allowed Brady to introduce into evidence a redacted version of the consent decree "for the limited purpose of showing that Wal–Mart was aware of its obligations under the ADA." *Brady v. Wal–Mart Stores, Inc.,* 455 F.Supp.2d at 179. Appellants argue that the consent decree was irrelevant and prejudicial because Wal–Mart was not on trial for violating the consent decree, and that a new trial is the proper remedy.

The trial court's evidentiary rulings are reviewed only for abuse of discretion. *See, e.g., Old Chief v. United States,* 519 U.S. 172, 174 n. 1, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). A consent decree may properly be admitted to demonstrate that a defendant was aware of its legal obligations. *United States v. Gilbert,* 668 F.2d 94, 97 (2d Cir.1981). The district judge here instructed the jury that "the only fact you should take into consideration about the ... consent decree ... is that Wal–Mart undertook certain obligations. It has nothing to do with this case and what preceded it. Just that they had these obligations they agreed to. And that is the only purpose that those obligations that are being referred to are admitted in evidence." In short, the court instructed the jury that it could consider the consent decree only as an implicit acknowledgment by Wal–Mart that it was familiar with the ADA. Given this limiting instruction, we cannot find that the district court abused its discretion in admitting the consent decree. *See United States v. Downing,* 297 F.3d 52, 59 (2d Cir.2002) ("Absent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions."). We moreover find that it was not an abuse of discretion for the district court to determine that Appellee's arguments in summation regarding Appellants' violation of the decree were justified by Appellants' own arguments that the decree demonstrated that "Wal–Mart was doing the right thing" with regard to disabled employees. A new trial is therefore unwarranted.

E. Pre–Employment Inquiry

Appellee claims that Wal–Mart's pre-employment inquiry as to whether he could carry fifty-pound boxes while climbing a ladder violated the requirement that pre-employment medical inquiries be narrowly tailored to the job for which the applicant is applying, *see* 29 C.F.R. § 1630 app. Appellants reply that, because Appellee answered that he was able to perform the job, and because he was hired, he has no standing to make this claim. The question is a close one. *See Conroy v. N.Y. State Dep't of Corr. Servs.,* 333 F.3d 88, 94 (2d Cir.2003) (stating that "a plaintiff need not prove that he or she has a disability unknown to his or her employer in order to challenge a medical inquiry or ***137** examination" under a similar statutory provision); *but see O'Neal v. City of New Albany,* 293 F.3d 998, 1007 (7th Cir.2002) (requiring an "injury-in-fact" for standing to challenge a pre-employment inquiry under the ADA); *Tice v. Ctr. Area Transp. Auth.,* 247 F.3d 506, 519–20 (3d Cir.2001) (similar); *Cossette v. Minn. Power & Light,* 188 F.3d 964, 970 (8th Cir.1999) (similar); *Griffin v. Steeltek,* 160 F.3d 591, 595 (10th Cir.1998) (similar); *Armstrong v. Turner Indus.,* 141 F.3d 554, 562 (5th Cir.1998) (similar).

But we need not take a stand on the matter today. It is manifest that the damages ultimately awarded would have been the same regardless of the position we took on this question. The court, well within its discretion, assigned all of the compensatory damages to the state law claims, which were not based on the pre-employment inquiry. The jury awarded punitive damages of $5 million; these were reduced to the statutory cap of $300,000. The jury awarded $4.5 million in punitive damages on the basis of discrimination alone. Hence we can say without fear of peradventure that all of the damages awarded, which we affirm *infra,* were attributable to other behavior on the part of Appellants.

F. Punitive Damages

Appellants assert that Appellee failed to present sufficient evidence to justify an award of punitive damages. An award of punitive damages in an ADA case requires a showing "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 535, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). In other words, for punitive damages to be awarded, Brady had to show that Wal–Mart "discriminate[d] in the face of a perceived risk that its actions w[ould] violate federal law." *Id.* at 536, 119 S.Ct. 2118. There was ample evidence of such a perceived risk here to justify the award of punitive damages.

G. Remittitur

Because the compensatory damages were allocated entirely to the state law claim, the remittitur is evaluated under state law. Appellants assert that the district court improperly evaluated its remittitur application under the standard set forth in *New York City Transit Authority v. State Division of Human Rights,* 78 N.Y.2d 207, 219, 573 N.Y.S.2d 49, 577 N.E.2d 40 (N.Y.1991), rather than the standard laid out in section 5501(c) of the New York Civil Practice Law and Rules. Under the statutory provision, a compensatory damages award is excessive "if it deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. § 5501(c). In *Transit Authority,* the New York Court of Appeals identified three factors to be considered in reviewing mental anguish compensatory damages awarded by the State Commissioner of Human Rights in a discrimination case: "whether the relief was reasonably related to the wrongdoing, whether the award was supported by evidence before the Commissioner, and how it compared with other awards for similar injuries." *N.Y. City Trans. Auth.,* 78 N.Y.2d at 219, 573 N.Y.S.2d 49, 577 N.E.2d 40.

The district court here wrote that,

> Whether I analyze it under the "deviates materially" standard of § 5501(c) or the more nuanced approach of *Transit Authority,* ***138** I cannot sustain the jury's award of $2.5 million as compensation for Brady's emotional distress. With respect to § 5501(c), the award does deviate materially from other awards that the parties have cited.... And under the *Transit Authority* analysis, the third prong—requiring a comparison to other awards—compels a similar result.

Brady v. Wal–Mart Stores, Inc., 455 F.Supp.2d at 198. The court, however, did "discern at least some daylight, if not much, between 'deviates materially' and the standard that applies under the NYHRL." *Id.* at 196. The court then determined the magnitude of the remittitur by reference to three state cases. *See id.* at 201. Each of these cases was decided after *Transit Authority. See Tiffany & Co. v. Smith,* 224 A.D.2d 332, 638 N.Y.S.2d 454, 454 (1996); *Sogg v. Am. Airlines, Inc.,* 193 A.D.2d 153, 603 N.Y.S.2d 21, 27–28 (1993); *Cavagnuolo v. Baker & McKenzie,* No. 1B–E–D–86–115824, 1993 WL 766865, at *9 (N.Y.Div. of Human Rights Dec.17, 1993). The district court used those cases to help it identify "the greatest amount that would not be excessive." *Brady v. Wal–Mart Stores, Inc.,* 455 F.Supp.2d at 201.

We think it is uncertain which of the two standards the district court used in determining the amount of the remittitur. Its citations do not clarify the matter: two of the cases (*Tiffany & Co.* and *Sogg*) appear to use the "deviates materially" standard, while the third (*Cavagnuolo*) appears to use the *Transit Authority* standard. We believe that *Transit Authority* states the applicable law of New York.[2] We note, moreover, that the *Transit Authority* standard is more favorable to plaintiffs than the statutory standard. Therefore, either the district court correctly applied the *Transit Authority* standard, or it erred in a way that harmed Appellee—by applying the "deviates materially" standard—but Appellee has not protested. Either way, there is no cause for remand.

Therefore, the judgment of the district court is Affirmed.

All Citations

531 F.3d 127, 20 A.D. Cases 1281, 37 NDLR P 125

Footnotes

1 Brady had not been given the standard ninety-day probationary period and training generally provided to new employees, and he received no coaching, in violation of Wal–Mart's "coaching for improvement" policy. A Wal–Mart pharmacist, Joan Little, testified that it would normally take "one to three months just to [learn] the basic functions" of working in the pharmacy.

2 In *Cross v. New York City Transit Authority,* 417 F.3d 241, 258 (2d Cir.2005), this Court applied the "deviates materially" standard. However, that case did not present the question of whether the "deviates materially" standard or the *Transit Authority* standard applied.

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KeyCite history available

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Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Edilberto CANO-RODRIGUEZ, Plaintiff,
v.
ADAMS SCHOOL DISTRICT NO. 14, a political and quasi-municipal subdivision, Javier Abrego, in his individual capacity, and Aracelia Burgos, in her individual capacity, Defendants.

Civil Action No. 19-cv-01370-CMA-KLM
|
Signed 04/22/2020

Attorneys and Law Firms

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RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Kristen L. Mix, United States Magistrate Judge

***1** This matter is before the Court on Defendants' partial **Motion to Dismiss Second Amended Complaint** [#41][1] (the "Motion"). Plaintiff filed a Response [#49] in opposition to the Motion, and Defendants filed a Reply [#51]. Pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed. R. Civ. P 72(a) and (b), the Motion is referred to the undersigned for recommendation. *See* [#43]. The Court has reviewed the Motion, the Response, the Reply, the entire docket, and the applicable law, and is sufficiently advised in the premises. For the reasons set forth below, the Court **RECOMMENDS** that the Motion [#41] be **GRANTED in part** and **DENIED in part**.

I. Background[2]

Plaintiff filed this lawsuit on May 13, 2019. *Compl.* [#1]. In short, Plaintiff alleges that Defendants discriminated against him on account of his race, national origin, and his association with Hispanic individuals. *Second Am. Compl.* [#34] ¶ 1. Plaintiff alleges that he was terminated from his position as the Director of Teaching and Learning for English Language Development ("ELD") for Adams County School District No. 14 ("Defendant School District" or "Adams 14") after complaining about this discrimination. *Id.* Specifically, Plaintiff alleges that Defendants terminated him because he filed a complaint with the United States Department of Education, Office of Civil Rights (the "OCR") and raised the issue "with a community of professionals in bilingual education with whom he was associated." *Id.* Plaintiff further alleges that Defendant School District has a pattern and practice of race and national origin discrimination against Hispanic faculty, staff, parents, and children. *Id.* ¶ 19.[3]

To support his claims, Plaintiff asserts that he is a Hispanic man and a Mexican native who holds a PhD in Educational Equity and Cultural Diversity, with a focus on biliteracy development. *Id.* ¶¶ 9, 11. Plaintiff states that he was hired by Defendant School District "to design and implement alternative language programs, including biliteracy programs, to meet the requirements of the settlement agreements with OCR." *Id.* ¶ 21. Pursuant to that role, "he was a vocal advocate for [English Language Learner ("ELL")] students and their families and Spanish teachers." *Id.* ¶ 24. Plaintiff asserts that Defendant Javier Abrego ("Abrego"), Superintendent of Adams 14, and Defendant Aracelia Burgos ("Burgos"), Chief Academic Officer of Adams 14, treated him less favorably than they treated other employees. *Id.* ¶¶ 7, 8, 58-60. Specifically, Plaintiff alleges that Defendants "hampered" his job efforts, understaffed his department, removed his job duties, refused to implement his professional recommendations, and prohibited Plaintiff from meeting with other School District employees. *See id.* ¶¶ 34-35, 40-57. Additionally, Plaintiff alleges that Defendant Abrego accused Plaintiff of being unqualified for his position and falsely accused Plaintiff of poor job performance. *Id.* ¶ 60. Plaintiff avers that he was qualified for his position and performed his job competently at all pertinent times. *Id.* ¶ 93.

***2** Plaintiff filed a complaint with Defendant Abrego on

November 19, 2017. *Id.* ¶ 61. In this complaint, Plaintiff asserted that Defendant School District was discriminating against students, himself, and other staff based on race and national origin in violation of Title VI and Title VII. *Id.* On December 4, 2017, Plaintiff was placed on administrative leave for "allegations which warranted further investigation." *Id.* ¶ 66 (internal quotations omitted). On December 7, 2017, Plaintiff filed an OCR complaint "describing discrimination and retaliation by Defendants against himself, and against other employees and students." *Id.* ¶ 67. Plaintiff avers that his job responsibilities did not include filing complaints with OCR, reporting Title VI violations, or expressing concern "about [Defendant School District's] efforts to undermine bilingual education to professionals who worked in the bilingual education community." *Id.* ¶ 22. On April 30, 2018, Defendant Abrego "closed" Plaintiff's November 2017 complaint. *Id.* ¶ 70. That same day, Defendant Abrego "fired [Plaintiff] claiming he was terminated as part of a 'restructuring.' " *Id.* ¶ 71. Plaintiff claims that his position was not actually terminated, but that his job responsibilities were "reassigned to a white American born School District employee." *Id.*

In his Second Amended Complaint filed with this Court, Plaintiff presents five claims for relief. The claims are as follows: (1) all Defendants discriminated and retaliated against Plaintiff in violation of 42 U.S.C. § 1981; (2) Defendant School District discriminated and retaliated against Plaintiff on account of his race, national origin and his association with bilingual professionals in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"); (3) all Defendants discriminated against Plaintiff in violation of the Equal Protection Clause of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983; (4) Defendant School District retaliated against Plaintiff in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, et seq. ("Title VI"); and (5) all Defendants violated Plaintiff's First Amendment rights to freedom of speech and association, pursuant to 42 U.S.C. § 1983. *Id.* ¶¶ 75-128. Plaintiff seeks injunctive and declaratory relief, reinstatement, compensatory and punitive damages, attorney's fees and costs, and other relief and fees. *Id.* at 25.

On September 24, 2019, Defendants filed the instant Motion [#41]. Defendants seek dismissal with prejudice of Plaintiff's § 1981 claim against Defendant School District, Plaintiff's Title VII associational discrimination claim, Plaintiff's § 1983 equal protection claim against Defendant School District, Plaintiff's Title VI claim, and Plaintiff's § 1983 First Amendment claim.[4] *Motion* [#41] at 1.

II. Standard of Review

A motion filed pursuant to Rule 12(b)(6) "tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). To survive a Rule 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim is a claim that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012).

To begin, courts must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002); however, conclusory allegations are not entitled to this assumption of truth. *Iqbal*, 556 U.S. at 681. To deny a motion to dismiss, "[t]he complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) (citing *Twombly*, 550 U.S. at 570).

III. Analysis

A. Associational Discrimination Under Title VII

***3** Plaintiff asserts that Defendant School District, a qualified employer under Title VII, discriminated and retaliated against him in violation of Title VII. *Second Am. Compl.* [#34] ¶¶ 91, 94-95. In relevant part, Plaintiff asserts that Defendant School District "knowingly and intentionally engaged in discrimination against [Plaintiff] ... based on his association with other Hispanic and non-native born Hispanic faculty, staff members, parents and students on the basis of their race and national origin." *Second Am. Compl.* [#34] ¶ 94. In the Motion [#41], Defendants argue that Plaintiff's Title VII associational discrimination claim must be dismissed as a matter of law because associational race and national origin discrimination claims under Title VII are not cognizable in the Tenth Circuit. *Motion* [#41] at 6.

For the reasons that follow, the Court concludes that Plaintiff's Title VII associational discrimination claim must be dismissed because Plaintiff does not allege associational discrimination based on Plaintiff's own race. *See* 42 U.S.C. § 2000e-2a ("It shall be an unlawful employment practice for an employer ... to discrimination against any individual ... because of such individual's race, color, religion, sex, or national origin.").

Associational race and national origin discrimination claims have not generally been accepted in the Tenth Circuit. *See Salazar v. City of Commerce City*, No. 10-cv-01328-LTB-MJW, 2012 WL 1520124, at *6 (D. Colo. May 1, 2012) (noting that "the case law from the Tenth Circuit supporting a Title VII claim for national origin discrimination based on association ... is minimal, at best). To the extent that such claims have been recognized elsewhere, the alleged discrimination has been based on an interracial association. *See, e.g.*, *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 772 (D. Neb. 1999).

Courts have recognized interracial associational discrimination claims because "[w]here a plaintiff claims discrimination based upon an interracial ... association, he alleges, by definition, that he has been discriminated against because of *his* race." *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir.1986); *see also Reiter v. Ctr. Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 (D. Colo. 1985), *overruled on other grounds by Drake v. City of Fort Collins*, 927 F.2d 1156, 162 (10th Cir. 1991) (noting that "the underlying rationale" for Title VII race-based associational discrimination claims "is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with.")

While Plaintiff cites *Miller v. Leavitt* and *Reiter v. Center Consolidated School District* to support his argument, these cases are distinguishable from the case at hand. *See Miller v. Leavitt*, CIV No.06-1072-LH/ACT, 2009 WL 10665418, at *7 (D.N.M. Mar. 31, 2009); *Reiter*, 618 F. Supp. at 1460. In *Miller*, the plaintiff was a white male romantically involved with a Navajo female who alleged discrimination because of their association with each other. *Miller*, 2009 WL 10665418, at *7. In addition, although the race of the plaintiff in *Reiter* is ambiguous, the *Reiter* court's analysis emphasized the necessity of an interracial relationship as the basis for a Title VII associational discrimination claim. *Reiter*, 618 F. Supp. at 1460. Here, Plaintiff does not allege any interracial association. Therefore, Plaintiff has not sufficiently asserted a Title VII associational claim that implicates unlawful discrimination on the basis of his own race.

Accordingly, the Court **recommends** that the Motion [#41] be **granted** to the extent that Plaintiff's associational Title VII claim be **dismissed with prejudice**. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.").

B. Title VI

***4** Plaintiff asserts that Defendant School District violated Title VI when it retaliated against Plaintiff "by subjecting Plaintiff to a hostile work environment, removing his job duties, and terminating Plaintiff." *Second Am. Compl.* [#34] ¶ 113. To support his claim, Plaintiff alleges that Defendant School District is a recipient of federal financial assistance, including Title III funds.[5] *Id.* ¶ 111. Plaintiff also alleges that while he worked for Defendant School District, "one of the primary purposes of such funds was to provide funding for job positions, specifically position [sic] for Parental Liaisons in the School Districts' ELL program." *Id.* Defendant School District argues that Plaintiff's Title VI claim fails as a matter of law because Plaintiff cannot plausibly allege that Defendant School District received Title III funding primarily for employment purposes. *Motion* [#41] at 4.

Title VI prohibits discrimination on the basis of race, color, or national origin by federally funded programs. 42. U.S.C. § 2000d. This statute also prohibits employment discrimination by such programs. *Reynolds v. Sch. Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1531 (10th Cir. 1995). Covered entities can only be sued for employment discrimination, however, if "a primary objective of the Federal financial assistance [to that program or activity] is to provide employment." *Id.* (quoting 42. U.S.C. § 2000d-3). "This requirement ensures that Title VI is not transformed into an avenue for pursuing all employment claims." *Rogers v. Bd. of Educ. of Prince George's Cty.*, 859 F. Supp. 2d 742, 747 (D. Md. 2012); *see also Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632 n.13 (1984) ("As the Court of Appeals observed, it was unnecessary to extend Title VI more generally to ban employment discrimination, as Title VII comprehensively regulates such discrimination.").

The case law is now clear that "a primary purpose of employment" is an element of a Title VI claim. *See Rogers*, 859 F. Supp. 2d. at 748-49 (explaining that while a minority of courts viewed the primary purpose as a standing requirement, it is "more properly understood as an element of a litigant's cause of action"). Consequently, plaintiffs must sufficiently plead factual allegations to support the "primary purpose element." *Sims v. Unified Gov't of Wyandotte Cty./Kan. City, Kan.*, 120 F. Supp. 2d 938, 955 (D. Kan. 2000). The primary purpose objective "need not be exclusive" because "providing employment need only be *a* primary goal," but courts interpret the word "primary" strictly. *Rogers*, 859 F. Supp. 2d at 751. Thus, for example, federal funding "aimed at improving education in general" or "distributed for non-employment purposes [that] might require hiring individuals to carry out those goals" is too attenuated to meet the primary purpose standard. *Id.*

Turning to the merits here, the Court concludes that Plaintiff does not plausibly state a Title VI claim. While Plaintiff states that Parental Liaison positions were paid for by federal funds, including Title III funds, Plaintiff's bare assertions cannot overcome the statutory text, which explicitly lists the purposes of Title III funds. *See* 20 U.S.C. § 6825. Title III lists four purposes: (1) developing new language instruction educational programs; (2) carrying out activities to expand existing language instruction; (3) implementing, within an individual school, schoolwide programs; and (4) implementing, within an entire jurisdiction of a local educational agency, agencywide programs. § 6825(a). Plaintiff's reference to Title III funds necessarily implies that the purpose of the funding met the statutory language recited above. However, these purposes are "aimed at improving education in general" or "distributed for non-employment purposes [that] might require hiring individuals to carry out those goals," which the court in *Rogers v. Board of Education of Prince George's County* indicated are purposes too attenuated to meet the primary purpose standard. 859 F. Supp. 2d. at 751.

***5** The Court notes that the court in *Sims v. Unified Government of Wyandotte County/Kansas City, Kansas* stated that:

> [T]he vast majority of courts faced with the issue of whether an entity receives federal financial assistance within the meaning of the civil rights laws have concluded that the resolution of the issue requires inquiry into factual matters outside the complaint and, accordingly, is a matter better suited for resolution after both sides have conducted discovery on the issue.

Sims, 120 F. Supp. 2d at 955. Nonetheless, the Court finds that dismissal is appropriate in this case because Plaintiff's assertion about the primary purposes of Title III funds is contrary to the plain language of the statutory text. *See Albers v. Bd. of Cty. Comm'rs of Jefferson Cty., Colo.*, 771 F.3d 697, 705 (10th Cir. 2014) (finding that a motion to dismiss was properly granted when the plaintiff's position was contrary to law). District courts have granted motions to dismiss in the Title VI context when the statutory language contradicts the plaintiff's claims. *See, e.g.*, *Thornton v. Nat'l R.R. Passenger Corp. (Amtrak)*, 16 F. Supp. 2d 5, 6-7 (D.D.C. 1998) (granting a motion to dismiss the plaintiff's Title VI claims when the statutory language offered by the defendant contradicted the plaintiff's primary purpose claim); *Ward v. Mass. Bay Transp. Auth.*, 550 F. Supp. 1310 (D. Mass. 1998) (granting a motion to dismiss the plaintiff's Title VI claim when the enabling legislation did not support the plaintiff's primary purpose assertion).

While Plaintiff argues that he can also bring a Title VI employment discrimination suit "where the employment discrimination complained of 'necessarily causes discrimination against the intended beneficiaries of the federal funding,' " *Response* [#49] at 7 (citing *Trageser v. Libbie Rehab Center Inc.*, 590 F.2d 87, 89 (4th Cir. 1978)), this assertion is unsupported by applicable Tenth Circuit law. The Tenth Circuit has not adopted the Fourth Circuit's alternative Title VI employment discrimination standard. *See Reynolds*, 69 F.3d 1523; *Maldonado v. City of Altus*, 433 F.3d 1294, 1302 (10th Cir. 2006) (abrogated in part on other grounds) (affirming the *Reynolds* standard in the Tenth Circuit stating that entities "can *only* be sued for employment discrimination" under Title VI "where a primary objective of the Federal financial assistance ... is to provide employment") (emphasis added).

Accordingly, the Court **recommends** that the Motion [#41] be **granted** to the extent that Plaintiff's Title VI claim be **dismissed without prejudice**. *See, e.g.*, *Rosario-Olmedo v. Cmty. Sch. Bd. for Dist. 17*, 756 F. Supp. 95, 96-97 (E.D.N.Y. 1991) (stating that courts have dismissed Title VI employment discrimination claims without prejudice where the plaintiff failed to allege "when funds were received, what they were used for, and whether their primary objective was to provide employment"); *see also Second Am. Compl.* [#34] ¶ 111 (stating that the federal financial assistance included Title III funds, not that the federal assistance at issue was solely Title III funds).

C. First Amendment

***6** Plaintiff asserts two discrete First Amendment claims, averring that Defendants retaliated against him for exercising his freedom of speech and his freedom of association. *Second Am. Compl.* [#34] at 23-25; *see* *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1138 (10th Cir. 2006) (noting the difference between freedom of speech and freedom of association retaliation claims). Defendants argue that Plaintiff's First Amendment claims should be dismissed as a matter of law. *Motion* [#41] at 7.

1. Free Speech Retaliation

Plaintiff asserts that Defendants violated his freedom of speech by retaliating against him for "sp[eaking] out on matters of public concern to bilingual professionals about the School District's violations of Title VI, its failure to comply with the OCR settlement agreements and its decision to abandon bilingual education and when he filed a complaint with OCR alleging discrimination in violation of Title VI." *Second Am. Compl.* [#34] ¶ 120. Defendants argue that Plaintiff's free speech retaliation claim fails because Plaintiff made his alleged protected speech pursuant to his official duties. *Motion* [#41] at 7.

Proof of five elements is necessary in order for a public employee's free speech retaliation claim to succeed. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007). First, the employee must show that he spoke pursuant to his official duties. Determination of this element is a matter of law for the Court. *Id.* Second, the employee must show that his speech was a matter of public concern. Determination of this element is also a matter of law for the Court. *Id.* Third, the employee must show that "the employee's interest in commenting on the issue outweighs the interest of the state as employee." Again, determination of this issue is a matter of law for the Court. *Id.* at 1203 (quoting *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1327 (10th Cir. 2007)). Fourth, the employee must show that his speech constituted a "substantial factor" or "motivating factor" in a "detrimental employment decision." *Id.* (quoting *Lybrook v. Members of Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1338 (10th Cir. 2000)). Fifth, and finally, the employer must show that it did not take the employment action due to the plaintiff's speech. *Id.*

At the first step, "the court must determine whether the employee speaks 'pursuant to [his] official duties.' " *Id.* at 1202 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). In *Thomas v. City of Blanchard*, 548 F.3d 1317, 1323 (10th Cir. 2008), the Tenth Circuit characterized this inquiry as one to determine "whether the speech was 'commissioned' by the employer[.]" As mentioned above, the first step is a matter of law to be resolved by the Court. *Brammer-Hoelter*, 492 F.3d at 1203. When an employee speaks pursuant to his official duties, the speech is not constitutionally protected. *Id.* If an employee speaks as a citizen, however, rather than pursuant to his official duties, the court moves on to the second step of analysis. *Id.* Here, Defendants only challenge Plaintiff's claim at the first step.

In the Tenth Circuit, courts take a case-by-case approach to determine whether speech was made pursuant to an employee's official duties. *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010). In order to make its determination, courts look to the content of the speech and the employee's chosen audience. *Id.* An employee's speech is within his official duties "if it is generally consistent with 'the type of activities [the employee] was paid to do.' " *Brammer-Hoelter*, 492 F.3d at 1202 (quoting *Green v. Bd. of Cty. Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007)). Speech may be made pursuant to an employee's job responsibilities even if it deals with activities "not part of his everyday functions" or that the employee "is not expressly required to perform." *Id.* at 1203. The Tenth Circuit has also held that speech is made pursuant to an employee's official duties if it "reasonably contributes to or facilitates the employee's performance of the official duty[.]" *Thomas*, 548 F.3d at 1324 (quoting *Brammer-Hoelter*, 492 F.3d at 1203). An employee's communications that would be attributed to the employer can also constitute speech made pursuant to an official duty. *Green*, 472 F.3d at 801.

***7** Nonetheless, "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417. Not all speech that occurs at the workplace is made pursuant to an employee's job responsibilities. *Brammer-Hoelter*, 492 F.3d at 1204. Similarly, "speech that simply relates to public employment or concerns information learned in the course of public employment" is not necessarily speech made pursuant to an employee's official duties. *Lane v. Franks*, 573 U.S. 228, 239 (2014).

Although the Tenth Circuit has "refrained from establishing per se rules" in its analysis of an employee's speech, it has found that speech was not made pursuant to the employee's official duties when "the speech occurred outside school, after hours, and with 'ordinary citizens and parents.' " *Rohrbough*, 596 F.3d at 747 (quoting *Brammer-Hoelter*, 492 F.3d at 1205). Furthermore, "speech directed at an individual or entity outside of an employee's chain of command is often outside of an employee's official duties." *Id.* Ultimately, the analysis turns on whether "the employee speaks as a citizen[.]" *Brammer-Hoelter*, 492 F.3d at 1205; *see also Garcetti*, 547 U.S. at 417 ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

In summary, for the reasons stated in detail below, when taking all of Plaintiff's allegations as true, the Court finds that Plaintiff sufficiently alleges facts that indicate that his conversations with most bilingual professionals, and his act of filing the OCR complaint, constituted speech that Plaintiff made as a citizen. While all of the alleged protected speech pertained to the subject matter of Plaintiff's job and information he learned through his employment, this does not mandate a finding that the speech occurred pursuant to Plaintiff's job responsibilities. *See Lane*, 573 U.S. at 239. The Court notes that Plaintiff summarily pleads that his job responsibilities did not include "reporting Adam 14's Title VI violations, or his concern about Adams 14's efforts to undermine bilingual education to professionals who worked in the bilingual education community" or "filing complaints of discrimination with the OCR." *Second Am. Compl.* [#34] ¶ 22. Nonetheless, sufficient additional allegations in the Second Amended Complaint [#34] support these allegations.

To that end, Plaintiff provides extensive allegations regarding his job as the Director of Teaching and Learning for ELD and Biliteracy for Adams 14. Plaintiff lists when and why he was hired by Defendant School District, his title, the actions he took pursuant to that role, and how his job duties changed under the leadership of Defendants Abrego and Burgos. *See id* ¶¶ 20-21, 23-41. Plaintiff states that he was hired "to design and implement alternative language programs, including biliteracy, to meet the requirements of the settlement agreements with OCR." *Id.* ¶ 21. Plaintiff also states that he was "responsible for supporting the professional development of teachers working with ELL students." *Id.* Pursuant to his role, Plaintiff designed and submitted a plan to the OCR that included a biliteracy program. *Id.* ¶ 23; *Defs.' Ex. C* [#41-3].[6] Plaintiff also states that in his role "he was a vocal advocate for ELL students and their families and Spanish teachers." *Second Am. Compl.* [#34] ¶ 24. The Court notes that in 2015, Plaintiff was hired to his position, which included duties relating to biliteracy development, and submitted the ELD plan to the OCR including biliteracy programming. *See id.* ¶¶ 20, 23. The Court further notes that Plaintiff alleges that Defendants Abrego and Burgos did not enter their respective supervisory roles until the fall of 2016 and did not begin to allegedly undermine bilingual education until 2017. *Id.* ¶ 32.

***8** Plaintiff gives many examples of how his job responsibilities changed from when he was hired to when he made allegedly protected speech. *See id.* ¶¶ 23-41. Plaintiff alleges that, in April and May of 2017, Defendant Abrego "removed [Plaintiff's] job duties when he instructed him that he would no longer be responsible for organizing the ELL program or bilingual curriculum or help develop and train Spanish teachers." *Id.* ¶ 38. Plaintiff further alleges that Defendants continued to remove his job duties in September 2017 by preventing him from speaking to school principals about biliteracy and the ELD program. *Id.* ¶ 40. Plaintiff alleges that, in October 2017, Defendant Abrego claimed that Plaintiff's title "did not include biliteracy." *Id.* ¶ 46. Plaintiff also alleges that, in November 2017, Defendant Burgos removed educational coaches from Plaintiff's supervision and canceled "all professional development sessions between [Plaintiff's] Department and ELD & Biliteracy coaches." *Id.* ¶¶ 53, 57.

Thus, Plaintiff alleges that his protected speech included (1) speaking to bilingual professionals about Defendants' decision to abandon bilingual education; (2) speaking to bilingual professionals about Defendants' alleged failure to comply with the OCR settlement agreements; and (3) speaking to bilingual professionals about the Defendants' alleged violations of Title VI and filing a complaint with OCR alleging discrimination in violation of Title VI. *Id.* ¶ 120. The Court addresses each type of speech in turn. *See Brammer-Hoelter*, 492 F.3d at 1204-05 (evaluating teachers' separate matters of discussion separately). For the reasons stated below, the Court finds that most of Plaintiff's alleged protected speech was not made pursuant to his official job responsibilities. The Court finds, however, that Plaintiff's speech about Defendants abandoning biliteracy education to staff of the Bueno Center and Dr. Kathy Escamilla ("Escamilla") was made pursuant to his official job responsibilities.

a. Decision to Abandon Bilingual Education

When taken together in a light most favorable to Plaintiff, the Court finds that the statements Plaintiff made to bilingual professionals, except to the staff of the Bueno Center and Dr. Escamilla, expressing his concerns about Defendants abandoning bilingual education, were not made pursuant to his job duties.

i. Bueno Center and Dr. Escamilla

Plaintiff spoke pursuant to his job duties as ELD Director when he told staff of the Bueno Center and Dr. Escamilla that Defendants had decided to abandon bilingual education. Plaintiff had a professional relationship with the Bueno Center and Dr. Escamilla in his capacity as the ELD Director. Both the Bueno Center and Dr. Escamilla are specifically listed as "External Support" to the 2015 ELD plan, which stated: "Biliteracy is the goal." *Defs.' Ex. C* [#41-3] at 2. Communicating changes to the ELD plan, due to the abandonment of bilingual education, to these individuals was directly pursuant to Plaintiff's role as the ELD Director, and thus speech commissioned by Defendant School District that cannot constitute protected speech. *See Thomas*, 548 F.3d at 1323.

Accordingly, the Court finds that Plaintiff's discussions with the Bueno Center and Dr. Escamilla were not protected speech as a matter of law. *See Brammer-Hoelter*, 492 F.3d at 1203 (stating that whether an employee speaks pursuant to his official duties is a matter of law to be resolved by the Court).

ii. Other Bilingual Professionals

Plaintiff spoke as a citizen, and not as Adams 14's ELD Director, however, when he told general bilingual professionals that Defendants had decided to abandon bilingual education. Plaintiff asserts that, "among others," he associated with "Dr. Sandra Butilovsky of the Bueno Center, Kathy Escamilla of the University of Colorado and Jorge Garcia" of the Colorado Association for Bilingual Education ("CABE"). *Second Am. Compl.* [#34] ¶ 62. Furthermore, Plaintiff asserts that he spoke "to these and other individuals outside of Adams 14" about Defendants' decision to abandon bilingual education. *Id.* ¶ 63, 120. The Court finds that Plaintiff's speech to these other bilingual professionals, including Jorge Garcia of CABE, does not constitute speech made pursuant to Plaintiff's job responsibilities.

***9** The Court acknowledges and rejects Defendants' argument that the Court should dismiss this portion of the claim because Plaintiff partnered with the Colorado Association for Bilingual Education ("CABE") "to assist facilitating his programming." *Motion* [#41] at 10. Plaintiff only partnered with CABE to provide one "independent training," constituting a professional development session in the 2015 ELD plan, by allowing school district teachers to attend CABE's conference in September 2015. *See Defs.' Ex. C* [#41-3] at 58. This is not sufficient to indicate that Plaintiff had an ongoing professional relationship with CABE at the end of 2017 such that he would have either expressly or impliedly needed to communicate with CABE pursuant to his job responsibilities.

Furthermore, while Plaintiff states that his job duties included designing and implementing alternative language programs for Adams 14 and helping support the professional development of ELL program teachers, Plaintiff avers that communicating with bilingual professionals was not part of his job duties. To support his claim, Plaintiff alleges that Defendants Abrego and Burgos stripped his job duties as ELD Director beginning in April and May of 2017 and continued to do so into the fall of 2017. Notably, in October 2017, Defendant Abrego stated that Plaintiff's title "did not include biliteracy," *id.* ¶ 46, and in November 2017, Defendant Burgos cancelled Plaintiff's professional development sessions, *id.* ¶ 57. This indicates that by the fall of 2017 Plaintiff's job duties no long included promoting bilingual education by coordinating with bilingual professionals. Under these circumstances, the Court finds that Plaintiff's speech was not commissioned by the Defendants and instead represented Plaintiff's speech as a concerned citizen.

In reaching this determination, the Court also notes that Plaintiff alleges that "many if not all" of his conversations with bilingual professionals "were made to non-District employees, outside of Adams 14 and outside of work hours." *Id.* ¶ 121. "[S]peech directed at an individual or entity outside of an employee's chain of command is often outside of an employee's official duties." *Rohrbough*, 596 F.3d at 747. Furthermore, Plaintiff's speech was made outside of work hours to "ordinary citizens," albeit ones particularly concerned with bilingual education. *See Brammer-Hoelter*, 492 F.3d at 1205 (finding that teachers spoke as citizens when they gathered outside of work hours, at locations other than the school where they taught, in order to speak about matters relating to the school with ordinary citizens and parents).

For the foregoing reasons, the Court finds that Plaintiff was not speaking to his job responsibilities when he expressed his concerns about the Defendants undermining biliteracy education to bilingual professionals other than those working at the Bueno Center and Dr. Escamilla. *See Brammer-Hoelter*, 492 F.3d at 1203 (stating that whether an employee speaks pursuant to his official duties is a matter of law to be resolved by the Court).

b. Failure to Comply with the OCR Settlement

Agreements

The Court finds that the statements Plaintiff made to bilingual professionals informing them that Defendants were failing to comply with the OCR settlement agreements constituted speech that Plaintiff made as a citizen, rather than pursuant to his official duties.

As previously stated, Plaintiff worked with certain bilingual professionals in the community in order to develop and implement programming in compliance with the OCR agreements. Specifically, Plaintiff developed the 2015 ELD plan which he submitted to the OCR with the "external support" of the Bueno Center and Dr. Escamilla. *Defs' Ex. C* [#41-3] at 2. There is nothing however, that indicates that Plaintiff had any obligation or reason pursuant to his job as ELD Director to inform these individuals, or any other bilingual professionals, whether Defendants were in compliance with the OCR settlement agreements.

***10** The Court agrees with Plaintiff that this distinguishes this case from cases cited by Defendants where the plaintiff was under legal requirements to report to a third-party agency or to authorities under federal law. In *Casey v. West Las Vegas Independent School District*, the court found that the plaintiff was speaking pursuant to her job duties when she circumvented the school board and reported the school district's Head Start funding irregularities in violation of federal law to federal authorities. *Casey*, 473 F.3d at 1332. In that case, however, argued before the Supreme Court issued its decision in *Garcetti v. Ceballos*, the plaintiff had conceded that one of her job duties included reporting funding irregularities to federal authorities. *Id.* at 1331. Similarly, in *Winder v. Erste*, 566 F.3d 209, 214-15 (D.C. Cir. 2009), the court held that the plaintiff spoke pursuant to his official duties when he reported the defendants' failure to comply with a court order to a third party "Special Master," to whom he was required to report. Here, however, the bilingual professionals were not in Plaintiff's chain of command, inside or outside the organization.

The Court finds that Plaintiff was speaking as a citizen when he told the bilingual professionals, outside work and outside Adams 14, that Defendants were not in compliance with the OCR settlements. In the circumstances, this speech was more similar to activities that the Tenth Circuit in *Green v. Board of County Commissioners* indicated would not constitute speech made pursuant to an employee's job responsibilities, such as communicating with newspapers or legislators or "performing some similar activity afforded citizens." *Green*, 472 F.3d at 800. Here, Plaintiff airing his concerns about Defendants' failure to comply with the OCR settlement agreements did not reasonably contribute to or facilitate Plaintiff's performance in bringing Defendant School District in compliance with the OCR settlement agreements. *See Brammer-Hoelter*, 492 F.3d at 1203. For these reasons, the Court does not find that Plaintiff made this speech pursuant to his job responsibilities. *See Brammer-Hoelter*, 492 F.3d at 1203 (stating that whether an employee speaks pursuant to his official duties is a matter of law to be resolved by the Court).

c. Violations of Title VI

Lastly, the Court finds that Plaintiff was speaking as a citizen when he reported discrimination in violation of Title VI to the bilingual professionals and to the OCR in the form of a complaint.

To begin, there is no indication that Plaintiff had a responsibility, express or implied, in his capacity as ELD Director to report conduct in violation of Title VI to third parties such as bilingual professionals or the OCR. Although Defendants aver that Plaintiff, as an Adams 14 employee, had a duty to report discrimination against himself or others under Board Policy AC [#41-2], this policy only indicates that Plaintiff had a duty to report the discrimination internally.[7] In relevant part, Board Policy AC states that "any employee ... who believes he or she has been a victim of unlawful discrimination or harassment, or who has witnessed such unlawful discrimination or harassment, shall file a complaint with either an immediate supervisor or the district's compliance officer." *Defs.' Ex. B* [#41-2] at 1. Plaintiff alleges that he complained twice to Defendant School District about alleged discrimination and filed a formal complaint to Defendant Abrego on November 19, 2017, before escalating his complaints to the OCR. *See Second Am. Compl.* [#34] ¶¶ 42-43, 61, 67. Plaintiff does not assert, however, that the internal complaints, made pursuant to Board Policy AC, constitute protected speech. This case is thus similar to *Thomas*, where the Tenth Court stated that the plaintiff's act of filing an external complaint to report fraud was not pursuant to his job duties even though his discovery of the alleged fraud was "relevant to [the plaintiff's] performance of his job ... [and] he [was] expected to report such occurrences at least to those higher up his chain of command." *Thomas*, 548 F.3d at 1324. Furthermore, the Court notes that Plaintiff did not file the OCR complaint until three days after he was placed on administrative leave from his position. *Id.* ¶¶ 66-67 ("On December 4, 2017, [Plaintiff] was placed on administrative leave .... On December 7, 2017, [Plaintiff] filed a complaint with the OCR.").

***11** The Court acknowledges Defendants' statement that "the fact that it was not an employee's express responsibility to report wrongdoing is not dispositive as to whether the employee was acting pursuant to his official duties." *Motion* [#41] at 9 (citing *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1135 (10th Cir. 2010). As stated by the Tenth Circuit in *Thomas*, "the fact that it was not expressly [the plaintiff's] duty to report to the [investigative agency] is not dispositive on whether he was acting 'pursuant' to his duties." *Thomas*, 548 F.3d at 1323-1324. Nonetheless, the Court finds that the speech at issue here is similar to claims that the Tenth Circuit allowed to proceed in *Casey, Thomas*, and *Reinhardt v. Albuquerque Public Schools Board of Education*. *Casey*, 473 F.3d at 1332 (finding that the plaintiff did not act pursuant to her job duties as superintendent when she reported the Board's alleged violation of the New Mexico Open Records Act to the New Mexico Attorney General); *Thomas*, 548 F.3d at 1324-25 (finding that the plaintiff did not speak pursuant to his job duties as a housing code inspector when he complained to the Oklahoma State Bureau of Investigation about housing occupancy certificate fraud, which he learned during the course of his employment); *Reinhardt*, 595 F.3d 1126 (finding that the plaintiff did not speak pursuant to her job duties when she went beyond complaining to school administrators and internal grievance procedures to consult an attorney and file an Individuals with Disabilities Education Act complaint). Like the plaintiffs in the aforementioned cases, Plaintiff's "repeated attempts to use internal mechanisms to remedy the problem ... proved futile, and [he] took [his] concerns beyond that realm." *Reinhardt*, 595 F.3d at 1136-37. It is this speech, beyond the realm of Defendant School District, that the Plaintiff argues is protected, and the Court agrees.

The Court also rejects Defendants' argument that Plaintiff's speech is not protected because "Plaintiff's job responsibilities included advocating for ELL students, and because of that role, he aligned himself with Hispanic students and staff to overcome the District's alleged past discriminatory practices." *Motion* [#41] at 10. Plaintiff's speech is distinguishable from the plaintiff's speech in *Ibarra v. Lexington-Fayette Urban County Government*, cited by Defendants to support their argument. *Id.* at 11 (citing 240 F. App'x 1 (6th Cir. 2007)). In *Ibarra*, unlike here, the plaintiff as the city's "Coordinator of Immigrant Services" had a responsibility, as part of his conceded job responsibilities, to advocate for and speak to the Hispanic community, including through the press. *Ibarra*, 240 F. App'x at 4-5. Although Plaintiff alleges he allied himself with the Hispanic community, as previous stated, filing an OCR complaint and speaking to external third parties was beyond the scope of the job duties he was paid to do. As stated by the court in *Thomas*, "it would be going too far to hold that every time a public employee discovers wrongdoing related to his job and brings it to the attention of law enforcement or other outside parties, the speech is unprotected." *Thomas*, 548 F.3d at 1324.

For the foregoing reasons, the Court finds that Plaintiff was not speaking pursuant to his job responsibilities when he communicated his concerns about Defendants violating the OCR settlement agreements and Title VI to bilingual professionals, and when he filed the OCR complaint. *See Brammer-Hoelter*, 492 F.3d at 1203 (stating that whether an employee speaks pursuant to his official duties is a matter of law to be resolved by the Court).

2. Freedom of Association Retaliation

Plaintiff next asserts that Defendants violated his freedom of association when they retaliated against him for associating with professionals affiliated with the bilingual community. *Second Am. Compl.* [#34] ¶ 122. Defendants argue that this claim should be dismissed. *Motion* [#41] at 13. Because Plaintiff was "clearly associating for the purpose of discussing the very speech that supports [his] freedom of speech retaliation claim," the Court rejects Defendants' arguments. *Brammer-Hoelter*, 492 F.3d at 1210. While freedom of speech and freedom of association claims are independent, the analysis is "effectively indistinguishable," such that Plaintiff's freedom of association retaliation claim survives to the extent that his free speech retaliation claim survives at this stage of litigation. *Id.*

For the foregoing reasons, the Court **recommends** that the Motion [#41] be **granted in part** and **denied in part** as to the freedom of speech and freedom of association claims. The Court **recommends** that the Motion be **granted** to the extent that Plaintiff's First Amendment claims be **dismissed with prejudice** as to Plaintiff's alleged protected speech with members of the Bueno Center and Dr. Escamilla. *See Brereton*, 434 F.3d at 1219. The Court **recommends** that the Motion be **denied** with respect to the remainder of these two claims.

D. Municipal Liability Under 42 U.S.C. § 1983

***12** Plaintiff alleges that all Defendants discriminated and retaliated against Plaintiff in violation of 42 U.S.C. § 1981, the Equal Protection Clause of the Fourteenth Amendment, and the First Amendment "by subjecting Plaintiff to a hostile work environment, removing his job duties, and terminating Plaintiff." *Second Am. Compl.* [#34] ¶¶ 79, 103, 123. Defendants challenge these claims as asserted against Defendant School District. *Motion* [#41] at 1. Defendants argue that these claims should be dismissed against Defendant School District because Plaintiff's allegations do not support municipal liability against the District. *Id.* at 13.

Under 42 U.S.C. § 1983, every person who, under the color of law, "causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law" shall be liable. § 1981 "forbids all intentional racial discrimination in the making and enforcement of private or public contracts." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1134 (10th Cir. 2004). § 1981 claims against municipalities must be brought under § 1983. *Bolden v. City of Topeka*, 441 F.3d 1129, 1134-37 (10th Cir. 2006). Municipalities are considered persons for the purpose of § 1983 and can incur § 1983 liability. *Lankford v. City of Hobart*, 73 F.3d 283, 286 (10th Cir. 1996). Similarly, school districts, as quasi-municipal agencies, can be sued "for depriving someone of constitutional or civil rights." *Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000). In order for a municipality to be held liable under § 1983 there must be an underlying constitutional violation. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

Furthermore, in order for a school district, or any municipal institution, to be held responsible for the unconstitutional act of an employee, the plaintiff must make certain showings. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable under § 1983 on *respondeat superior* theory."). First, the plaintiff must show that the employee's actions "were representative of an official policy or custom of the municipal institution, or were carried out by an official with final policy making authority with respect to the challenged action." *Seamons*, 206 F.3d at 1029. Second, the plaintiff must show that "there is a direct causal link between the policy or custom and the injury alleged." *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993). Defendants challenge Plaintiff's municipal liability claim on the first prong. *See Motion* [#41] at 13-15.

Turning to the analysis, for the following reasons, the Court finds that Plaintiff fails to adequately state a claim that Defendant School District can be held liable under a theory of municipal liability. To begin, although Plaintiff summarily pleads that certain actions constituted "the official custom, policy, and practice," of Defendant School District, Plaintiff does not allege the existence of a formal or written District policy to support his municipal liability claim. *See Second Am. Compl.* [#34] ¶¶ 86, 106, 125. Furthermore, Defendant School District's Board Policy AC [#41-2] forbids the type of discrimination alleged by Plaintiff. For this reason, Plaintiff fails to sufficiently plead that Defendant School District can be held liable due to an official policy.

Next, Plaintiff fails to sufficiently plead facts that, if true, "would give rise to a plausible inference that [an informal] policy exists." *See Griego v. City of Albuquerque*, 100 F. Supp. 3d 1192, 1213 (D.N.M. 2015). In order to establish an informal policy or custom of misconduct, the plaintiff must demonstrate "the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.' " *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168) (1970)). To demonstrate that Defendants had a "widespread' informal policy or custom of misconduct Plaintiff "cannot simply allege that there is a policy in place," but must plead "a pattern of multiple similar instances of misconduct[.]" *Griego*, 100 F. Supp. 3d at 1213. The Court acknowledges that Plaintiff lists six other individuals who he alleges suffered similar discrimination and retaliation. *See Second Am. Compl.* [#34] ¶ 19. The Court finds that these pleadings are insufficient however, because Plaintiff merely states:

> ***13** As part of this pattern, Adams 14 discriminated and retaliated against former Superintendent Patrick Sanchez based on his race and efforts to end discrimination in Adams 14. Mr. Sanchez was ultimately forced out of his position with Adams 14. Because of their efforts to end discrimination in Adams 14, Adams 14 also fired Walter Kramarz, former District Counsel; Marisol Enriquez, a former human resources director for Adams 14; Dr. Robyn Mondragon, the former Chief Academic and Equity Officer, and pushed out Ari Gerzon, Monaco Elementary Principal. For the same reasons, the Adams 14 also targeted, bullied and harassed Sherry Segura.

Id. While "no set number" of multiple similar instances of misconduct are required, *Griego*, 100 F. Supp. 3d at 1213, the claim is not sufficiently alleged by mere conclusory statements. Here, Plaintiff's statements are threadbare and conclusory. All detail regarding the purported similar discriminatory acts is lacking, including when the alleged illegal activities occurred, their circumstances, and the identities of the decision-makers for the School District.

Lastly, the Court finds that Plaintiff has not sufficiently alleged that the misconduct was "carried out by an official with final policy making authority with respect to the challenged action." *Seamons*, 206 F.3d at 1029. Whether an employee is an official with final policy making authority is a matter of law to be determined by the court under state law or local law. *Milligan-Hitt v. Bd. of Trustees of Sheridan Cty. Sch. Dist. No. 2*, 523 F.3d 1219, 1224 (10th Cir. 2008). The court considers three factors to determine whether an individual is a final policy maker. *Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995). First, the court considers whether "the official is meaningfully constrained by 'policies not of that official's making[.]' " *Id.* Second, the court considers whether the official's decisions are final or are subject to any meaningful review. *Id.* Last, the court considers whether the official took the alleged actions "within the realm of the official's grant of authority." *Id.*

Although Plaintiff asserts that Defendants Abrego and Burgos were "final decisionmakers for Defendant Adams 14" with respect to actions taken against Plaintiff, this assertion is contrary to applicable state law. *Second Am. Compl.* [#34] ¶¶ 88, 107, 126. First, Defendants Abrego and Burgos were constrained by the School Board's policies, including Board Policy AC [#41-2]. Like the superintendent in *Milligan-Hitt v. Board of Trustees of Sheridan School District No. 2*, Adams 14's superintendent, Defendant Abrego, was only charged with executing the Board's policies to manage the schools. *Milligan-Hitt*, 523 F.3d at 1228; *Defs.' Ex. F* [#41-6][8] (stating that the superintendent is charged with "developing specific policies, procedures and programs to implement direction established by the Board"). Second, while Defendant Abrego was charged with "directing and delegating operations and activities of other supervisory staff" and evaluating the performance of supervisors, such as Plaintiff, Defendant Abrego's decisions were nonetheless subject to review by the Board of Education. *See Defs.' Ex. F* [#41-6] (stating that the Superintendent must "provide[ ] necessary reports to the Board as directed" and "keep[ ] the Board informed on the condition of the district's education and support system"). Lastly, under Colorado law, the Board of Education holds the exclusive power "to discharge or otherwise terminate the employment of any personnel." Colo. Rev. Stat. § 22-32-110(h). Therefore, under Colorado law, the Board's ability to supervise Defendant Abrego's actions "ma[ke] the board, not the superintendent, the proper target in a municipal liability suit." *Milligan-Hitt*, 523 F.3d 1229. Yet, as emphasized by Defendants, Plaintiff has failed to allege that the Board took any unlawful actions against him.

***14** Accordingly, the Court **recommends** that the Motion [#41] be **granted without prejudice** as to Plaintiff's alleged municipal liability claims. *See, e.g.*, *Griego*, 100 F. Supp. 3d at 1229 (dismissing a municipal liability claim without prejudice because the plaintiff "may be able to amend his complaint to rectify the deficiencies in pleading the policy.").

IV. Conclusion

Accordingly, the Court respectfully **RECOMMENDS** that the Motion [#41] be **GRANTED in part** and **DENIED in part**, as follows:

> (1) The Motion should be **granted** to the extent that Plaintiff's associational discrimination claim under Title VII be **dismissed with prejudice**, Plaintiff's Title VI claim be **dismissed without prejudice**, Plaintiff's First Amendment claims regarding his speech about Defendants abandoning bilingual education to the Bueno Center and Dr. Escamilla be **dismissed with prejudice**, and municipal liability claims against Defendant School District be **dismissed without prejudice**.
>
> (2) The Motion should be **denied** to the extent that it seeks to dismiss Plaintiff's First Amendment claims regarding association with and speech to (a) bilingual professionals, except the Bueno Center and Dr. Escamilla, about Defendants' decision to abandon bilingual education; (b) bilingual professionals about Defendants failing to comply with the OCR agreements; and (c) bilingual professionals and the OCR about Defendants violating Title VI.

IT IS HEREBY **ORDERED** that, pursuant to Fed. R. Civ. P. 72, the parties shall have fourteen (14) days after service of this Recommendation to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. A party's failure to serve and file specific, written objections waives de novo review of the Recommendation by the District Judge, Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996). A party's objections to this Recommendation must be both timely and specific to preserve an issue for de novo review by the District Court or for appellate review. *United States v.*

One Parcel of Real Prop., 73 F.3d 1057, 1060 (10th Cir. 1996).

All Citations

Slip Copy, 2020 WL 6049531

Footnotes

1 "[#41]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Recommendation.

2 All well-pled facts from the complaint are accepted as true and viewed in the light most favorable to Plaintiff. *See Barnes v. Harris*, 783 F.3d 1185, 1191-92 (10th Cir. 2015).

3 Although Plaintiff states that Defendants entered into two settlement agreements after OCR complaints, "Plaintiff's Complaint does not cite the two previous OCR settlement agreements with [Defendant School District] as proof of a widespread practice of discrimination and retaliation." *Second Am. Compl.* [#34] at 19 n.2.

4 Defendants "do not move to dismiss Plaintiff's § 1981 claims against Dr. Abrego and Ms. Burgos (claim 1), Title VII race/national origin and retaliation claims (claim 2), and the § 1983 Equal Protection claims against Dr. Abrego and Ms. Burgos (claim 3)." *Motion* [#41] at 1 n.1.

5 While never defining "Title III," Plaintiff appears to refer to the "English Language Acquisition, Language Enhancement, and Academic Achievements Act," known as Title III, Part A of the Elementary and Secondary Education Act ("ESEA"), as amended by the Every Student Succeeds Act ("ESSA"). *See* 20 U.S.C. § 6825.

6 Defendants assert that the Court may consider Exhibit C, a copy of Plaintiff's ELD Plan submitted to the OCR, because Plaintiff refers to his ELD Plan in the Second Amended Complaint [#34]. *Motion* [#41] at 3 n.4. However, the standard Defendants cite is incomplete, because the Court may only consider a document referred to in a complaint if the document is "central" to the claim(s) and there is no dispute over the document's authenticity. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). In other words, merely referring to a document in a complaint is insufficient. After review of the Second Amended Complaint [#34], the Court finds it to be somewhat of a close call whether the ELD Plan is "central" to Plaintiff's claims, although it is clear that it is certainly important. However, given that Plaintiff does not contest the authenticity of the document and does not contest Defendants' argument that the document may be considered on a motion to dismiss without converting the motion into a motion for summary judgment, the Court finds that the ELD Plan is "central" to Plaintiff's claims and considers it here without converting the motion.

7 Board Policy AC, provided by Defendants as Exhibit B [#41-2], is a matter of public record of which the Court takes judicial notice. *See Gardner v. Miami-Yoder Sch. Dist. JT-60*, 10-cv-00530-ZLW-KLM, 2010 WL 4537951, at *1 (D. Colo. Nov. 3, 2010) (stating that the "[s]chool board policies are a matter of public record in Colorado" and are therefore subject to judicial notice on a Rule 12(b)(6) motion).

8 Board Policy CBA is a matter of public record of which the Court takes judicial notice. *See Gardner*, 2010 WL 4537951, at *1.

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Darryl CHALMERS, Darren Connors, Glenn Mendez, James Nova, and Fatima Q. Rosemond, On behalf of themselves and all others similarly situated, and AFSCME District Council 37 Local 2507, on behalf of its members, Plaintiffs,
v.
CITY OF NEW YORK, Defendant.

20 Civ. 3389
|
Signed 09/16/2021

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ORDER

ANALISA TORRES, District Judge:

***1** Plaintiffs, "minority" and white fire protection inspectors and associate fire protection inspectors (collectively, "FPIs") employed by the Fire Department of the City of New York (the "FDNY") and their representative union, bring this putative class action against Defendant, City of New York (the "City") alleging employment discrimination on the basis of race, in violation of 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.* ("Title VII"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.* (the "NYCHRL"). Compl., ECF No. 6. The City moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, the motion is GRANTED as to the white individual Plaintiff, Darren Connors, and putative class members' (the "white FPIs") claims under Title VII and the NYCHRL, and DENIED in all other respects.

BACKGROUND[1]

FPIs are employed by the FDNY to conduct inspections of buildings, facilities, vehicles, and public activities in New York City to ensure compliance with safety codes and regulations. Compl. ¶ 1. Before the 1990s, the majority of FPIs were white, but in the last three decades, the proportion of minority FPIs has increased significantly. *Id.* ¶ 2. Presently, only thirty percent of FPIs identify as white. *Id.* ¶¶ 2, 31. Since at least fiscal year ("FY") 2008, the City has paid FPIs salaries that are substantially lower than salaries paid to the City's building inspectors ("BIs") employed by the Department of Buildings, where white employees comprise fifty percent of the workforce. *Id.* ¶¶ 6, 14, 31–32.

FPI positions require an associate's degree, or 60 college credits; BI positions require 60 college credits towards a degree in their field of work. *Id.* ¶¶ 36–37. FPIs and BIs take qualifying exams of similar duration, administered by the same entity, and covering similar subject matters. *Id.* ¶ 39. They both undergo City-administered training, covering a "virtually identical" range of subjects. *Id.* ¶¶ 40–41.

FPIs and BIs share the same principal duty of conducting field inspections to ensure conformance with the City's codes and standards. *Id.* ¶ 42. BIs and FPIs are both tasked with enforcing the City's building codes, though FPIs additionally enforce the City's fire codes. *Id.* ¶ 44. In the course of field inspections, FPIs and BIs must review the same plans and specifications stored on a shared intranet. *Id.* ¶ 43. FPIs inspect almost all the same building types as BIs, though FPIs only inspect one- and two-family housing as part of joint task forces. *Id.* ¶ 45. Like BIs, FPIs conduct inspections while buildings are under construction or repair, or in response to reported violations—though FPIs also conduct annual inspections. *Id.* ¶ 46. At the close of inspection, FPIs and BIs are both empowered to issue certificates that, although differently-titled, share the same function of allowing occupancy or use of the inspected premises. *Id.* ¶¶ 49–51. Finally, FPIs and BIs work on an "equal and collaborative footing" as part of joint task forces. *Id.* ¶¶ 54–56. Plaintiffs do note the positions are not "identical." For instance, FPIs, unlike the majority of BIs, are peace officers, permitting FPIs to issue criminal summonses and court appearance tickets. *Id.* ¶ 53. The two positions have different requirements with respect to working hours, and separate unions. *Id.* ¶¶ 119, 165. And FPIs experience more physical risks in their work, such as being required to enter buildings where fires were recently extinguished. *Id.* ¶¶ 57–59. Plaintiffs contend that such distinctions should militate in favor of FPIs receiving salaries equivalent to, or higher than BIs. *Id.* ¶ 12.

***2** FPI and BI job titles are arranged hierarchically, with four tiers of FPI designations, and three tiers for BIs. *Id.* ¶ 60. Based on publicly available salary data for City employees from FYs 2008–2019, Plaintiffs allege that even adjusted for hours, the City pays FPIs lower salaries than BIs at comparable levels. *Id.* ¶¶ 62–98. For example, in FY 2019, entry-level FPI salary ranges were $46,607 to $66,005, with a median of $46,607, while entry-level BIs received salaries from $61,800 to $80,555, with a median of $65,087. *Id.* ¶ 96. Similarly, associate FPIs earned salaries ranging from $59,872 to $81,624, with a median of $67,073, whereas associate BIs received salaries of $70,161 to $98,347, with a median of $80,152. *Id.* ¶ 96. Plaintiffs also allege that the gap between median FPI and BI salaries has grown steadily over the last 12 fiscal years, from a gap of approximately $2,500 in FY 2008, to a gap of $9,000 in FY 2019. *Id.* ¶¶ 64, 97, 99. Each of the individual Plaintiffs, including one white FPI, received a salary that was lower than the corresponding average BI salary. *Id.* ¶¶ 24, 101. Plaintiffs allege that FPIs' lower base salaries in turn result in lower overtime pay and pension benefits, because these figures are tied to their base salary. *Id.* ¶¶ 102, 116–19. Plaintiffs contend these disparities amount to disparate treatment of FPIs as a predominantly-minority workforce, compared to similarly situated BIs. *Id.* ¶¶ 193–212.

Plaintiffs also allege that the City has maintained a policy of paying FPIs at, or slightly above, the minimum salary level established in their union's collective bargaining agreement ("CBA"), while paying BIs well above the minimum salary prescribed by their union's CBA—including, in some cases, exceeding the prescribed maximum. *Id.* ¶ 165. For instance, in FY 2018, the FPIs' CBA set minimum salaries for the lowest-grade FPIs at $46,607 for new hires, and $53,598 for incumbents. *Id.* ¶ 166. Plaintiffs submit data indicating that eighty-eight percent of FPIs at that grade were paid at the minimum salary rate, and ninety-nine percent were paid within $400 of the CBA minimum. *Id.* ¶ 167. By contrast, the BIs' CBA established minimum salaries for inspectors at $49,862 for new hires and $57,341 for incumbents. *Id.* ¶ 166. It further set minimum salaries for senior inspectors at $51,328 for new hires and $59,027 for incumbents. *Id.* The salary data for inspectors and senior inspectors indicates that 365 of the 420 BIs at these levels were paid $61,800, or nearly $12,000 above the inspector new hire minimum salary; and the remainder were paid at higher levels. *Id.* ¶ 168. Plaintiffs allege that because of the differences in the racial composition of FPIs and BIs, this practice has resulted in a disparate impact in base compensation—and correspondingly, overtime pay, pensions, and other benefits—which unfairly disadvantages the minority FPIs. *Id.* ¶¶ 173, 177.

Finally, Plaintiffs allege that these compensation disparities are part of a broader pattern of racial discrimination perpetuated by the FDNY, wherein predominantly-minority FPIs are treated less favorably than firefighters, who are over eighty percent white, and emergency medical service ("EMS") employees, who are about fifty percent white. *Id.* ¶ 142. For instance, Plaintiffs allege that firefighters receive significantly higher base salary ranges, and more generous pension, medical, dental, and educational benefits than FPIs. *Id.* ¶¶ 143–46. Plaintiffs also contend that FPIs are provided with less safety and protective equipment than firefighters and EMS employees, are not honored or recognized at FDNY awards ceremonies, and are required to wear uniforms that differ from other FDNY employees. *Id.* ¶¶ 147–49.

DISCUSSION

I. Rule 12(b)(6) Standard

***3** To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff is not required to provide "detailed factual allegations" in the complaint, but must assert "more than labels and conclusions." *Twombly*, 550 U.S. at 555. The court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). On a Rule 12(b)(6) motion, the court may consider only the complaint, documents attached to the complaint, matters of which a court can take judicial notice, or documents that the plaintiff knew about and relied upon. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

II. Use of Building Inspectors as Comparators

The City first argues that Plaintiffs have failed to plausibly allege an inference of discrimination that supports their disparate treatment and disparate impact claims, because their chosen comparators—BIs—are not sufficiently similar to Plaintiffs. Def. Mem. at 6–11, ECF No. 26. The Court disagrees.

A. Title VII, § 1981, and NYCHRL Disparate Treatment Claims

Claims of disparate treatment under Title VII and § 1981 are analyzed under the same substantive standards of the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Vivienzo v. City of Syracuse*, 611 F.3d 98, 106 (2d. Cir. 2010). To establish a prima facie case of discrimination under *McDonnell Douglas*, Plaintiffs must demonstrate that they (1) are members of a protected class; (2) are qualified for their positions; (3) suffered an adverse employment action; which (4) took place under circumstances giving rise to the inference of discrimination. *Ruiz v. County of Rockland*, 609 F.3d 486, 491–92 (2d Cir. 2010).

To survive a motion to dismiss, the complaint "must be facially plausible and allege sufficient facts to give the defendant fair notice of the basis for the claim; it need not, however, make out a prima face case," *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 228 n.10 (2d Cir. 2014), though the elements of a prima facie case "provide an outline of what is necessary" to render such claims plausible. *Kassman v. KPMG LLP*, 925 F. Supp. 2d 453, 461 (S.D.N.Y. 2013) (citation omitted). At this stage, "a plaintiff has a *minimal* burden of alleging facts suggesting an inference of discriminatory motivation." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (emphasis in original) (quotation marks and citation omitted).

Plaintiffs can raise an inference of discriminatory intent by showing "more favorable treatment of employees not in the protected group." *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 502 (2d Cir. 2009) (citation omitted), *superseded by statute on other grounds.* In such cases, they must "show that [they] shared sufficient employment characteristics with the comparator so that they could be considered similarly situated in all material respects." *McDowell v. N. Shore-Long Island Jewish Health Sys., Inc.*, 839 F. Supp. 2d 562, 568 (E.D.N.Y. 2012). This does not require "a showing that both cases are identical." *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000). Rather, Plaintiffs need only allege facts demonstrating the two groups are "sufficiently similar 'to support at least a minimal inference that the difference of treatment may be attributable to discrimination.' " *McDowell*, 839 F. Supp. 2d at 569 (quoting *McGuinness v. Lincoln Hall*, 263 F.3d 49, 54 (2d. Cir. 2001)).

***4** Plaintiffs raise an "atypical discrimination claim," in that they "do[ ] not rely on a comparator group of [non-minority] 'co-employees.' " *Hill v. City of New York*, 136 F. Supp. 3d 304, 335 (E.D.N.Y. 2015). Rather, Plaintiffs allege that the City's discriminatory intent can be inferred from the fact that the predominantly-minority FPIs are paid significantly lower salaries than BIs of comparable titles, with comparable job functions—who are also likelier to be white. Compl. ¶¶ 31–102. But the City contends that Plaintiffs' claims fail, because BIs are not "similarly situated" to FPIs in all material respects, citing several factual distinctions between the groups. Def. Mem. at 6–11.

At this early stage of litigation, the Court cannot agree. It is well-established that " '[w]hether ... employees are similarly situated ... presents a question of fact,' rather than a legal question to be resolved on a motion to dismiss." *Brown*, 756 F.3d at 230 (citing *Graham*, 230 F.3d at 39); *see also Woods v. Newburgh Enlarged City Sch. Dist.*, 288 Fed. App'x 757, 760 (2d Cir. 2008) (noting it is "a rare case" where the similarity of comparators' situations "can be resolved as a matter of law"). In this Circuit, the question of whether comparators are sufficiently similar is typically resolved at the earliest at the summary judgment stage, following discovery. *E.g., Ulrich v. Moody's Corp.*, No. 13 Civ. 8, 2017 WL 1232709, at *11–12 (S.D.N.Y. Mar. 13, 2017) (ruling on similarity of comparators on motion for summary judgment), *aff'd* 721 Fed. App'x 17 (2d. Cir. 2018); *Villar v. City of New York*, 135 F. Supp. 3d 105, 121–22 (S.D.N.Y. 2015) (same); *Canales-Jacobs v. N.Y. State Office of Court Admin.*, 640 F. Supp. 2d 482, 504–05 (S.D.N.Y. 2009) (same). To survive a motion to dismiss, Plaintiffs need only allege facts that give "plausible support to a minimal inference of discriminatory motivation." *Vega*, 801 F.3d at 84. The Court finds that Plaintiffs have met that low bar. Plaintiffs allege that FPI and BI positions have "similar" educational requirements, including the same number of required college credits towards a degree, Compl. ¶¶ 35–37, that FPIs and BIs must sit for exams of a similar duration that cover similar subject matters, *id.* ¶ 39, and that FPIs and BIs undergo City-administered training in a "virtually identical" range of subjects, *id.* ¶¶ 40–41. They further allege "substantial[ ] overlap" in the field inspections conducted by BIs and FPIs, including examinations of the same kinds of buildings under the same circumstances, and requiring review of the same plans and specifications stored on a shared database. *Id.* ¶¶ 42–43, 45–46. FPIs and BIs may both issue certificates allowing occupancy or use of the premises at the close of the inspection. *Id.* ¶¶ 49, 51. And BIs and FPIs work "on an equal and collaborative footing" on various joint task forces. *Id.* ¶¶ 54–55.

It may well be that the numerous distinctions Defendants point out will ultimately doom Plaintiffs' case at a later stage of litigation. But given the nuances and complexities inherent in a putative class-wide employment discrimination suit, for the Court to accept the City's arguments at this early juncture would amount to "improper fact-finding at the pleading stage."[2] *Minto v. Molloy Coll.*, No. 16 Civ. 276, 2021 WL 1394329, at *11 (E.D.N.Y. Jan. 21, 2021). Drawing all reasonable inferences in Plaintiffs' favor, the Court finds Plaintiffs have plausibly alleged that FPIs and BIs "work together and in tandem to perform the same function," and thus have plausibly alleged these groups are similarly situated. *Hill*, 136 F. Supp. 3d at 335–36.

B. Title VII and NYCHRL Disparate Impact Claims

***5** Plaintiffs also allege that the City's facially neutral practice of paying FPIs the minimum allowed under their CBA, while paying BIs "much more than the minimum" range prescribed by their CBA, has resulted in a disparate impact actionable under Title VII and the NYCHRL because the predominantly-minority FPIs receive lower compensation than predominantly-white BIs. Compl. ¶ 165.

Under Title VII, to make a prima facie showing of disparate impact, a plaintiff must "(1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two." *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012) (quotation marks and citations omitted). Unlike a disparate treatment claim, a disparate impact claim "does not require the plaintiff to show that the defendant *intended* to discriminate against a particular group." *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 207 (2d Cir. 2020) (emphasis in original). To survive a motion to dismiss, Plaintiffs must merely allege sufficient facts to support a plausible claim that an employer's facially neutral practice or policy disproportionately and adversely affects a particular protected group. *Malone v. N.Y. Pressman's Union No. 2*, No. 7 Civ. 9583, 2011 WL 2150551, at *7 (S.D.N.Y. May 31, 2011).

Plaintiffs often rely on statistical evidence to "show a disparity in outcome between groups" and thus "nudge [such a] claim across the line from conceivable to plausible[.]" *Mandala*, 975 F.3d at 209. At the motion to dismiss stage, Plaintiffs are not required "to prove in detail the methodological soundness of [their] statistical assessment" or to "supplement [the complaint's] statistical analysis with corroborating evidence," but "the statistics must plausibly suggest that the challenged practice *actually* has a disparate impact." *Id.* at 209–10 (emphasis in original). The statistical analysis must therefore, at minimum, "focus on the disparity between appropriate comparator groups" or "reveal disparities between populations that are relevant to the claim ... plaintiff[s] seek[ ] to prove." *Id.* at 210.

As discussed, at this early stage of the litigation, Plaintiffs have plausibly alleged that BIs are an appropriate comparator group for FPIs. *See supra* § IIA. Moreover, Plaintiffs' statistical analysis, based on publicly available data, demonstrates that, between FYs 2008 and 2019, on average FPIs were paid lower salaries than BIs at comparable job grades. Compl. ¶¶ 61–98. It further indicates the gap between median FPI and BI pay has "grown steadily" over the last twelve years. *Id.* ¶ 99. Plaintiffs attribute this to the City's practice of "pay[ing] the great majority of FPIs the minimum allowed under Local 2507's CBA" while "pay[ing] virtually every BI far more than the allowed minimum[.]" *Id.* ¶ 172. Among other examples, Plaintiffs allege that ninety-nine percent of FPI fire protection inspectors in FY 2018 were paid "at or within $400 of the minimum [for new hire and incumbent salaries] prescribed in the CBA." *Id.* ¶ 167. In the same year, eighty-seven percent of BI inspectors and senior inspectors (the equivalent BI job titles)[3] received salaries that started at almost $12,000 higher than the minimum new hire salary set forth in the BIs' CBA. *Id.* ¶¶ 168–69. Thus, the Court finds that Plaintiffs have plausibly alleged that the City's practice of paying predominantly-minority FPIs the minimum salary prescribed by their CBA, while paying predominantly-white BIs significantly more than the minimum salary established in their CBA, has "disproportionately and adversely" affected minority FPIs in terms of their compensation. At this stage, no further showing is needed.[4]

III. White FPIs' Claims Under Title VII and NYCHRL

***6** The City next contends that the white FPIs cannot state a claim for disparate treatment under Title VII and the NYCHRL because they cannot allege they were discriminated against on the basis of their race. Def. Mem. at 4–5. The City also argues that white FPIs cannot claim associational discrimination under Title VII and the NYCHRL because they do not sufficiently allege the kind of interpersonal relationships with the minority FPIs this Circuit's precedents have recognized as a basis for associational discrimination claims. *Id.* at 5–6. The Court agrees.

A. Title VII Claims

Title VII makes it "an unlawful employment practice for an employer ... to discriminate against any individual ... *because of such individual's race*[.]" 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Plaintiffs argue that it is "inherent" in their discrimination claim that because the City "discriminates against the white FPIs for being in the minority[,] they ... are discriminated against because of their race." Pl. Opp'n at 20–21, ECF No. 34. They contend the present matter is analogous to situations where "plaintiffs claim they had been injured by discrimination directed against them because of their association with members of a protected class." *Id.* at 21.

But this Circuit's precedents, including those cited by the Plaintiffs, make clear that a white employee suffers discrimination because of the employee's own race where "an employer disapproves of interracial association," and therefore subjects the white employee to adverse action on that basis. *Holcolmb v. Iona Coll.*, 521 F.3d 130, 138–139 (2d Cir. 2008); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112–113 (2d Cir. 2018) (concluding "from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex").

Although the Court declines to read these precedents so narrowly as to require a "romantic interpersonal relationship" for a claim of associational discrimination, it agrees with the City that at this stage, to state a claim under Title VII, Plaintiffs must plausibly allege facts that indicate the white FPIs faced adverse action, and that their race was a "motivating factor" in such action. *Vega*, 801 F.3d at 86. Doing so requires pleading facts supporting that a relationship or association between white FPIs and their minority counterparts existed, the City disapproved of this interracial association, and such disapproval was, at least in part, a basis for the discrimination the white FPIs experienced. *E.g., Holcomb*, 521 F.3d at 138 (upholding associational discrimination claim based on defendants' racially insensitive comments about the white plaintiff's marriage to a Black woman); *Kauffman v. Maxim Healthcare Servs., Inc.*, No. 4 Civ. 2869, 2006 WL 1983196 (E.D.N. Y Jul. 13, 2006) (recognizing associational discrimination claim where white plaintiff alleged retaliation "on account of his claimed opposition" to defendants' racially-discriminatory hiring policies); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (finding plaintiff's complaint sufficiently stated associational discrimination claim where "as alleged, the defendant disapproved of a social relationship between a white woman and a [B]lack man").

Plaintiffs have failed to make the required allegations. Beyond the inference that white FPIs and minority FPIs hold the same job title, that one individual white plaintiff was "paid less than the average salary" for a comparable BI, Compl. ¶ 24, and the conclusory assertion that "the disparate treatment [in compensation] equally affects the white FPIs who are Plaintiffs and [c]lass members," *id.* ¶ 203, Plaintiffs plead no allegations that specifically relate to white FPIs. They do not indicate that white FPIs and their minority counterparts have a "relationship"—personal, social, professional, or otherwise—that goes beyond the tenuous bounds of merely working within the same 400-person department. They do not allege facts indicating that the City disapproved of the interracial relationship between white and minority FPIs, and they do not allege that there is a causal link between the compensation disparities white FPIs face compared to similarly situated BIs and the City's disapproval of interracial relationships or associations. And, although they generally describe FPIs' advocacy for improved working conditions and benefits, they do not allege that white FPIs have experienced consequences with respect to, or that white FPIs advocated for, their minority coworkers. Plaintiffs, therefore, have failed to plead sufficient facts—even under the *de minimis* standard required at this stage—that give rise to an inference of discrimination against the white FPIs on the basis of their own race, as Title VII requires. Therefore, Defendant's motion to dismiss the white FPIs' claims under Title VII is GRANTED.[5]

B. NYCHRL Claims

***7** The Court analyzes Plaintiff's NYCHRL claims "separately and independently" from any federal law claims, "construing the NYCHRL's provisions broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible[.]" *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (quotation marks and citation omitted). Importantly, unlike Title VII, where associational discrimination claims have been imputed under specific circumstances from the statute, the NYCHRL specifically prohibits employment discrimination against individuals because of "the actual or perceived race ... of a person with whom such person has a *known relationship or association.*" N.Y.C. Admin. Code § 8-107(20) (emphasis added); *see, e.g., Lapko v. Grand Mkt. Int'l Corp.*, No. 514403-2019, 2020 WL 4818702, at *4 (N.Y. Sup. Ct. Aug. 12, 2020) (finding plaintiff's complaint sufficiently stated claim for associational discrimination under the broader protections of the NYCHRL, but not under Title VII). Unlike the Title VII context, where a white plaintiff must allege discrimination on the basis of their *own* race, NYCHRL "allow[s] claims by persons who were not themselves members of the protected class, but who were personally affected, albeit indirectly, by virtue of the alleged discrimination." *Axelrod v. 400 Owners Corp.*, 733 N.Y.S.2d 587, 590–91 (N.Y. Sup. Ct. 2001); *see also Morton v. 303 W. 122nd St. H.D.F.C.*, No. 100677-09, 2011 WL 2790597, at *1 (N.Y. Sup. Ct. Jul. 7, 2011) (collecting cases). To maintain a claim under the NYCHRL, therefore, Plaintiffs "must simply allege that [the white FPIs] suffered an independent injury because of its relationship with [the predominantly minority FPIs], who allege[ ] unlawful discriminatory practices related to [their] terms, conditions, or privileges of employment." *Zhang v. Jenzabar, Inc.*, No. 12 Civ. 2988, 2015 WL 1475793, at *12 (E.D.N.Y. Mar. 30, 2015).

Affording Plaintiffs' claims the broadest possible construction and drawing all reasonable inferences in their favor, the Court nevertheless finds that, even under this more flexible standard, Plaintiffs' factual allegations as to the white FPIs are too scant to establish a cause of action. Plaintiffs do not plead facts that go to the "independent injuries" white FPIs have suffered, or the relationship between them and their minority counterparts. Even cases under the NYCHRL require this bare showing. *E.g., Lapko*, 2020 WL 4818702, at *1–2, 4 (upholding national origin associational discrimination claim under the NYCHRL where plaintiff alleged defendants asked about his ties to a pro-Russia town and subjected him to adverse employment action thereafter).

Accordingly, Defendant's motion to dismiss the white FPIs' claims under NYCHRL is GRANTED.

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is GRANTED as to the claims of the white FPIs under Title VII and the NYCHRL, and DENIED in all other respects.

SO ORDERED.

All Citations

Slip Copy, 2021 WL 4226181

Footnotes

1 The facts in this section are taken from the complaint and "are presumed to be true for purposes of considering a motion to dismiss for failure to state a claim." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 398 (2d Cir. 2015).

2 The Court declines to take judicial notice of the notices of examination (the "Notices") for the FPI and BI positions proffered by the City. *See* ECF Nos. 27-2, 27-3. The Court cannot take judicial notice of documents for the "truth of the matters asserted." *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d. Cir. 1991). Here, the City asks the Court to do precisely that—that is, to assume that the Notices actually describe in full the relevant requirements and descriptions of the FPI and BI positions, such that the Court could conclude that the BI position is too dissimilar to serve as an adequate comparator to the FPI job. Def. Mem. at 9–10. The Court, therefore, will not consider the Notices at this stage.

3 Plaintiffs indicate that the BI "senior inspector" title is used only for current incumbents and will be eliminated when persons with that title stop working, and that it is the same grade as "inspector." Compl. ¶ 60.

4 As the Court has determined Plaintiffs' federal disparate treatment and disparate impact claims are sufficient to withstand the motion to dismiss, it concludes Plaintiffs' NYCHRL claims similarly survive, because "federal ... civil rights laws [are] a floor

below which the City's Human Rights law cannot fall." The Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 § 1 (Oct. 3, 2005); *see, e.g., Clarke v. InterContinental Hotels Grp., PLC*, No. 12 Civ. 2671, 2013 WL 2358596, at *11 n.13 (S.D.N.Y. May 30, 2013) (denying motion to dismiss NYCHRL retaliation claim, "without further analysis," because the court had denied defendant's motion to dismiss plaintiff's Title VII claims).

5 The City initially sought dismissal of Plaintiffs' Title VII claims on the ground that Plaintiffs had failed to administratively exhaust these claims because they had not yet received a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC") despite filing a charge. Def. Mem. at 3. Plaintiffs informed the Court on November 6, 2020, that they had undertaken diligent efforts to obtain their right-to-sue letters and finally received copies via e-mail, rather than mail, on November 5, 2020. ECF No. 37. Because the parties agree that this development rendered the City's administrative exhaustion argument moot, the Court does not address it here. *Id.*

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KeyCite negative history or citing references available
Rehearing en Banc Granted, Opinion Vacated by Williams v. Wal-Mart Stores, Inc., 5th Cir.(Tex.), February 26, 1999

156 F.3d 581
United States Court of Appeals,
Fifth Circuit.

Julie DEFFENBAUGH–WILLIAMS, Plaintiff–Appellee/Cross–Appellant,
v.
WAL–MART STORES, INC., et al., Defendants,
Wal–Mart Stores, Inc., Defendant–Appellant/Cross–Appellee.

No. 97–10685.
|
Sept. 24, 1998.

Synopsis
Former employee, a white female, sued employer-department store for race discrimination under Title VII and § 1981, alleging that she was terminated because she was dating a black male. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., granted judgment as a matter of law for employer as to punitive damages, but otherwise entered judgment on jury verdict for former employee. Employer appealed, and employee cross-appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that: (1) Title VII prohibits discrimination in employment premised on an interracial relationship; (2) employee produced sufficient evidence that employer's stated reason for discharging her was pretext for race discrimination; (3) as to mitigation of damages, district court did not reversibly err in permitting jury to consider awarding lost-earnings for period after employee voluntarily quit her subsequent employment; (4) evidence of malice or reckless indifference on part of direct supervisor who discharged plaintiff was sufficient to permit punitive damages, as a matter of law, against employer, receding from *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, but (5) jury's punitive damages award of $100,000 was excessive, thus requiring remittitur to $75,000, with plaintiff having the option of a new trial on such damages.

Affirmed in part and reversed in part; remittitur of punitive damages; remanded.

Procedural Posture(s): On Appeal; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict.

Attorneys and Law Firms

***584** Mark C. Brodeur, Dallas, TX, for Deffenbaugh–Williams.

Jimmy Preston Wrotenbery, Kevin D. Jewell, Magenheim, Bateman, Robinson, Wrotenbery & Helfand, Houston, TX, for Wal–Mart Stores, Inc.

Appeals from the United States District Court for the Northern District of Texas.

Before JOLLY, SMITH and BARKSDALE, Circuit Judges.

Opinion

RHESA HAWKINS BARKSDALE, Circuit Judge:

For the numerous issues presented regarding the amended judgment, the principal matter at hand is the imposition of punitive damages against an employer, through vicarious liability, for a racially discriminatory termination, in the light of two very recent Supreme Court decisions regarding employer vicarious liability for sexual harassment. A jury having found Wal–Mart Stores, Inc., liable under Title VII, 42 U.S.C. § 2000e *et seq.,* and 42 U.S.C. § 1981, for such termination of Julie Deffenbaugh–Williams (Deffenbaugh), and having awarded her compensatory and punitive damages, Wal–Mart raises liability and the failure to mitigate the compensatory damages; Deffenbaugh, the district court's setting aside, as a matter of law, the punitive damages. In the alternative, Wal–Mart asserts that the punitive damages are excessive. We AFFIRM as to liability and the amount of compensatory damages; as to the denial of punitive damages, we REVERSE, ***585** but order a remittitur of $25,000, resulting in those damages being reduced from $100,000 to $75,000, with Deffenbaugh having the option of a new trial on such damages.

I.

Deffenbaugh began working for Wal–Mart in 1979 as the jewelry manager for its store in Bowie, Texas. She voluntarily quit in 1982. In 1989, she began working as a sales associate at the Wal–Mart Hypermart in Arlington, Texas. In 1990, Deffenbaugh was promoted to manager of the jewelry department.

In May 1992, Deffenbaugh, who is white, began dating Truce Williams (Williams), a black sales associate in the Arlington Hypermart men's wear department. They did not reveal the existence of their relationship to their co-workers.

Charlotte England served as Deffenbaugh's direct supervisor until May or June 1993, when Dale Gipson became District Manager of the shoe and jewelry departments of six Wal–Mart stores, including the Arlington Hypermart. As manager of the jewelry department employees at the Hypermart, Gipson had direct supervisory authority over Deffenbaugh. Around this same time, Pat Price became the manager of Deffenbaugh's store; but, he never directly supervised Deffenbaugh.

In May and August 1993, Price saw Deffenbaugh and Williams together at local restaurants; and, on one of these occasions, saw them kiss. In August 1993, shortly after the second occasion on which he saw Deffenbaugh and Williams together in public, Price asked Deffenbaugh to attend a lunch meeting at a local restaurant to discuss store inventory. Deffenbaugh testified that Price, England, and Gipson attended this meeting; and that, in the presence of Price and Gipson, England told Deffenbaugh that she "would never move up with the company being associated with a black man and that Wal–Mart frowned upon fraternization with[in] the company". Deffenbaugh responded that her personal business was not their concern, "because it did not affect [her] job performance". Price and Gipson did not respond to these comments.

In October 1993, Price advised Deffenbaugh about Wal–Mart's nonfraternization policy; and she signed a written acknowledgment of this policy. But, the policy did not prohibit employees from dating if they were not in a direct supervisory relationship.

Prior to December 1993, Deffenbaugh's performance evaluations were favorable and she earned high revenues for the store. Early that December, however, Gipson reprimanded Deffenbaugh for an incident that October, in which she set aside a bottle of perfume to purchase at the end of her shift. Gipson accused her of "shopping on the clock", *i.e.,* shopping for store merchandise during working hours. (In late November, Gipson and Greg Shelton, the Wal–Mart Loss Prevention Manager, had initially accused Deffenbaugh of stealing the perfume.)

Deffenbaugh was suspended for one day and returned to work only after she had prepared and signed a "plan of action", outlining how she would improve her work performance. The plan included a statement that she would "never shop while on company time". Despite her compliance with these instructions, Deffenbaugh believed the reprimand was pretextual, noting that there was no written policy prohibiting "shopping on the clock".

Deffenbaugh testified that, after this reprimand, she contacted David Norman, the Wal–Mart regional manager, and told him that the Wal–Mart managers were "out to get [her] ... because of [her] dating [Williams]...." Norman replied that it was not a problem if she was dating a black man and assured her that he would "check into it".

On Friday, 14 January 1994, the day after Deffenbaugh married Williams, he told her that he wanted to purchase a VCR from the electronics department. Just before 4:00 p.m., Deffenbaugh, before clocking out, went to the men's wear department to give Williams cash from a paycheck she earlier had cashed for him. Williams asked Deffenbaugh for her Wal–Mart discount card. Deffenbaugh testified that she stopped near the ***586** electronics department cashier and handed Williams, not the cashier, the card. Williams used the card to purchase the VCR, while Deffenbaugh went to check on the jewelry department before walking to the front of the store to clock out.

The next morning, Williams' supervisor, Arthur Stanford, telephoned Williams and informed him and Deffenbaugh that "they" were going to "mess with" and "terminate" Deffenbaugh on the following Monday. On Wednesday, 19 January 1994, Gipson told Deffenbaugh that her employment was terminated because she had "shopp[ed] on the clock" again. Deffenbaugh countered that the VCR had been purchased by Williams, not her; and that Gipson could verify this by asking a fellow employee who had seen Williams make the purchase. Instead, Gipson relied on the cashier's handwritten report that Deffenbaugh had been present when Williams made the purchase, and that store records showed that the card was used before Deffenbaugh clocked out.

Deffenbaugh brought this action against Wal–Mart in March 1995, claiming, *inter alia,* that, in violation of Title VII and § 1981, she, a white female, was discharged because she was dating a black male. Prior to the trial in July 1996, the district court dismissed all claims except that of racial discrimination.

At the close of Deffenbaugh's case, and pursuant to Fed.R.Civ.P. 50, Wal–Mart moved for judgment as a matter of law, asserting that Deffenbaugh failed to establish a *prima facie* case because she is not a member of a protected class; that there was no evidence of discriminatory animus; that Wal–Mart could not be liable for compensatory damages after December 1994, when Deffenbaugh voluntarily terminated her next employment; and that Deffenbaugh was not entitled to punitive damages. The court immediately denied the motion; and Wal–Mart announced that it rested, without presenting any evidence. At the charge conference, Wal–Mart renewed the same motion for judgment; it was, again, denied.

The jury found that race was a motivating factor in Wal–Mart's decision to discharge Deffenbaugh; specifically, that she was discharged because of her association with a black person. It awarded compensatory damages for lost-earnings of $19,000 and punitive damages of $100,000. Judgment was entered to that effect in September 1996.

Prior to entry of judgment, Wal–Mart renewed, and post-entry amended, its motion for judgment as a matter of law and moved for a new trial. A hearing was held in December 1996. As a result, for the punitive damages issue, the district court ordered supplemental briefing on the effect of *Patterson v. P.H.P. Healthcare Corp.,* 90 F.3d 927 (5th Cir.1996), *cert. denied,* 519 U.S. 1091, 117 S.Ct. 767, 136 L.Ed.2d 713 (1997). *Patterson,* which our court decided approximately a week before the verdict for Deffenbaugh, is quite similar to the case at hand, in that it had Title VII and § 1981 claims for racial discrimination in employment, and involved, *inter alia,* issues concerning employer vicarious liability, mitigation of compensatory damages, and punitive damages, to include whether they were excessive. Unlike the case at hand, *Patterson* was a bench, not a jury, trial.

In May 1997, pursuant to a comprehensive opinion by the district court, and in the light of *Patterson,* judgment as a matter of law was granted for Wal–Mart as to punitive damages, the district court holding that Wal–Mart was not vicariously liable for such damages, even though its employee had terminated Deffenbaugh in violation of Title VII and § 1981. Therefore, the district court did not reach whether the punitive damages award was excessive. Otherwise, Wal–Mart's motions were denied. Both parties appeal the amended judgment.

II.

Wal–Mart contends that it was entitled to judgment as a matter of law; alternatively, that the compensatory damages for lost-earnings must be reduced. Deffenbaugh cross-appeals the denial of punitive damages; in the alternative, Wal–Mart maintains such damages are excessive.

A.

Liability is contested in two ways: (1) failure to establish a *prima facie* case; and (2) ***587** insufficient evidence of racial discrimination. Contrary to its claim that it is not vicariously liable for punitive damages, as discussed *infra* in part II.C.1., Wal–Mart does not make a similar claim concerning liability.

1.

Concerning the *prima facie* case, Wal–Mart maintains that Deffenbaugh failed to show both that she is a member of a protected class and that she is qualified for the position. It appears this is based on the district court's denial of Wal–Mart's motion for judgment as a matter of law at the close of Deffenbaugh's case-in-chief. As discussed below, only the first point (not in protected class) was raised in that motion; the second (not qualified for position) was not raised until the post-verdict motion.

"Claims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to claims of employment discrimination brought under Title VII." *LaPierre v. Benson Nissan, Inc.,* 86 F.3d 444, 448 n. 2 (5th Cir.1996). Therefore, "to succeed on a claim of intentional discrimination under Title VII ... or [§] 1981, a plaintiff must first prove a *prima facie* case of discrimination". *Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996).

Discrimination claims under Title VII and § 1981, based on circumstantial evidence, are subject to the well-established burden-shifting provided in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, Deffenbaugh was required to establish a *prima facie* case; to show, by a preponderance of the evidence, that she: (1) is a member of a protected class; (2) was qualified for the position; (3)

was terminated; and (4) was replaced by someone outside the protected class. *E.g., St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Ward v. Bechtel Corp.,* 102 F.3d 199, 202 (5th Cir.1997); *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 992 (5th Cir.1996) (en banc).

Under this procedure, if Deffenbaugh meets this burden, a presumption of discrimination arises, which Wal–Mart may overcome by proffering a legitimate, nondiscriminatory reason for the termination. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817; *Rhodes,* 75 F.3d at 992–93. If Wal–Mart meets this burden, the presumption disappears; but, Deffenbaugh has the opportunity to prove that Wal–Mart's articulated reason for termination was a pretext for discrimination. *McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. 1817; *Rhodes,* 75 F.3d at 993.

The shifting presumptions alter only the *burden of production;* "[t]he ultimate *burden of persuading* the [jury] that [Wal–Mart] intentionally discriminated against [Deffenbaugh] remains at all times with [Deffenbaugh]". *Hicks,* 509 U.S. at 507, 113 S.Ct. 2742 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)) (emphasis added); *see also* Fed.R.Evid. 301. And, it is more than well-established that, "[a]fter a case has been fully tried on the merits, the *McDonnell Douglas* burden shifting analysis ceases to be of import to an appellate court". *Patterson,* 90 F.3d at 933; *accord United States Postal Serv. Bd. v. Aikens,* 460 U.S. 711, 714–16, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Travis v. Board of Regents of the Univ. of Tex.,* 122 F.3d 259, 263 (5th Cir.1997), *cert. denied,* 522 U.S. 1148, 118 S.Ct. 1166, 140 L.Ed.2d 176 (1998); *Harrington v. Harris,* 118 F.3d 359, 367 (5th Cir.), *cert. denied,* 522 U.S. 1016, 118 S.Ct. 603, 139 L.Ed.2d 491 (1997); *Molnar v. Ebasco Constructors, Inc.,* 986 F.2d 115, 118 (5th Cir.1993); *Walther v. Lone Star Gas Co.,* 952 F.2d 119, 122–23 (5th Cir.1992). "Instead, our inquiry becomes whether the record contains sufficient evidence to support the conclusions reached by the [jury]." *Patterson,* 90 F.3d at 933; *LaPierre,* 86 F.3d at 448.

This notwithstanding, Wal–Mart appears to contend that, even when there has been a jury verdict, we nevertheless review proof *vel non* of the elements of a *prima facie* case in the context of the denial of judgment as a matter of law at the close of the plaintiff's case. We need not reach this question because, as noted, Wal–Mart did not present a case. Instead, it presented evidence only by ***588** cross-examination of the witnesses called for Deffenbaugh's case.

In any event, the elements of a *prima facie* case must, of course, be satisfied. *E.g., Hicks,* 509 U.S. at 509–10, 113 S.Ct. 2742. For our purposes, the issue is whether the case should have been submitted to the jury. We deal with that question *infra,* in reviewing the sufficiency of the evidence challenge; doing so, of course, only within the confines of the issues properly raised both in district court and here.

2.

As for whether the evidence was sufficient for the jury to find Wal–Mart liable for racial discrimination under Title VII or § 1981, in reviewing the "denial of [a Rule 50 motion], the appellate court uses the same standard to review the verdict that the district court used in first passing on the motion". *Hiltgen v. Sumrall,* 47 F.3d 695, 699 (5th Cir.1995). Accordingly, we apply the well-known standard articulated in *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir.1969) (en banc), *overruled in part on other grounds by Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5th Cir.1997) (en banc):

> [T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting [judgment as a matter of law] is proper.

In this regard, although "we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to re-evaluate credibility of witnesses". *Hiltgen,* 47 F.3d at 700 (quoting *Rideau v. Parkem Indus. Serv., Inc.,* 917 F.2d 892, 897 (5th Cir.1990) (citation and quotation omitted)).

Again, after a case has been fully tried on the merits, we no longer focus on the *McDonnell Douglas* burden-shifting rubric; the inquiry becomes whether the record contains sufficient evidence to support the jury's ultimate finding of race discrimination. Nevertheless, as also discussed *supra,* in determining whether the evidence supports finding a Title VII or § 1981 violation, we may look to whether the plaintiff has produced evidence satisfying the *prima facie* elements under those statutes.

Title VII provides:

> It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. § 2000e–2(a)(1). And, § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

a.

Wal–Mart contends that reasonable jurors could not find a Title VII violation, on the ground that Deffenbaugh failed to satisfy the membership-in-a-protected-class requirement. Specifically, it maintains that, for this case, the protected class is black persons, premised on its claim that it is Deffenbaugh's relationship with Williams, a black person, that is at issue; and that, because Deffenbaugh was replaced by a black employee, she has failed to demonstrate a *prima facie* case of Title VII discrimination.

In making this claim, Wal–Mart asserts, quite half-heartedly, that Title VII does not apply to employment discrimination premised on an interracial relationship. As Wal–Mart notes, this is an issue of first impression for our court. But, Wal–Mart fails to provide any sound reason why such discrimination is not covered by Title VII. It is true that, as Wal–Mart notes, Title VII's plain language does not address this precise point; but, read as a whole, it does. In essence, ***589** the claim, as made by Deffenbaugh, is that she was discriminated against, as proscribed by the following language from Title VII, "because of [her] race" (white), as a result of her relationship with a black person. In short, we agree with other courts that have concluded that Title VII does proscribe such discrimination. *See Stacks v. Southwestern Bell Yellow Pages, Inc.,* 27 F.3d 1316, 1327 n. 6 (8th Cir.1994); *Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 891–92 (11th Cir.1986); *see also Patrick v. Miller,* 953 F.2d 1240, 1250 (10th Cir.1992); *Sperling v. United States,* 515 F.2d 465, 484 (3d Cir.1975), *cert. denied,* 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976); *Whitney v. Greater N.Y. Corp. of Seventh–Day Adventists,* 401 F.Supp. 1363, 1366 (S.D.N.Y.1975); *Reiter v. Center Consolidated Sch. Dist.,* 618 F.Supp. 1458, 1460 (D.Colo.1985); *Gresham v. Waffle House, Inc.,* 586 F.Supp. 1442, 1445 (N.D.Ga.1984); *cf. Oncale v. Sundowner Offshore Serv., Inc.,* 523 U.S. 75, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201 (1998) (holding that Title VII covers same-sex sexual harassment, even though not specifically enumerated in the language of the Act, because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils").

In sum, Title VII prohibits discrimination in employment premised on an interracial relationship. This is consistent with our § 1981 precedent concerning employment discrimination because of interracial *marriages* (Deffenbaugh's marriage to Williams just before her discharge is *not* one of her asserted reasons for her discharge); " § 1981 provides a cause of action to a white spouse who alleges that he was discriminated against in employment because of his marriage to a nonwhite". *Alizadeh v. Safeway Stores, Inc*., 802 F.2d 111, 114 (5th Cir.1986).

Concomitantly, we disagree with Wal–Mart's quite strained assertion that the relevant protected class is blacks. Deffenbaugh, who is white, alleged that she was fired because she was engaged in an interracial relationship. *See Parr,* 791 F.2d at 891 (citing *Whitney,* 401 F.Supp. at 1366, and *Reiter,* 618 F.Supp. at 1460). She produced evidence to that effect, and it was not impermissible for the jury to find a violation under Title VII premised on discrimination based on that relationship. Restated, and assuming sufficient supporting evidence, a reasonable juror could find that Deffenbaugh was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person.

b.

Wal–Mart maintains that Deffenbaugh produced insufficient evidence that its stated reason for discharging her was a pretext; it asserts that there is no evidence that her termination was because of her association with a black male. Deffenbaugh had the burden to prove that Wal–Mart's purported reason for her termination was a pretext for racial discrimination. *E.g., Travis,* 122 F.3d at 263. "[Deffenbaugh] may demonstrate pretext either by showing that a discriminatory motive more likely motivated [Wal–Mart], or that [Wal–Mart]'s explanation is unworthy of credence." *Harrington,* 118 F.3d at 367–68.

Wal–Mart's asserted reason for terminating Deffenbaugh was that she was "shopping on the clock". (This ties in with the claim that she failed to prove one of the *prima facie* elements for her claim: being qualified for her position. But, Wal–Mart failed to preserve that precise point; it did not raise it in its pre-verdict motion for judgment as a matter of law. In any event, that question is subsumed within the point now at issue: discriminatory discharge.)

Prior to December 1993, Deffenbaugh had received favorable performance reviews, promotions, and pay increases. In fact, Gipson, who terminated her, testified that he did not have problems with the way Deffenbaugh was running the jewelry department.

As discussed, Deffenbaugh testified that, on 14 January 1994, she gave Williams her discount card, because he wanted to purchase a VCR. While he made this purchase in the electronics department, Deffenbaugh returned to the jewelry department and then to the front of the store to clock out.

***590** When Gipson told Deffenbaugh that she was terminated for "shopping on the clock", she explained that the VCR had been purchased by Williams, not her; and that Gipson could verify this by asking a fellow employee who had seen Williams make the purchase. Deffenbaugh testified that Gipson told her that his "mind [was] made up". He did not interview possible witnesses to the sale, even after Williams approached him and told him that he had made the purchase; did not interview the cashier; and did not check to see if there was a videotape of the incident. Instead, Gipson relied on the cashier's handwritten report that Deffenbaugh had been present when Williams made the purchase, and that store records reflected the card's being used three minutes before Deffenbaugh checked out. *But, Gipson testified that handing a discount card to one's spouse before clocking out would not be a violation of Wal–Mart policy.* And, Deffenbaugh testified that she did not deal with the cashier who conducted the VCR transaction.

Moreover, even if Deffenbaugh was technically "shopping on the clock", the evidence was sufficient for a reasonable jury to find that it was not the motivating reason for Wal–Mart firing her. For example, Deffenbaugh testified that she observed other employees buying items at the end of their shifts without being disciplined, and had never heard of anyone else being terminated from Wal–Mart for "shopping on the clock". Gipson failed to investigate, even when confronted by Williams' corroboration of Deffenbaugh's version of events. And, Deffenbaugh had positive performance evaluations prior to the time her supervisors, including Gipson, became aware of her interracial relationship.

Regarding its claim that there was no evidence of a discriminatory motive, Wal–Mart continuously states that it is "undisputed" that Gipson, the supervisor who solely made the decision to discharge Deffenbaugh, had no knowledge of her interracial relationship. This is simply not correct. As discussed *supra,* Deffenbaugh testified that, at the August meeting attended by Gipson, England told her, in Gipson's presence, that Deffenbaugh "would never move up with the company being associated with a black man". After Deffenbaugh responded that her personal business was not their concern, "because it did not affect [her] job performance", Gipson remained silent. That meeting occurred only around five months before Deffenbaugh's termination.

Wal–Mart asserts that England's statement was a "stray remark" that cannot enter into the equation. *See Ray v. Tandem Computers, Inc.,* 63 F.3d 429, 434 (5th Cir.1995) ("[A] single comment, made several years prior to the challenged conduct, is a stray remark too remote in time to support an inference of ... discrimination in later employment actions."). Far from being a "stray remark", the comment, made only around five months before termination and directly bearing on the discriminatory issue presented, is of critical importance.

Gipson testified that he was *not* present at the August meeting and was *not* aware of Deffenbaugh's relationship with Williams. In short, the jury was presented with two differing accounts; exercising its function of determining facts and assessing credibility, it obviously found Deffenbaugh's, not Gipson's, credible.

In this regard, a reasonable jury could also infer from Gipson's silence that he agreed with England's remark. And, it could infer from that remark, as well as Gipson's association with fellow supervisors Price (who had seen Deffenbaugh and Williams together in a romantic context) and England, that Gipson was aware of this relationship.

Moreover, Deffenbaugh testified that the morning after January 14 (when Williams used Deffenbaugh's card to purchase the VCR), Williams was telephoned by his supervisor, Stanford, who informed Williams and Deffenbaugh that "they" were going to "mess with" and "terminate" Deffenbaugh on the following Monday.

The above evidence, viewed in the light and with all reasonable inferences most favorable to Deffenbaugh, was sufficient for reasonable jurors to find that

Wal–Mart's decision to terminate her was because of her association with a black person; and that "shopping on the clock" was merely a pretext. ***591** Again, "we are not free to reweigh the evidence or to re-evaluate credibility of witnesses". *Hiltgen,* 47 F.3d at 700 (quoting *Rideau,* 917 F.2d at 897 (citation and quotation omitted)).

B.

As covered by the district court's instructions and a detailed special interrogatory, the jury awarded Deffenbaugh $19,000 to compensate her for lost-earnings between her termination (January 1994) and the trial (July 1996). The instructions and interrogatory addressed Deffenbaugh's duty to mitigate those damages.

Wal–Mart contends that it is entitled to a remittitur, on the basis that the district court should not have permitted the jury to award such damages for the period after December 1994, when Deffenbaugh voluntarily quit subsequent employment. Wal–Mart raised this issue in its pre-verdict motions for judgment as a matter of law and, concomitantly, in its objections to the lost-earnings instructions and special interrogatory.

Wal–Mart had the burden at trial of proving Deffenbaugh's failure to mitigate damages. *Sellers v. Delgado College,* 902 F.2d 1189, 1193 (5th Cir.), *cert. denied,* 498 U.S. 987, 111 S.Ct. 525, 112 L.Ed.2d 536 (1990). Again, its evidence came in only through Deffenbaugh's case.

"Because an award of back pay is an equitable remedy designed to make the injured party whole, ... an injured party has a duty under both § 1981 and Title VII to use reasonable diligence to attain substantially similar employment and, thereby, mitigate damages." *Patterson,* 90 F.3d at 935; *see also Sellers,* 902 F.2d at 1193. And, "it necessarily follows that the claimant must also use reasonable diligence in maintaining that substantially similar employment". *Patterson,* 90 F.3d at 936. "The reasonableness of a Title VII claimant's diligence should be evaluated in light of the individual characteristics of the claimant and the job market." *Sellers,* 902 F.2d at 1193 (citation and internal quotation omitted).

Wal–Mart terminated Deffenbaugh in January 1994. She next worked at Venture stores from June 1994 until that December. She testified that she resigned following a sexual assault at her new residence with her in-laws; she had moved there (a lower-income residential area) because of her decreased earnings at her new job.

Deffenbaugh sought approximately $34,000 in lost-earnings. In conjunction with its claim that the jury should not have been allowed to consider lost-earnings after December 1994, Wal–Mart posits that, as so limited, the maximum the jury could have awarded Deffenbaugh was only approximately $10,000—the difference for the period January through December 1994 between what she would have earned at Wal–Mart (approximately $20,000) and what she did earn at Venture (approximately $9,400 for June-December 1994). It requests a remittitur to that amount.

Deffenbaugh presented proof of her lost-earnings, including why she left Venture, her attempts to obtain employment after she did so in December 1994, and her subsequent employment. The jury awarded $19,000, implicitly finding that Deffenbaugh made reasonable efforts to mitigate her damages.

But, again, Wal–Mart maintains that the jury should not have been allowed to consider the period after December 1994, when Deffenbaugh voluntarily quit her Venture employment. Consistent with the duty to mitigate, as outlined in *Patterson,* Wal–Mart's basis for its damages time bar, however, is only that "[v]oluntarily resigning from employment does not, and should not, constitute a reasonable good faith effort to maintain substantially equivalent employment".

As the mitigation tests, as well as Wal–Mart's assertion, reflect, the question is one of fact, *see Patterson,* 90 F.3d at 936; it keys on matters such as reasonableness, similarity, and diligence. On this record, a reasonable jury could find that Deffenbaugh satisfied her duty to mitigate damages. Therefore, the district court did not reversibly err in permitting the jury to consider awarding lost-earnings for the period after December 1994. For this issue, judgment as a matter of law was properly denied.

***592** C.

Deffenbaugh contests the district court's setting aside, pursuant to *Patterson* and as a matter of law, the jury's punitive damages award. "We review the district court's grant of a motion for judgment as a matter of law *de novo.*" *Hidden Oaks Ltd. v. City of Austin,* 138 F.3d 1036, 1042 (5th Cir.1998) (citation omitted). But, again, "[t]o the extent that our review requires consideration of the evidence introduced by the parties, as opposed to pure questions of law, we apply the same standard as the district court, considering all evidence with all reasonable inferences in the light most favorable to the non-moving party". *Id.* (internal quotation and citation omitted).

Although punitive damages have long been available for § 1981 claims, *see Jones v. Western Geophysical Co.,* 761 F.2d 1158, 1162 (5th Cir.1985), they were not available for Title VII claims until the 1991 amendments to the Civil Rights Act of 1964, 42 U.S.C. § 1981a. Those amendments served to unify the law for employment discrimination cases; accordingly, we apply the same criteria in considering the propriety of punitive damage awards under Title VII (§ 1981a) and § 1981. *Patterson,* 90 F.3d at 941–42. Under § 1981a(b)(1), punitive damages are to be awarded when the complaining party shows "that the respondent engaged in a discriminatory practice ... with *malice* or with *reckless indifference* to the federally protected rights of an aggrieved individual". (Emphasis added.)

Deffenbaugh contends (1) that *Patterson,* relied upon by the district court, does not preclude recovery of punitive damages, because Gipson's malice can be imputed to Wal–Mart; and (2) that in addition to Gipson, other employees acted with malice or were recklessly indifferent to her right to be free from racial discrimination. Wal–Mart disputes these contentions; alternatively, it maintains that the award was excessive.

1.

For the bench trial in *Patterson,* our court held, 90 F.3d at 944, that it was an abuse of discretion to award punitive damages against an employer when "the record is completely void of evidence showing that [the employer] took part in any discriminatory conduct much less any 'malicious' or 'reckless' conduct". This conclusion was based on the discriminatory acts being committed solely by a "project manager" of one office; the employer provided a handbook establishing a nondiscrimination policy; testimony indicated that memoranda were distributed explaining complaint procedures; there was no evidence that plaintiffs followed any complaint procedures; and there was no evidence that the employer knew, or should have known, of the discriminatory acts of its project manager. *Id.* Our court concluded that the project manager's actions alone, without any showing that the employer "*knew or should have known* of [his] malicious or reckless conduct", did not support the imposition of punitive liability to the employer. *Id.* (emphasis added).

Patterson must be viewed in the light of two Supreme Court cases, decided shortly before oral argument in this case: *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); and *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). (Post-argument, at our instruction, the parties filed supplemental briefs on the applicability of those cases.) There, the Court applied agency principles in determining whether an employer is vicariously liable for *sexual harassment* conducted by supervisory employees. In so doing, it noted that "there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, *firing,* promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown". *Faragher,* 524 U.S. at ——, 118 S.Ct. at 2284 (emphasis added). These cases stated the rule as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment *created by a supervisor with immediate (or successively higher) authority* over the employee. *When no tangible employment action is taken,* a defending employer may raise an affirmative ***593** defense to liability or damages, subject to proof by a preponderance of the evidence.... *No affirmative defense is available, however,* when the supervisor's harassment culminates in a tangible employment action, *such as discharge,* demotion, or undesirable reassignment.

Faragher, 524 U.S. at —— – ——, 118 S.Ct. at 2292–93; *Burlington,* 524 U.S. at ——, 118 S.Ct. at 2270 (emphasis added).

In adopting this standard, the Court's purpose apparently was not to state a standard solely for sexual harassment claims, but rather "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees...." *Burlington,* 524 U.S. at ——, 118 S.Ct. at 2270. Accordingly, it appears that the Court intended to apply these same agency principles to all vicarious liability inquiries under Title VII for acts by supervisors, including racial discrimination. *See Faragher,* 524 U.S. at —— n. 1, 118 S.Ct. at 2283 n. 1 ("Although racial and sexual harassment will often take different forms, and standards [may] not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.");

see also id. at —— n. 3, 118 S.Ct. at 2290 n. 3 (stating that the Court's "obligation ... is to adapt agency concepts to the practical objectives of Title VII"). Therefore, even though the case at hand involves a racially-discriminatory-discharge claim, rather than one for sexual-harassment-hostile-work-environment, we find the standard enunciated in *Faragher* and *Burlington* controlling.

Viewed in the light of *Faragher* and *Burlington,* the *ratio decidendi* in *Patterson* falls short of the new standard. As stated, applying then-existing precedent, *Patterson* held that the supervising employee's actions alone, absent a showing that the employer "*knew or should have known* of [his] malicious or reckless conduct", do not support the imposition of punitive liability to the employer. 90 F.3d at 944 (emphasis added). But, as stated in *Burlington,* 524 U.S. at ——, 118 S.Ct. at 2267,

> although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it *knew or should have known* about the conduct and failed to stop it. Negligence sets a *minimum standard* for employer liability under Title VII; but Ellerth [the employee] seeks to invoke *the more stringent standard of vicarious liability.*

(Emphasis added.) The Court then fashioned the vicarious liability standard, quoted *supra,* based in part on the Restatement (Second) of Agency § 219(2)(d) (1957), which permits a master to be liable for the torts of his servant, *committed outside the scope of employment,* when the servant "was aided in accomplishing the tort by the existence of the agency relation". *Id.* at —— – ——, ——, 118 S.Ct. at 2267–68, 2270. The court reasoned that a supervisor's tangible employment action, such as discharge, requires the aid of the agency relationship, *i.e.* official authority, to have effect. *Id.* at —— – ——, 118 S.Ct. at 2268–69.

Moreover, *Patterson* refused, for purposes of punitive damages, to impute the supervisory employee's acts to the employer because the employee was only a "project manager", and not a "corporate officer". 90 F.3d at 944. But, as the Court's vicarious liability standard makes clear, all that is required is that the employee be "a supervisor with immediate (or successively higher) authority". *Faragher,* 524 U.S. at —— – ——, 118 S.Ct. at 2292–93; *Burlington,* 524 U.S. at ——, 118 S.Ct. at 2270. Gipson was Deffenbaugh's direct supervisor; he was authorized to, and did, discharge her.

a.

Having concluded that Gipson's malicious or recklessly indifferent acts, if any, are imputed to Wal–Mart, we must determine whether there was sufficient evidence of such acts. Wal–Mart does not challenge the jury instructions regarding "malice" and ***594** "reckless indifference". The jury was instructed that it could award punitive damages only if the preponderance of the evidence showed that Wal–Mart discriminated against Deffenbaugh either:

> (1) with malice, that is, out of ill will, spite or for the purpose of causing injury to [Deffenbaugh]; or
>
> (2) with reckless indifference to [Deffenbaugh]'s right to be free from discrimination based on race.

As stated *supra,* reasonable jurors could believe Deffenbaugh's version of the events at the August 1993 meeting, during which England told her, in Gipson's presence, that Deffenbaugh "would never move up with the company being associated with a black man". As also stated above, Gipson's association with fellow supervisors (Price, who had seen Deffenbaugh and Williams together in a romantic context) and England, along with Gipson's silence in the face of this comment and Deffenbaugh's response, could be inferred to mean that he was aware of Deffenbaugh's interracial relationship and that he agreed with England's remark. Deffenbaugh also testified that she perceived tension between herself and these supervisors in the car ride back to work.

Deffenbaugh testified that, in December, Gipson reprimanded her for "shopping on the clock" in October; and that, even though this was the first time she had been so reprimanded, she was not given a verbal or written reprimand—instead, Gipson suspended her for one day. Deffenbaugh testified also that, shortly after this suspension, she was given a written reprimand for holding a Christmas party without contacting Gipson. Deffenbaugh testified that she left messages on Gipson's voice mail concerning the party; and that she had held this same party for four years. Deffenbaugh also testified that she observed other employees buying items at end of their shifts without being disciplined. A reasonable juror could draw the inference that, based on Deffenbaugh's positive evaluations prior to the August 1993 meeting, at which Gipson learned of Deffenbaugh's interracial relationship, these subsequent reprimands were motivated either by malice or with reckless indifference toward her right to engage in such a relationship.

And, as covered earlier, Deffenbaugh testified that, on the day she was terminated, after she explained that Williams purchased the VCR, Gipson told her that his "mind [was] made up". Gipson did not speak with any witnesses to the sale, even after Williams approached him and told him that he had made the purchase; did not interview the cashier; and did not check to see if there was any videotape of the incident. And, Gipson testified that handing a discount card to one's spouse before clocking out would not be a violation of Wal–Mart policy. A reasonable juror could draw the inference that Gipson refused to investigate, even when confronted by Williams' corroboration of Deffenbaugh's version of events, because he disapproved of her interracial relationship.

It goes without saying that the evidence of malice or reckless indifference is not overwhelming, but that is not the standard we apply. "[C]onsidering all evidence with all reasonable inferences in the light most favorable to the non-moving party", *Hidden Oaks Ltd.,* 138 F.3d at 1042 (internal quotation and citation omitted), a reasonable juror could conclude that, based on the preponderance of the evidence, Gipson, and therefore, as discussed *supra,* Wal–Mart, discharged Deffenbaugh with malice or reckless indifference.

b.

Deffenbaugh contends also that employees other than Gipson, namely Price, England, Shelton, and Norman, were malicious or recklessly indifferent to her right to be free from racial discrimination. But, as stated *supra,* in the light of the recent Supreme Court cases, the evidence of malice or reckless indifference on the part of Gipson, the direct supervisor who discharged Deffenbaugh, was sufficient to permit punitive damages, as a matter of law, against Wal–Mart. Therefore, we need not reach this contention.

2.

Because, as a matter of law, punitive damages were proper, we reach Wal–Mart's contention that the $100,000 award is excessive. In ruling on Wal–Mart's post-judgment motions, ***595** and because it held Wal–Mart was not liable for such damages, the district court did not reach the excessiveness issue.

Notwithstanding its brevity, Wal–Mart's excessiveness claim is quite vague. As discussed below, it does *not* claim that the award exceeds constitutional limits. In an extremely brief argument, it states that the "Supreme Court recently articulated three factors applicable to the *reasonableness* of a punitive damage award", citing *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); notes that "*Patterson* found *BMW* 's language *instructive* regarding the excessiveness of the punitive damages awarded in that case"; asserts, in one paragraph, that the award in this case "fails the *BMW* test", looking to each of the three factors; notes that, as discussed *infra,* Deffenbaugh relies on a pre-*BMW* case from another circuit, and does not even cite *BMW;* and closes by asserting that, if we allow punitive damages, we should either "remit the ... award ... or remand". (Emphasis added.)

Wal–Mart's only reference to constitutional limits is its claim that the "Supreme Court has recognized that an exemplary damage [award] of four times the amount of compensatory damages to be [sic] close to the constitutional limit", citing to *BMW,* 517 U.S. at 581, 116 S.Ct. 1589. But, as discussed *infra,* Wal–Mart attributes far too much certainty to the cited passage from *BMW.* In fact, in that passage, the Court was noting the different ratios of punitive to compensatory damages that it has found non-violative of constitutional limits, including a ratio far greater than the four-to-one noted by Wal–Mart. *See id.*

Likewise, Wal–Mart places far too much reliance on *Patterson.* The case at hand was tried to a jury; *Patterson,* to the district judge. Obviously, a challenge to damages awarded in a bench trial is not freighted with Seventh Amendment considerations. Hence, rather than ordering the plaintiff to make a remittitur, or, if the plaintiff declined, ordering a new trial on actual and punitive damages, as discussed *infra,* we instead remanded to the district court for it to reassess both types of damages. Here, the punitive ($100,000) to compensatory ($19,000) ratio is 5.26 to 1; in *Patterson,* because we ordered the actual damages award for plaintiff Brown reduced from approximately $63,000 to "substantially" below $23,000 (to be determined on remand), the ratio there of *substantially less* than $23,000 actual to $150,000 punitive would be much greater than that here. *See Patterson,* 90 F.3d at 943.

In sum, Wal–Mart falls far short of making a constitutional challenge to the size of the punitive damages award, if indeed that is the issue it was intending to present. Instead, its challenge, at best, is simply that the award is excessive. Therefore, on the one hand, *BMW* is "instructive", as we found it to be in *Patterson;* on the other hand, for this appeal, we will not develop in detail the three *BMW*-factors as will be necessary for a constitutional challenge. Such development awaits another day. Suffice it to say, each of the three factors involves numerous considerations. For example, the constitutional analysis will include the type injury inflicted, whether physical or economic; whose conduct is to be examined; and the geographic area within which comparable cases are to be found. *See BMW,* 517 U.S. at 575–78, 580–83, 116 S.Ct. 1589. Wal–Mart does not come close to presenting, much less developing, those considerations here.

The jury was instructed that, if it awarded punitive damages, then, for

> fixing the amount, [it] should consider the following:
>
> (1) How offensive was Wal–Mart's conduct?
>
> (2) What amount is needed to prevent repetition of such conduct in light of Wal–Mart's financial condition?
>
> (3) Does the amount bear a reasonable relationship to the actual damages awarded?

The factors to have been considered by the jury are, understandably, similar to the three factors designated in *BMW,* 517 U.S. at 559, 116 S.Ct. 1589, for determining *the constitutional limits,* under the Due Process Clause of the Fourteenth Amendment, for the amount of punitive damages awarded in a *state court* trial: (1) the degree of reprehensibility ***596** of the defendant's conduct; (2) the disparity between the harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the award and penalties authorized or imposed in comparable cases.

We stated in *Patterson* that "we understand that *BMW* deals with *constitutional limits* on punitive damages, but we find it *instructive* ". 90 F.3d at 943 (emphasis added). And, like the case at hand, and unlike the situation in *BMW, Patterson* concerned federal, not state, law. Concerning the application of *BMW* to federal cases, *see, e.g., Lee v. Edwards,* 101 F.3d 805, 809 n. 2 (2d Cir.1996).

Again, Wal–Mart requests us to either "remit" the amount of punitive damages "or remand" this issue to the district court. *See Patterson,* 90 F.3d at 943 (in the light of the *BMW*-factors, remanding for reassessment of punitive damages amount awarded in *bench trial* against employee project manager); *FDIC v. Hamilton,* 122 F.3d 854, 862 (10th Cir.1997) (in the light of the *BMW* factors, ordering reduction of punitive damages awarded in *bench trial* on state law fraud claim); *Mathie v. Fries,* 121 F.3d 808, 817–18 (2d Cir.1997) (same for *bench trial* on § 1983 prisoner action); *Lee,* 101 F.3d at 809–13 (for § 1983 action against police officer for malicious prosecution and assault and battery, and rather than remand, court of appeals may determine amount of remittitur for *jury's* punitive damages award, pursuant to *BMW* factors; plaintiff has option of accepting the reduced amount or receiving new trial on issue of punitive damages); *Continental Trend Resources, Inc. v. Oxy USA Inc.,* 101 F.3d 634, 642–43 (10th Cir.1996) (same for *jury trial* on state law fraud claim), *cert. denied,* 520 U.S. 1241, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997). Deffenbaugh did not respond to Wal–Mart's "remit or remand" request.

In her affirmative cross-appeal brief on punitive damages, Deffenbaugh not only urges that they be reinstated, but also anticipates Wal–Mart's alternative excessiveness contention (as had been raised in district court). As to the amount, Deffenbaugh claims that the $100,000 is appropriate. But, as noted, Deffenbaugh did not respond through a reply brief to Wal–Mart's subsequent contentions that the award is excessive and that we should "remit or remand". Similar to Wal–Mart's brief, Deffenbaugh's briefing on this point is remarkable, both for what it does, and does not, say. As for the latter, it does not mention either *Patterson* or *BMW;* or whether the award can be reduced by us, or should first be considered by the district court; or whether, if there is a remittitur, Deffenbaugh should have the option of a new trial on that issue. (In not mentioning *Patterson* on this point, Deffenbaugh is at least being consistent. As noted by the district court in its post-judgment opinion addressing Wal–Mart's motion for judgment as a matter of law, Deffenbaugh was instructed post-judgment to discuss *Patterson;* in her response, she failed to do so.) And, as referenced *supra,* in urging that the 5.26 to 1 ratio of punitive to compensatory damages is proper, Deffenbaugh, unencumbered by any citation to *BMW,* which was decided approximately 20 months before she filed her cross-appeal brief here, notes that a ratio of almost 10 to 1 in an employment discrimination case was upheld by another circuit; sadly for our purposes, that decision was long before the *BMW* decision.

Wal–Mart's terse "remit or remand" request may be shorthand for the well-established rule that, if we order a remittitur, we must give Deffenbaugh the option of a new trial on that jury-determined issue. *See, e.g., Hetzel v. Prince William County,* 523 U.S. 208, 118 S.Ct. 1210, 140 L.Ed.2d 336 (1998); *Hansen v. Johns–Manville Prods. Corp.,* 734 F.2d 1036, 1046–48 (5th Cir.1984). Or, for the "remand" request, it could be suggesting either that the award was based on passion or bias, requiring a new trial on punitive damages, *see Auster Oil & Gas, Inc. v. Stream,* 835 F.2d 597, 603–04 (5th Cir.1988); or that the district court should rule on this issue before we do. Of this much we are certain: Wal–Mart does not claim bias or passion. But, again, other than that, the brevity of Wal–Mart's request prevents a positive answer to just what it is proposing.

In sum, the briefing on this point falls far short of that expected, required, and ***597** needed. This is especially harmful in the light of the newly evolving standards for this issue. For this and other obvious reasons, remand for the district court to rule first on excessiveness seems, at first blush, to be the proper course.

Instead, we have determined that we should address this issue now. We base this on two factors. First, we give special weight to Deffenbaugh's not responding to Wal–Mart's "remit or remand" request. Second, in any event, efficiency and economy for the parties and the courts dictate our ruling now. Again, although *BMW* concerns constitutional limits, it is instructive for reviewing other excessiveness claims for punitive damages. *See, e.g., Mathie,* 121 F.3d at 816–17. Pre–*BMW*, in deciding whether to implement the remittitur procedure for jury awards, our standard touched, of course, on considerations similar to the three *BMW* factors:

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to." Nonetheless, when a jury's award exceeds the bounds of any reasonable recovery, we must suggest a remittitur ourselves or direct the district court to do so. Our power to grant a remittitur is the same as that of the district court. We determine the size of the remittitur in accordance with this circuit's "maximum recovery rule," which prescribes that the verdict must be reduced to the maximum amount the jury could properly have awarded.

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir.1983) (footnotes omitted); *see Hansen,* 734 F.2d at 1046–48.

In deciding the excessiveness claim here, we have utilized the *BMW*-factors. But, again, we stress that future applications of these factors, especially for constitutional claims, may demand far more detailed consideration, with far more subissues. For this case, in the light of this jury award and the inadequate briefing by the parties, a fairly summary analysis will suffice.

a.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the *degree of reprehensibility* of the defendant's conduct." *BMW,* 517 U.S. at 575, 116 S.Ct. 1589 (emphasis added). It goes without saying that any form of racial discrimination is "reprehensible". But, the evidence of "reprehensible" conduct (discrimination), even when viewed in the light most favorable to Deffenbaugh, is a close case, as was such evidence in *Patterson*, 90 F.3d at 943. The limited evidence of ill will, when viewed in the most favorable light to Deffenbaugh, was sufficient for the jury to infer malice; but, as the discussion concerning malice demonstrates, that evidence does not reveal a *high degree of reprehensibility.* For example, there was no verbal or physical abuse. *See Patterson,* 90 F.3d at 943; *Lee,* 101 F.3d at 809–10.

b.

As noted, the jury's $100,000 award for punitive damages is 5.26 times the $19,000 for compensatory damages. "The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *BMW,* 517 U.S. at 580, 116 S.Ct. 1589 (citations omitted). But, the Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula". *Id.* at 582, 116 S.Ct. 1589. "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). "We can say, however, that general concerns of reasonableness ... properly enter into the constitutional calculus." *Id.* As noted, the type harm inflicted or caused is a primary ***598** consideration in determining whether the ratio is acceptable. *BMW,* 517 U.S. at 580–83, 116 S.Ct. 1589; *Lee,* 101 F.3d at 810–11.

To some, on the facts in this case, a punitive damages award that is, as here, 5.26 times the compensatory amount may not be so disproportionate as to "raise a suspicious judicial eyebrow”. *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 481, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (O’Connor, J., dissenting). *Compare Haslip,* 499 U.S. at 23–24, 111 S.Ct. 1032 (holding that punitive damages award of “more than 4 times the amount of compensatory damages” might be “close to the line” but does not “cross the line into the area of constitutional impropriety”), *with TXO,* 509 U.S. at 462, 113 S.Ct. 2711 (indicating that a ratio between the punitive award and the potential harm of ten to one does not “jar one’s constitutional sensibilities”) (citation omitted).

Unlike the situation in *BMW,* the injury here was not simply economic. Deffenbaugh’s termination had wide-ranging adverse personal impact and consequences. And, again, we are not examining a constitutional challenge. In short, the ratio, standing alone, would not compel a remittitur.

c.

Finally, in comparing the award in this case to comparable cases (again, damages were based on Title VII and § 1981), we note that, for Title VII claims against an entity of Wal–Mart’s size, § 1981a(b)(3) imposes a maximum *combined* punitive and compensatory limit of $300,000. Obviously, the total $119,000 awarded is well below this maximum. With respect to § 1981 claims, $100,000 is on the high-end for cases of this type in our circuit. *See Patterson,* 90 F.3d at 943 (citing *Jett v. Dallas Indep. Sch. Dist.,* 798 F.2d 748 (5th Cir.1986)). For the geographic area to look to for comparable cases, *see, e.g., Mathie,* 121 F.3d at 816–17; *Lee,* 101 F.3d at 812–13.

In the light of the above discussion of the three *BMW*-factors, we conclude that the jury-awarded punitive damages of $100,000 are excessive. Wal–Mart’s maliciousness or reckless indifference is a close call; the degree of reprehensibility is not great enough alone to support the amount of punitive damages awarded by the jury; and, compared to comparable cases, the award is high. Considering all these factors, a remittitur to $75,000 is required.

III.

For the foregoing reasons, and regarding the amended judgment, we AFFIRM as to liability and the amount of compensatory damages; we REVERSE the denial of punitive damages, reduce the amount to $75,000, and REMAND. On remand, if Deffenbaugh accepts the remittitur, the district court shall grant it and enter judgment accordingly. If Deffenbaugh refuses the remittitur, the district court shall grant a new trial solely on the issue of punitive damages.

AFFIRMED in PART; REVERSED in PART; REMITTITUR of PUNITIVE DAMAGES; REMANDED.

All Citations

156 F.3d 581, 77 Fair Empl.Prac.Cas. (BNA) 1699, 74 Empl. Prac. Dec. P 45,510

End of Document

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United States District Court, D. Arizona.

EQUAL EMPLOYMENT OPPORTUNITY, COMMISSION, Plaintiff, v. L&W SUPPLY CORPORATION, a Delaware Corporation, d/b/a Coyote Building Materials, Defendant.

2:07-cv-1364 JWS
|
Signed 02/11/2008
|
Filed 02/12/2008

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ORDER AND OPINION

[Re: Dockets 12 and 23]

JOHN W. SEDWICK, UNITED STATES DISTRICT JUDGE

I. MOTIONS PRESENTED

***1** At docket 12, defendant L&W Supply Corporation ("L&W") moved for partial summary judgment with respect to the claims relating to Ricardo Lopez Gonzales. Plaintiff Equal Employment Opportunity Commission ("EEOC") responded at docket 18, and L&W replied at docket 21. L&W also filed a motion to strike portions of EEOC's response and supporting documents at docket 23. A response and reply were filed at dockets 24 and 25 respectively. Oral argument was heard on January 23, 2008.

II. BACKGROUND

Kevin Hamilton ("Hamilton") filed a charge with EEOC alleging violations of Title VII by L&W.[1] According to EEOC, its investigation disclosed that L&W had discriminated against Hamilton on the basis of his race and against his co-worker, Ricardo Lopez-Gonzales ("Lopez"). "because of his association with Hamilton."[2] EEOC then sued L&W pursuant to Title VII of the Civil Rights Act of 1964, and Title I of the Civil Rights Act of 1991, alleging that since November 2003, L&W has engaged in unlawful employment practices in violation of 42 U.S.C. § 2000e-2(a), including discrimination against Hamilton based on his race and discrimination against Lopez "on the basis of his association with Mr. Hamilton."[3] Hamilton and Lopez worked as a team which allegedly received less desirable work for which they were paid less than was paid for work assigned to other employees.[4]

L&W's motion requests judgment against EEOC on its Lopez claims, and for purposes of the present motion only, L&W concedes that it discriminated against Hamilton on the basis of his race. L&W argues that EEOC's "associational discrimination" theory has not been recognized in the Ninth Circuit, and alternatively, that even if associational discrimination is cognizable under Title VII, the facts do not support its application here.[5] EEOC's response to the motion for summary judgment includes a request pursuant to Rule 56(f) for a continuance of the summary judgment motion in order to permit discovery to be conducted "[t]o the extent that Defendant's motion does depend upon fact."[6] In addition to "associational" discrimination, the parties' papers also address the theory of "indirect discrimination."

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56© provides that summary judgment should be granted when there is no genuine dispute about material facts and when the moving party is entitled to judgment as a matter of law. The moving party has the burden to show that material facts are not genuinely disputed.[7] To meet this burden, the moving party must point out the lack of evidence supporting the nonmoving party's claim, but need not produce evidence negating that claim.[8] Once the moving party meets its burden, the nonmoving party must demonstrate that a genuine issue exists by presenting evidence indicating that certain facts are so disputed that a fact-finder must resolve the dispute at trial.[9] The court must view this evidence in the light most favorable to the nonmoving party, must not assess its credibility, and must draw all justifiable inferences from it in favor of the nonmoving party.[10]

IV. DISCUSSION

A. Associational Discrimination

***2** EEOC's claims against L&W are based on L&W's alleged violation of 42 U.S.C. § 2000e-2(a). That statute provides that it is unlawful for certain employers to:

> fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[11]

It is not disputed that L&W is an employer within the meaning of the prohibition,[12] and, as noted above, L&W concedes that for purposes of this motion it did discriminate against Hamilton because he is an African-American. Nevertheless, L&W contends that § 2000e-2(a) does not render it unlawful for L&W to have assigned less favorable work to Lopez, because that assignment was not based on Lopez's own race, color, religion, sex or national origin.[13] To emphasize the significance of the literal language of § 2000e-2(a), L&W points out that Title VII makes it unlawful for most federal government employers to discriminate based on "race, color, sex, or national origin" without requiring that it be the victim's own race, color, sex or national origin giving rise to the discrimination.[14]

Despite the apparent limitation in the statute, in *Parr v. Woodmen of the World Life Insurance Company*,[15] the Eleventh Circuit held that a claim could be pursued by the Caucasian husband of an African-American woman: "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."[16] The *Parr* court supported its conclusion by explaining that plaintiff's own race rendered the marriage interracial, by noting that courts liberally construe Title VII, and by emphasizing that EEOC, the agency responsible for interpreting, administering, and enforcing Title VII, has consistently held that employers taking adverse actions against employees based on interracial associations violate Title VII.[17]

While the parties point to no Ninth Circuit case directly discussing associational discrimination (and this court has found none), at least one district court in the Ninth Circuit has followed the Eleventh Circuit's lead with respect to associational discrimination. In *Chacon v. Ochs*,[18] a Central District of California district court adopted the reasoning in *Parr* and found that Title VII protections applied to discrimination based on an interracial relationship (marriage), finding this "consistent with the very purpose of Title VII" and observing that "by necessity, the race of the plaintiff is a factor affecting the conduct of the defendant."[19]

***3** Here, the Hamilton/Lopez relationship was not a marriage but a workplace team or partnership. Their co-worker relationship differs in material respects from a marriage relationship. L&W urges that these differences render *Parr* inapposite. This court agrees. Marriage is a relationship of potentially lifelong duration. Marriage is a relationship that is both solemn and in many eyes sacred. Marriage is a relationship which many consider the foundation of a civilized society and the source of a new generation of human life. Marriage is a relationship which it would be wholly unreasonable to abandon in order to get better pay. None of these considerations apply to the co-worker relationship here. Furthermore, EEOC has not even alleged that L&W's discrimination was directed *at* Lopez because of his association or relationship with Hamilton. Instead, EEOC's claim actually rests on the premise that Lopez suffered *indirectly* from discrimination directed against Hamilton. Any discrimination against Lopez is not "associational" within the meaning of the jurisprudence represented by *Parr*. Rather, the loss of wages allegedly suffered by Lopez is an indirect consequence of racial discrimination against Hamilton. EEOC makes an indirect discrimination argument in its response to L&W's motion for summary judgment.[20] The court turns next to the theory of indirect discrimination.

B. Indirect Discrimination

The Third Circuit recognized "indirect" discrimination as a valid cause of action under Title VII in *Anjelino v. New York Times Company*.[21] The Third Circuit found that "indirect victims of sex-based discrimination have standing to assert claims under Title VII if they allege colorable claims of injury-in-fact that are fairly traceable to acts or omissions by defendants that are unlawful under the statute."[22] In *Anjelino*, male employees of the New York Times mailroom were part of a group of employees bringing a suit alleging discrimination based on sex. Extra staffers in the mailroom were hired from a priority list based on seniority. Plaintiffs alleged that hiring for work shifts would stop just before the names of female employees were reached on the priority list. This cost the women both hours of work and seniority. The male plaintiffs alleged that when hiring was stopped at female names, the males numbered on the list among the women were also not hired. Thus, the men listed among women alleged that they *indirectly* suffered the consequences of sex discrimination. The Third Circuit found that the male workers had standing because they suffered from the discrimination as well and were thus a party "aggrieved" by discrimination.

The Ninth Circuit has not accepted indirect discrimination as a basis for a Title VII claim. In *Patee v. Pacific Northwest Bell Telephone Co.*,[23] male employees filed an action charging sex discrimination, alleging that Pacific Bell discriminated against women by paying lower wages to those who worked as Maintenance Administrators (a predominately female position). In two separate suits, female and male Maintenance Administrators filed charges of sex discrimination. The Ninth Circuit found that the district court properly dismissed the male employee's suit, because they lacked standing to seek redress for wages lost because of discrimination directed at a protected class to which plaintiffs did not belong.[24] The court noted that as it found in *Spaulding v. University of Washington*,[25] "a male employee could not maintain a Title VII action as a person aggrieved because of sex-based wage discrimination against women."[26]

EEOC argues the case at hand is distinguishable from *Spaulding* and *Patee* because it involves specific, directed discrimination, rather than broad discriminatory effects. The language of *Patee* and *Spaulding* does not distinguish between directed discrimination and broad discriminatory effects. Plaintiff argues that the language of *Waters v. Heublein Incorporated*,[27] supports its position. In *Waters*, the Ninth Circuit applied *Trafficante v. Metropolitan Life Insurance Company*[28] to find that a white woman had standing to enjoin discrimination in a Title VII action where she was "aggrieved" by racial discrimination because due to discrimination she lost the benefits of interracial associations that would flow from working in an environment free from discrimination.[29] However, the Court in *Patee* distinguished itself from *Waters* by stating that the "male employees do not claim that they have been denied interpersonal contacts with women."[30] Here, there is no claim advanced on behalf of Lopez that he was denied the benefits of interracial association. Of course, *Patee* addressed indirect discrimination in the standing context, but the *Patee* court noted that the distinction between standing and entitlement to a remedy is "without substance" for purposes of a Rule 12(b)(6) motion and that "the concept of standing and entitlement to a remedy overlap."[31]

***4** It may be counterintuitive to conclude that discrimination against Hamilton which, for purposes of this motion, the court assumes damaged both Hamilton and Lopez is not subject to remedy for both individuals under Title VII. However, the result is required by the language of § 2000e-2(a) and Ninth Circuit law on indirect discrimination. It may be added that given the facts assumed for purposes of this motion, Lopez almost certainly has a state law remedy for breach of the implied covenant of good faith and fair dealing in his employment contract.

C. Rule 56 (f) Request

Rule 56 (f) provides as follows:

> If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

EEOC's Rule 56(f) request is supported by an affidavit[32] the gist of which is the following:

> A postponement is necessary so that the EEOC may conduct discovery as to the discrimination that [Lopez] incurred as a result of his association with [Hamilton]. Such discovery includes, but is not limited to, evidence that the terms and conditions of the employment of

> [Hamilton and Lopez] were negatively affected by racial animus on the basis of Hamilton's race (black), that [Lopez] was discriminated against because he associated with an individual of another race, and that [Lopez] suffered injuries as a result of the unlawful employment practices against Hamilton.[33]

For purposes of the pending motion, the court has assumed that L&W did discriminate against Hamilton based on his race resulting in the imposition of negative terms and conditions of employment, that Lopez was discriminated against because of his association with Hamilton, and that Lopez did suffer injuries because of his association with Hamilton. Thus, the Rule 56(f) request ultimately rests on no more than an assertion in EEOC's briefing that summary judgment is ordinarily not appropriate unless there has been adequate time to conduct discovery.[34] This is insufficient to support relief under Rule 56(f) where, as here, all facts as to which discovery would be directed have been assumed to be true. It may be added that EEOC conducted an investigation before it filed suit, and that it has unfettered access to Messrs. Hamilton and Lopez.

D. Motion To Strike

Given the court's disposition of L&W's motion for partial summary judgment, there is no need to address its motion to strike. That motion will be denied as moot.

V. CONCLUSION

For the reasons above: (1) L&W's motion at docket 12 for summary judgment regarding claims for relief on behalf of Mr. Lopez-Gonzales is **GRANTED** such that the claims brought on behalf of Mr. Lopez-Gonzales are dismissed; EEOC's request for relief pursuant to rule 56(f) at docket 18 is **DENIED**; and L&W's motion to strike at docket 23 is **DENIED** as moot.

All Citations

Not Reported in Fed. Supp., 2008 WL 11339622

Footnotes

1 Doc. 1 at 2.

2 Doc. 18 at 2.

3 Doc. 1 at 2-3.

4 Doc. 1 at 3.

5 Doc. 14 at 3.

6 Doc. 18 at 2-3.

7 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

8 *Id.* at 325.

9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

10 *Id.* at 255; *Soldano v. United States*, 453 F.3d 1140, 1143 (9th Cir. 2006) (citation omitted).

11 42 U.S.C. § 2000e-2(a).

12 42 U.S.C. § 2000e(b) defines the term "employer." Generally speaking it means a private sector employer engaged in interstate commerce which has engaged 15 or more employees over a prescribed length of time.

13 Lopez may be a person whose national origin could support a claim, but EEOC makes no attempt to show that he was the subject of discrimination based on Hispanic origin.

14 42 U.S.C. § 2000e-16(a).

15 791 F.2d 888 (11th cir. 1986).

16 *Id.* at 892.

17 *Id.*

18 780 F.Supp. 680 (C.D. Cal. 1991).

19 *Id.* at 682.

20 Doc. 18 at 9.

21 200 F.3d 73, 92 (3d Cir. 1999).

22 200 F.3d 73, 92 (3d Cir. 1999).

23 803 F.2d 476 (9th Cir. 1986).

24 *Id.* at 477.

25 740 F.2d 686 (9th Cir. 1984) (overruled on other ground in *Antonio v. Ward's Cove Packing Co.,* 810 F. 2d 1477, 1482 (9th Cir. 1987) (en banc)).

26 803 F.2d 476, 479 (9th Cir. 1986).

27 547 F.2d 466 (9th Cir. 1977).

28 409 U.S. 205 (1972).

29 *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70 (9th Cir. 1976).

30 *Id.* at 479.

31 *Id.* at 478.

32 Doc. 19-2, Exhibit 5, Declaration of Valerie L. Meyer.

33 *Id.* at ¶ 3.

34 Doc. 18 at p. 3.

End of Document

KeyCite history available

93 S.Ct. 477
Supreme Court of the United States

Paul P. ERLENBAUGH et al., Petitioners, v. UNITED STATES.

No. 71—839.
|
Argued Nov. 13, 1972.
|
Decided Dec. 12, 1972.

Synopsis
The United States District Court for the Northern District of Indiana, Hammond Division, George N. Beamer, J., found defendants guilty of conspiracy to violate federal statute prohibiting use of interstate facilities with intent to further unlawful activity and with substantive violations of statute and they appealed. The Court of Appeals, 452 F.2d 967, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Marshall, held that causing scratch sheet to be carried by facility of interstate commerce with intent to facilitate operation of illegal gambling business was violation of statute prohibiting use of any facility in interstate or foreign commerce with intent to further unlawful activity, and exemption for newspaper contained in statute prohibiting interstate transportation of wagering paraphernalia did not apply to former statute.

Affirmed.

Mr. Justice White took no part in decision of case.

Procedural Posture(s): On Appeal.

****478 *239** Syllabus[*]

Causing a publication to be carried by a facility of interstate commerce with an intent to facilitate the operation of an illegal gambling business is a violation of 18 U.S.C. s 1952. The exception for 'any newspaper or similar publication' contained in 18 U.S.C. s 1953, which prohibits the interstate shipment of certain gambling paraphernalia, was not intended to be read into s 1952. Pp. 479—483.

452 F.2d 967, affirmed.

Attorneys and Law Firms

Charles W. Grubb, Cedar Lake, Ind., for petitioners.

Allan A. Tuttle, Raleigh, N.C., for respondent.

Opinion

Mr. Justice MARSHALL delivered the opinion of the Court.

The petitioners in this case attack their convictions under the Travel Act, 18 U.S.C. s 1952, which makes it unlawful to use a facility of interstate commerce in furtherance of certain criminal activity. Petitioners were tried in five separate trials.[1] The cases were ***240** consolidated for purposes of appeal since each raised the question whether causing a publication to be carried by a facility of interstate commerce with an intent to facilitate the operation of a gambling business illegal under state law violated s 1952. The Court of Appeals for the Seventh Circuit affirmed the convictions, finding no exception in s 1952 for the transmittal of publications. 452 F.2d 967 (1971). We granted certiorari for the limited purpose of resolving the conflict between this decision and a previous ruling of the Court of Appeals for the Fourth Circuit.[2] 405 U.S. 973, 92 S.Ct. 1194, 31 L.Ed.2d 247 (1972). For reasons stated below, we affirm.

In all respects here relevant, the facts of the five cases are identical. Each involves the operation in Hammond, ***241** Indiana, of a bookmaking business. A publication known as the Illinois Sports News was important to the functioning of each bookmaking operation. The News, a publication of the type generally ****479** referred to as a 'scratch sheet,'[3] contains more complete and detailed horse racing information than is found in regular newspapers, and was used extensively by the customers of the five bookmaking operations in placing their bets. Because the News, which appears daily except Sunday, is published in Chicago, Illinois, it was necessary to make arrangements for prompt daily delivery from Chicago to Hammond and the bookmaking establishments. This was accomplished by causing copies of the News to be placed on board an early morning train of the Chicago, South Shore & South Bend Railroad in Chicago for delivery to the railroad station in Hammond, where copies were picked up for each of the bookmaking operations. In each case the petitioners assumed various roles in this scheme,[4] but the pattern of the scheme for securing the prompt daily delivery of the News was the same in all cases.

Section 1952(a) subjects to criminal liability anyone who 'uses any facility in interstate . . . commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of (these) acts . . ..' Unlawful activity includes 'any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are committed ***242** . . ..' See 18 U.S.C. s 1952(b).[5] For our limited purposes it is not open to dispute that in each case petitioners were involved in bookmaking businesses which violated Indiana law;[6] that the Illinois Sports News was important to the operation of those bookmaking businesses; that the scheme for delivery of the News—a scheme which involved the use of a facility of interstate commerce, the railroad—was intended to facilitate the operation of the bookmaking businesses; or that the requisite overt acts occurred following the use of the interstate facility. The only question here is whether these cases fall outside the ambit of s 1952 because the use of the interstate facility was to secure delivery of a news publication.[7]

The basis of petitioners' challenge to the legality of their convictions under s 1952—and of the conflict between the courts of appeals—is to be found in 18 U.S.C. s 1953. Section 1953(a) makes it unlawful for anyone, 'except a common carrier in the usual course of its business, knowingly (to) carr(y) or (to send) in interstate . . . commerce any . . . paraphernalia, . . . paper, writing, or other device used, or to be used . . . in (a) bookmaking; or (b) wagering pools . . .; or (c) in a numbers, policy, polita, or similar game . . ..' The broad sweep of subsection (a) in terms of paraphernalia covered is limited to some extent by s 1953(b)(3) which makes the section inapplicable to 'the carriage or transportation in interstate . . . commerce of any newspaper or similar publication.'[8]

****480 *243** Petitioners' argument starts from the premise that they could not have been prosecuted under s 1953(a) because the Illinois Sports News falls within the newspaper exception contained in s 1953(b)(3).[9] Petitioners recognize that s 1952 contains no express exception for newspapers comparable to s 1953(b)(3), but contend that s 1952 and s 1953 are in pari materia—that is, pertain to the same subject—and, under settled principles of statutory construction, should therefore be construed 'as if they were one law,' United States v. Freeman, 3 How. 556, 564, 11 L.Ed. 724 (1845); see, e.g., United States v. Stewart, 311 U.S. 60, 64, 61 S.Ct. 102, 105, 85 L.Ed. 40 (1940); Estate of Sanford v. Commissioner of Internal Revenue, 308 U.S. 39, 44, 60 S.Ct. 51, 56, 84 L.Ed. 20 (1939). Thus, petitioners would have us read the exception contained in s 1953(b)(3) as applicable to not only s 1953(a) but also s 1952(a), thereby barring their prosecution under the latter as well as the former. This we cannot do.

The rule of in pari materia—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a 'later act ***244** can . . . be regarded as a legislative interpretation of (an) earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting,' and 'is therefore entitled to great weight in resolving any ambiguities and doubts.' United States v. Stewart, supra, 311 U.S. at 64—65, 61 S.Ct. at 105. See also, e.g., Hunter v. Erickson, 393 U.S. 385, 388, 89 S.Ct. 557, 559, 21 L.Ed.2d 616 (1969); United States v. Freeman, supra, 44 U.S. at 565. The rule is but a logical extension of the principle that individual sections of a single statute should be construed together,[10] for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject, cf. Allen v. Grand Central Aircraft Co., 347 U.S. 535, 541—552, 74 S.Ct. 745, 748—755, 98 L.Ed. 933 (1954). Given this underlying assumption, the rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time. Such was indeed the case here.[11] Yet petitioners ****481** would have us resort to the exception ***245** contained in s 1953(b)(3) not simply to resolve any 'ambiguities (or) doubts' in the language in s 1952 but to introduce an exception to the coverage of the latter where none is now apparent. This might be a sensible construction of the two statutes if they were intended to serve the same function, but plainly they were not.[12]

True, s 1952 and s 1953 were both parts of a comprehensive federal legislative effort[13] to assist local authorities in dealing with organized criminal activity which, in many instances, had assumed interstate proportions[14] and which in all cases was materially assisted in its operations by the availability of facilities of interstate commerce.[15] The two statutes, however, play different roles in achieving these broad, common goals.

***246** Section 1953 has a narrow, specific function. It erects a substantial barrier[16] to the distribution of certain materials used in the conduct of various forms of illegal gambling.[17] By interdicting the flow of these materials to and between illegal gambling businesses, the statute purposefully seeks to impede the operation of such businesses.[18]

Section 1952, by contrast, does not apply just to illegal gambling; rather, it is concerned with a broad spectrum of 'unlawful activity,'[19] illegal gambling ****482** businesses being only one element. Moreover, the statute does not focus upon any particular materials, but upon the use of the facilities of interstate commerce with the intent of furthering an unlawful 'business enterprise.' It is, in short, an effort to deny individuals who act for such a criminal purpose access to the channels of commerce.[20] Thus, while s 1952 ultimately seeks, like s 1953, ***247** to inhibit organized criminal activity,[21] it takes a very different approach to doing so. To introduce into s 1952 an exception based upon the nature of the material transported in interstate commerce would carve a substantial slice from the intended coverage of the statute. This we will not do without an affirmative indication—which is lacking here—that Congress so intended.

Our conclusion here is bolstered by the fact that the reason for the newspaper exception to s 1953 is absent in the context of s 1952. The original version of s 1953 introduced in the Senate contained none of the exceptions set forth in subsection (b). It was quickly realized that the bill, as introduced, bore the potential for unreasonably broad application, since it would have imposed absolute criminal liability on anyone, except a common carrier, who 'knowingly carries or sends in interstate . . . commerce' any gambling paraphernalia ***248** used in an illegal gambling business. Were 'knowingly' construed as modifying only the phrase 'carries or sends'[22] the statute might have been applied to a wholly innocent person who knowingly carried a newspaper in interstate commerce unaware that it contained racing information.[23] It was to avoid this problem that the newspaper exception was added to s 1953.[24] But s 1952 obviously poses no threat to innocent citizens. Its application is limited to those who act with an intent to further unlawful activity—as was clearly true of these petitioners. ****483** There is, then, no reason for carrying the newspaper exception of s 1953(b)(3) over to s 1952.

The judgment is affirmed.

Affirmed.

Mr. Justice WHITE took no part in the decision of this case.

All Citations

409 U.S. 239, 93 S.Ct. 477, 34 L.Ed.2d 446

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Petitioners Erlenbaugh, Mitchell, and Hintz were tried together. Petitioner Erlenbaugh was convicted of conspiracy to violate s 1952. Petitioners Mitchell and Hintz were each convicted of two counts of violating s 1952 and of conspiracy to violate the section. Petitioners White and Lloyd were tried together with petitioner Hintz in a second trial. Each was convicted of conspiracy to violate s 1952, and petitioner White was convicted of three counts, petitioner Hintz of two counts, and petitioner Lloyd of one count of violating s 1952.
Petitioner Kelly was tried alone and convicted of one count of violating s 1952 and of conspiracy to violate the section.
Petitioners Kulik and Dobrowski were tried together and convicted of conspiracy to violate s 1952 and of three counts and two counts, respectively, of violating the section.
Petitioners Misiolek, Tumlin, and Strosky were tried together, and convicted of conspiracy to violate s 1952. Petitioner Misiolek was also convicted of three counts of violating s 1952, while petitioners Tumlin and Strosky were convicted of four counts of violating the section.

2 In United States v. Arnold, 380 F.2d 366, 368 (1967), the Fourth Circuit reversed a conviction under s 1952 because, in its view, 'the use of the telephone to order . . . transmittal through the mail (of a sports publication intended to be used to facilitate the operation of a football betting pool) is not the use of a 'facility . . . to . . . promote . . . any unlawful activity', as contemplated by . . . s 1952.' The Seventh Circuit in this case specifically declined to follow the decision in Arnold. See 452 F.2d, at 973.

3 A 'scratch' is a horse that has been withdrawn from a race in which it was entered. The withdrawal of a good horse obviously affects the odds in a race, and is therefore of great interest to bettors.

4 The Court of Appeals described each operation and the respective roles of the petitioners in detail, see 452 F.2d, at 969—970.

5 See n. 19, infra.

6 See Ind.Ann.Stat. ss 10—2304, 10—2307, 10—2331 (1956), IC 1971, 35—1—104—4, 35—1—104—7, 35—25—1—3.

7 The question presented in this case is solely one of statutory construction. There is no issue here as to the constitutionality of s 1952.

8 Subsection (b) also makes the section inapplicable to:
'(1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State . . ..'

9 Whether publications such as the 'scratch sheet' here at issue are in fact within the 'newspaper or similar publication' exception contained in s 1953(b) (3) is a question that has arisen on a number of occasions in the lower courts. See United States v. Kelly, 328 F.2d 227, 229—236 (CA6 1964); United States v. Arnold, 380 F.2d 366, 368 (CA4 1967); United States v. Kish, 303 F.Supp. 1212 (N.D.Ind.1969); United States v. Azar, 243 F.Supp. 345, 346—347 (E.D.Mich.1964). The Government here concedes that the Illinois Sports News is within s 1953(b)(3). See Brief for United States 9 n. 3.

10 See, e.g., Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 488, 68 S.Ct. 174, 177, 92 L.Ed. 88 (1947); Markham v. Cabell, 326 U.S. 404, 410—411, 66 S.Ct. 193, 196—197, 90 L.Ed. 165 (1945); Ex parte Public National Bank, 278 U.S. 101, 104, 49 S.Ct. 43, 44, 73 L.Ed. 202 (1928).

11 Section 1952 was added to Title 18 of the United States Code by the Act of Sept. 13, 1961, Pub.L. 87—228, s 1(a), 75 Stat. 498, amended, Act of July 7, 1965, Pub.L. 89—68, 79 Stat. 212; Act of Oct. 27, 1970, Tit. II, s 701(i) (2), 84 Stat. 1282. Section 1953 was added to Title 18 of the United States Code by the Act of Sept. 13, 1961, Pub.L. 87—218, 75 Stat. 492. Indeed, both statutes were a part of Attorney General Kennedy's legislative program to combat organized crime and racketeering, and were considered simultaneously by committees of the House and Senate. See Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter Senate Hearings); Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter House Hearings).

12 Cf. Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 764, 69 S.Ct. 1274, 1279, 93 L.Ed. 1672 (1949); Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87—88, 55 S.Ct. 50, 51—52, 79 L.Ed. 211 (1934); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433, 52 S.Ct. 607, 608, 76 L.Ed. 1204 (1932).

13 See n. 11, supra.

14 Attorney General Kennedy, who recommended the legislation to Congress, testified before the Senate and House Committees that 'the extent to which organized crime and racketeering have developed on an interstate basis convincingly (demonstrates) the need for new Federal laws.' Senate Hearings 10—11; see House Hearings 19—20. See also H.R.Rep. No. 966, 87th Cong., 1st Sess., 2—3 (1961) (s 1952) U.S.Code Cong. & Admin.News 1961, p. 2664.

15 Attorney General Kennedy observed before the Senate Committee that racketeers 'use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we could curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size.' Senate Hearings 11. Previously, before the House Subcommittee, the Attorney General had described the legislative package as 'designed to prohibit the use of interstate facilities for the conduct of the many unlawful enterprises which make up organized crime today.' House Hearings 20. See also H.R.Rep.No. 966, 87th Cong., 1st Sess., 3 (1961) (s 1952); H.R.Rep. No. 968, 87th Cong., 1st Sess., 2 (1961) (s 1953), U.S.Code Cong. & Admin.News 1961, p. 2634.

16 Only common carriers acting in the usual course of their business, plus those materials specified in s 1953(b), see n. 8, supra, are excluded from the statute's prohibition.

17 See also 18 U.S.C. s 1084.

18 Representative Celler, who introduced the statute in the House, described its purposes as follows:
'The primary purpose is to prevent the transportation in interstate commerce of wagering material. The purpose actually is to (cut

off) and (shut off) gambling supplies, in reality to prevent these lotteries and kindred illegal diversions.' 107 Cong.Rec. 16537. See also S.Rep. No. 589, 87th Cong., 1st Sess., 2 (1961); H.R.Rep. No. 968, 87th Cong., 1st Sess., 2 (1961).

19 'As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances . . . or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.'

20 'This bill will assist local law enforcement by denying interstate facilities to individuals engaged in illegal gambling, liquor, narcotics or prostitution business enterprises.' H.R.Rep. No. 966, 87th Cong., 1st Sess., 3 (1961); U.S.Code Cong. & Admin.News 1961, p. 2665. See also 107 Cong.Rec. 13943 (remarks of Sen. Eastland).

21 In Rewis v. United States, 401 U.S. 808, 811, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971), we observed that 's 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating, or managing illegal activities located in another.' We, of course, adhere to this view of the statute for 'Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which . . . relatively minor state offenses (would be transformed) into federal felonies.' Id., at 812, 91 S.Ct., at 1059. See also United States v. Bass, 404 U.S. 336, 349—350, 92 S.Ct. 515, 523—524, 30 L.Ed.2d 488 (1971). Petitioners contend that there was no proof in these cases that they were involved in organized criminal activity and that such activity was being directed from another State. Given the limited nature of our grant of certiorari, it is not open to question here that the five illegal bookmaking businesses were elements of organized criminal activity of the type contemplated by s 1952—though we do note that the reach of the statute clearly was not limited to instances in which organized criminal activity in one State is managed from another State, see n. 15, supra.

22 But cf. United States v. Chase, 372 F.2d 453, 460 (C.A.4), cert. denied, 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 626 (1967) ('(K)nowledge and intent to transmit gambling paraphernalia in interstate commerce are elements of the crime created by' s 1953).

23 'The committee . . . felt that the bill, as introduced, might be so interpreted as to bring within its criminal penalties a person who carried a newspaper or other publication containing racing results or predictions.' S.Rep. No. 589, 87th Cong., 1st Sess., 2 (1961).

24 See ibid.; H.R.Rep. No. 968, 87th Cong., 1st Sess., 3 (1961).

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Appeal Filed
Appeal Filed by FRITH, ET AL v. WHOLE FOODS MARKET, INC., ET AL, 1st Cir., March 4, 2021

517 F.Supp.3d 60
United States District Court, D. Massachusetts.

Suverino FRITH, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. WHOLE FOODS MARKET, INC., and Amazon.com, Inc., Defendants.

Civil Action No. 20-cv-11358-ADB
|
Signed 02/05/2021

Synopsis
Background: Employees of grocery store and its parent company, individually and on behalf of putative class of current and former employees, brought action against grocery store and parent company alleging employment discrimination and retaliation under Title VII arising from grocery store's discipline of employees who wore "Black Lives Matter" (BLM) attire in the workplace. Grocery store and parent company moved to dismiss for failure to state a claim.

Holdings: The District Court, Allison D. Burroughs, J., held that:

Court would waive administrative exhaustion requirement in the interest of efficiency;

discipline of employees, regardless of their race, for wearing BLM attire in workplace did not constitute race-based discrimination in violation of Title VII;

employees could not maintain their Title VII claims based on an associational theory;

one employee sufficiently alleged that her employment was terminated due to her participation in protected activity, so as to state a claim for retaliation; but

remaining employees could not have formed good faith, reasonable belief that store's discipline of employees, regardless of race, ran afoul of Title VII, and thus, grocery store's discipline of employees did not constitute retaliation.

Store's motion granted in part; parent company's motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

BURROUGHS, District Judge

Plaintiffs,[1] representing a putative class of current and former employees of Defendant Whole Foods Market, Inc. ("Whole Foods") or of Amazon.com, Inc. ("Amazon," and, together with Whole Foods, "Defendants"), allege that Defendants have violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") by discriminating and retaliating against employees for wearing Black Lives Matter ("BLM") masks and other attire. See [ECF No. 11 ("Am. Compl.")]. Currently before the Court are Defendants' respective motions to dismiss. [ECF Nos. 31 (Whole Foods), 49 (Amazon)]. For the reasons set forth below, Amazon's motion is GRANTED in its entirety and Whole

Foods' motion is GRANTED in part.

I. BACKGROUND

A. Factual Background

For purposes of the instant motions to dismiss, the Court, as it must, "accept[s] as true all well-pleaded facts alleged in the complaint and draw[s] all reasonable inferences therefrom in the pleader's favor." A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 80 (1st Cir. 2013).

Whole Foods is a corporation headquartered in Austin, Texas that operates hundreds of grocery stores throughout the United States. [Am. Compl. ¶ 36]. Amazon, Whole Foods' corporate parent, is headquartered in Seattle, Washington and, as is relevant here, employs "Prime Shoppers" at Whole Foods stores to fulfill grocery delivery orders placed online. [Id. ¶¶ 36–37].

***65** In the wake of George Floyd's killing and nation-wide protests against racial injustice and police brutality, people around the country have been showing their support for the BLM movement. [Am. Compl. ¶ 1]. Since approximately June 2020, Plaintiffs have demonstrated their support for the BLM movement by, among other things, wearing facial masks and other attire with BLM messaging to work.[2] [Id. ¶¶ 1, 49]. As grocery store employees, they are required to wear facial masks to work because of the global COVID-19 pandemic. [Id. ¶ 1].

Notwithstanding Whole Foods' public support for the BLM movement, [Am. Compl. ¶ 51], it began disciplining Plaintiffs and other employees in a variety of ways for wearing BLM masks and/or other BLM items, [id. ¶ 2].[3] For instance, at its store on River Street in Cambridge, Massachusetts, Whole Foods sent Plaintiffs Frith, Kinzer, Juarez, Walsh, Shanahan, Samuel, Osayande, Ifebohr, Ryland, Burt, and Michel (along with other employees) home because they reported for work wearing BLM masks. [Id. ¶ 54]. The sent-home employees received no pay and were given disciplinary "points," which accumulate over time and can result in termination. [Id.]. Plaintiff Kinzer was terminated, in part, because of the "points" she had accumulated as a result of wearing a BLM mask.[4] [Id. ¶ 75]. Even if an employee has not accumulated enough "points" to merit termination, any employee with "points" at the time of an annual review is ineligible to receive the maximum performance-based annual increase in wages. [Id. ¶ 55]. In Seattle, Washington, Whole Foods also sent employees, including Plaintiffs Tucker-Tolbert and Thompson, home from stores for wearing BLM masks and placed employees, including Plaintiff Tucker-Tolbert, on a "corrective action pathway" that requires employees to undergo additional training. [Id. ¶ 57]. In California, Whole Foods has sent employees, including Plaintiffs Del-Rio Ramirez and Visco, home from its Berkeley and Petaluma stores for wearing BLM masks and other paraphernalia (e.g., pins and tags), [id. ¶¶ 58–59], ***66** and took similar actions against employees in New Hampshire, [id. ¶ 60], Pennsylvania, [id. ¶ 61], Virginia, [id. ¶ 62], Georgia [id. ¶ 63], and Indiana, [id. ¶ 64]. Amazon has also disciplined at least one employee for wearing BLM attire. See [id. ¶ 81 ("Amazon Prime Shopper, Plaintiff [ ] Tisme, was sent home without pay for wearing her Black Lives Matter mask to work.")].[5]

In response to being disciplined, some plaintiffs quit, see [Am. Compl. ¶ 57 (Plaintiff Tucker-Tolbert)]; some acquiesced and stopped wearing BLM items, see [id. (Plaintiff Thompson); id. ¶ 71 (Plaintiff Robinson)]; while others continued to wear the masks in protest, see [id. ¶ 70].

At all relevant times, Whole Foods has maintained a company-wide dress code policy (the "Policy"), which prohibits employees from wearing clothing with visible slogans, messages, logos, and/or advertising that are not Whole Foods-related. [Am. Compl. ¶ 42]. Until Plaintiffs began wearing BLM masks and other attire in June 2020, however, the Policy was rarely enforced: Whole Foods employees previously wore a variety of items that were violative of the Policy and were not disciplined. [Id. ¶¶ 43, 44]. For instance, employees wore items with LGBTQ+ messaging, National Rifle Association ("NRA") messaging, the anarchist symbol, the phrase "Lock Him Up," and other non-Whole Foods messaging. [Id.]. Even in connection with masks specifically, Whole Foods has not strictly enforced the Policy, permitting at least one employee to wear a SpongeBob SquarePants mask. [Id. ¶ 47].

Plaintiffs' managers have informed them that enforcement of the Policy and discipline in connection with BLM attire are Whole Foods corporate directives and that store-level management has little discretion. [Am. Compl. ¶ 66]. Although Whole Foods regional managers visited with employees in Massachusetts and Washington to discuss the Policy as it pertained to BLM attire and told the employees that their concerns would be communicated upward, nothing changed. [Id.].

Plaintiffs contend that wearing BLM attire is a demand for better treatment of Black employees. [Am. Compl. ¶ 69]. Plaintiffs have also sought the release of racial demographic data for Whole Foods employees and management to assess whether Whole Foods' promotion practices are fair to Black employees and requested that armed guards be removed from Whole Foods stores to ensure that Black employees are comfortable at work. [Id.]. As employees continue to be disciplined, Plaintiffs are wearing BLM masks for the added purpose of challenging "what they perceive to be racism and discrimination by Whole Foods for not allowing employees to wear [BLM] masks." [Id. ¶ 70].

B. Procedural Background

Prior to filing their amended complaint, multiple plaintiffs filed complaints with the Equal Employment Opportunity Commission ("EEOC"). [Am. Compl. ¶ 84]. As of February 5, 2021, at least five plaintiffs have received EEOC "right to sue" letters. [ECF Nos. 55-1 (Plaintiff Frith), 55-2 (Plaintiff Kinzer), 55-3 (Plaintiff Barry), 55-4 (Plaintiff Styles), 54-2 (Plaintiff Tisme)].

Plaintiffs filed their operative, two-count complaint on July 31, 2020. [Am. Compl.]. In Count One, Plaintiffs allege that Defendants' selective enforcement of the Policy constitutes unlawful racial discrimination ***67** in violation of Title VII because "the [P]olicy has both adversely affected Black employees and it has singled out for disfavored treatment advocacy and expression of support for Black employees, by both Black employees and their non-Black coworkers who have associated with them and shown support for them through wearing, or attempting to wear, the [BLM] masks at work." [Id. at 20]. In Count Two, Plaintiffs allege that Defendants' "discipline of their employees for opposing their discriminatory policy in not allowing employees to wear [BLM] masks while working at Whole Foods locations" is unlawful retaliation in violation of Title VII. [Id.].

On August 14, 2020, Whole Foods moved to dismiss the complaint for failure to state a claim. [ECF No. 31]. Plaintiffs opposed Whole Foods' motion on August 28, 2020, [ECF No. 42], and Whole Foods filed a reply on September 1, 2020, [ECF No. 43].

On September 9, 2020, Amazon also moved to dismiss the complaint for failure to state a claim. [ECF No. 49]. Plaintiffs opposed Amazon's motion and filed a notice of supplemental authorities on September 23, 2020, [ECF Nos. 54, 55], and Amazon filed a reply on October 5, 2020, [ECF No. 58].

II. LEGAL STANDARD

In reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded facts, analyze those facts in the light most favorable to the plaintiff, and draw all reasonable factual inferences in favor of the plaintiff. See Gilbert v. City of Chicopee, 915 F.3d 74, 80 (1st Cir. 2019). "[D]etailed factual allegations" are not required, but the complaint must set forth "more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The alleged facts must be sufficient to "state a claim to relief that is plausible on its face." Id. at 570, 127 S.Ct. 1955.

"To cross the plausibility threshold a claim does not need to be probable, but it must give rise to more than a mere possibility of liability." Grajales v. P.R. Ports Auth., 682 F.3d 40, 44–45 (1st Cir. 2012) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). "A determination of plausibility is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' " Id. at 44 (quoting Iqbal, 556 U.S. at 679, 129 S.Ct. 1937). "[T]he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." Hernandez-Cuevas v. Taylor, 723 F.3d 91, 103 (1st Cir. 2013) (quoting Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 14 (1st Cir. 2011)). "The plausibility standard invites a two-step pavane." Elsevier, 732 F.3d at 80 (citing Grajales, 682 F.3d at 45). First, the Court "must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Id. (quoting Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). Second, the Court "must determine whether the remaining factual content allows a 'reasonable inference that the defendant is liable for the misconduct alleged.' " Id. (quoting Morales-Cruz, 676 F.3d at 224).

Although a "complaint in an employment discrimination lawsuit [need not] contain specific facts establishing a prima facie case of discrimination" but rather "must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' " Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting Fed. R. Civ. P. 8(a)(2)), the Court must dismiss a complaint if "it is clear that no relief could be ***68** granted under any set of facts that could be proved consistent with the allegations."

Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). The facts pled must "allow the Court to plausibly infer liability." Sisco v. DLA Piper LLP, 833 F. Supp. 2d 133, 140 (D. Mass. 2011).

III. DISCUSSION

Before considering the parties' arguments, the Court will briefly examine which plaintiffs have asserted and can assert claims against which defendants.

Plaintiff Evans alleges only that she "resides in Sicklerville, New Jersey, and works for Whole Foods at the Rt. 73N location in Marlton, New Jersey." [Am. Compl. ¶ 31]. She does not allege that she wore any BLM clothing or was disciplined. Although she makes such allegations in an affidavit she filed in support of Plaintiffs' now-withdrawn motion for a preliminary injunction, [ECF No. 28-2 ¶¶ 9, 14], courts "cannot consider affidavits and miscellaneous documents proffered by parties, *unless* such other materials are fairly incorporated within the complaint or are susceptible to judicial notice." Goodall v. Worcester Sch. Comm., 405 F. Supp. 3d 253, 258 (D. Mass. 2019). Here, because neither such circumstance exists, the amended complaint must be dismissed as to Plaintiff Evans for failure to state a claim.

Plaintiff Tisme alleges that she was an Amazon employee and that Amazon discriminated and/or retaliated against her. [Am. Compl. ¶¶ 22, 81]. Because she has made no allegations regarding Whole Foods, Whole Foods' motion to dismiss, [ECF No. 31], must be granted as to Plaintiff Tisme.

Similarly, the remaining twenty-six named plaintiffs (the "Whole Foods Plaintiffs") allege that they were Whole Foods employees and that Whole Foods discriminated and/or retaliated against them. See [Am. Compl.]. Because the Whole Foods Plaintiffs have made no allegations regarding Amazon, Amazon's motion to dismiss, [ECF No. 49], must be granted as to those plaintiffs.

In sum, both motions to dismiss, [ECF No. 31, 49], are GRANTED as to Plaintiff Evans, Whole Foods' motion to dismiss, [ECF No. 31], is GRANTED as to Plaintiff Tisme, and Amazon's motion to dismiss, [ECF No. 49], is GRANTED as to the Whole Foods Plaintiffs.

A. The Parties' Arguments

Whole Foods argues that Plaintiffs (1) are barred from pursuing their Title VII claims at this time because they have failed to exhaust their administrative remedies with the EEOC, [ECF No. 32 at 8–9]; (2) have failed to state a discrimination claim because they do not allege that Whole Foods disciplined or discharged any employees because of their race or applied the Policy differently based on any employee's race, [id. at 9–15]; and (3) have failed to state a retaliation claim because they have not identified an actionable protected activity, [id. at 15–19].

In response, Plaintiffs assert that (1) the administrative exhaustion requirement does not bar their claims because they initially sought, and still intend to seek, preliminary injunctive relief,[6] [ECF No. 42 at 19–21]; (2) by selectively enforcing the Policy to target and suppress BLM messaging, Whole Foods discriminated against ***69** Black employees, and other employees associating with and advocating for Black employees, in violation of Title VII, [id. at 8–14]; and (3) Whole Foods retaliated against employees for continuing to wear BLM apparel and otherwise protesting the Policy, which constitutes protected activity, [id. at 14–18].

Whole Foods responds that Plaintiffs' (1) withdrawal of their motion for preliminary injunctive relief undermines their arguments regarding administrative exhaustion, [ECF No. 43 at 2–3]; (2) failure to allege that Whole Foods took any particular action specifically because of the race of any particular employee is fatal to their discrimination claim, [id. at 3–5]; and (3) protesting was directed at a broad social injustice, not Whole Foods' enforcement of the Policy, and, therefore, was not a protected activity, [id. at 5–6].

Amazon largely echoes Whole Foods' arguments but focuses solely on Plaintiff Tisme, who is the only plaintiff who works for Amazon and who, at the time Amazon filed its brief, had not received a "right to sue" letter from the EEOC. See [ECF No. 50]. According to Plaintiffs, Plaintiff Tisme's receipt of a "right to sue" letter after the amended complaint was filed cured any administrative exhaustion issue, [ECF No. 54-2], and Plaintiff Tisme states claims for discrimination and retaliation for the same reasons her co-workers do, noting specifically that Amazon adopted the Policy in response to Whole Foods' employees wearing BLM masks and attire, [ECF No. 54 at 10–20].

B. Exhaustion of Administrative Remedies

Though the "First Circuit has repeatedly held that 'a federal court will not entertain employment discrimination claims brought under Title VII unless administrative remedies have first been exhausted,' " Ngomba v. Olee, No. 18-cv-11352, 2019 WL 1119588, at *2 (D. Mass. Mar. 11, 2019) (quoting Rodriguez v. United States, 852 F.3d 67, 78 (1st Cir. 2017)), it has also held that "while the right-to-sue-letter requirement remains, it is simply 'a precondition to bringing' suit, not a jurisdictional bar, and thus 'can be waived by the parties or the court.' " Martínez-Rivera v. Commonwealth of P.R., 812 F.3d 69, 78 (1st Cir. 2016) (quoting Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist., 180 F.3d 468, 474 (2d Cir. 1999)); see also Robertson v. Barber Foods, LLC, No. 19-cv-00455, 2020 WL 3104047, *4 (D. Me. June 11, 2020) (noting that requiring "a plaintiff to plead exhaustion in his complaint makes little sense when the exhaustion requirement can be waived by the parties or the court"); id. at *4 n.5 (collecting cases where, for various reasons, courts waived the administrative exhaustion requirement). Waiver aside, courts have held that subsequent receipt of a "right to sue" letter cures any deficiency with an earlier, pre-letter filing. See, e.g., Pinkard v. Pullman-Standard, a Div. of Pullman, Inc., 678 F.2d 1211, 1218 (5th Cir. 1982); Holmes v. PHI Serv. Co., 437 F. Supp. 2d 110, 123 (D.D.C. 2006) ("Thus ... where a defendant moves to dismiss a plaintiff's Title VII action for failure to exhaust administrative remedies because the plaintiff did not receive a right-to-sue letter before filing suit, the court should not dismiss the claim if, after filing the complaint but before dismissal, the plaintiff receives a corresponding right-to-sue letter from the EEOC.").

As of February 5, 2021, at least five of the twenty-eight plaintiffs have received EEOC "right to sue" letters. [ECF Nos. 55-1 (Plaintiff Frith), 55-2 (Plaintiff Kinzer), 55-3 (Plaintiff Barry), 55-4 (Plaintiff Styles), 54-2 (Plaintiff Tisme)]. Others ***70** have filed EEOC complaints and additional "right to sue" letters are likely.

Although the Court could dismiss the complaint as to the plaintiffs who have not yet received a "right to sue" letter and permit them to amend once they have received one, in the interest of efficiency, the Court will waive the administrative exhaustion requirement and adjudicate Defendants' motions to dismiss on the merits. Additionally, as Plaintiffs note, the First Circuit has recognized that exhaustion of administrative remedies may be unnecessary when plaintiffs seek preliminary injunctive relief. See Bailey v. Delta Air Lines, Inc., 722 F.2d 942, 944 (1st Cir. 1983). Here, Plaintiffs sought a preliminary injunction when they filed the operative complaint. The Court will not dismiss the complaint as premature simply because they have since withdrawn their motion.

Accordingly, the Court waives Title VII's administrative exhaustion requirement for those plaintiffs who have not yet received a "right to sue" letter.

C. Title VII Claims

1. Discrimination

Title VII makes it unlawful for any employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race*, color, religion, sex, or national origin" or "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's race*, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added). "These two proscriptions, often referred to as the 'disparate treatment' (or 'intentional discrimination') provision and the 'disparate impact' provision, are the only causes of action under Title VII." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 135 S. Ct. 2028, 2032, 192 L.Ed.2d 35 (2015).

> To establish a prima facie case of disparate treatment discrimination, a plaintiff must show: (1) he is a member of a protected class; (2) he was qualified for his position; (3) his employer took an adverse employment action against him; and (4) some evidence of a causal link between his protected status and the adverse employment action.

Mason v. Cent. Mass Transit Mgmt./Worcester Reg'l Transit Auth., 394 F. Supp. 3d 166, 173 (D. Mass 2019) (citing Bhatti v. Trs. of Bos. Univ., 659 F.3d 64, 70 (1st Cir. 2011)).

> To state a prima facie case of disparate impact under Title VII, a plaintiff must first "identify the challenged employment practice or policy and pinpoint the defendant's use of it. Second, the plaintiff must demonstrate a disparate impact on a group

characteristic, such as race, that falls within the protective ambit of Title VII. Third, the plaintiff must demonstrate a causal relationship between the identified practice and the disparate impact."

Mompoint v. Dep't of Elementary and Secondary Educ., No. 18-cv-11094, 2019 WL 1921631, at *3 (D. Mass. Apr. 30, 2019) (internal citations omitted) (quoting EEOC v. S.S. Clerks Union, Local 1066, 48 F.3d 594, 601 (1st Cir. 1995)).

For purposes of this case, Title VII prohibits race-based discrimination. Here, the Plaintiffs, who do not allege any facts regarding their own races, have failed to adequately allege a Title VII violation under either a disparate treatment ***71** or disparate impact theory. They do not allege that Defendants disciplined them because of their race or applied the Policy differently based on the race of employees violating it, or that Defendants' application of the Policy had a disproportionate impact on employees of any particular race. Rather, they allege that Defendants disciplined employees, regardless of race, for wearing BLM clothing and that the discipline was content-based and intended to suppress BLM messaging. Putting aside the wisdom or fairness of Defendants' decision to aggressively discipline employees for wearing BLM attire, particularly when Defendants purportedly allowed employees to wear clothing with other messaging, inconsistent enforcement of a dress code does not constitute a Title VII violation because it is not race-based discrimination and because Title VII does not protect free speech in a private workplace.

In Bostock v. Clayton County, the Supreme Court addressed a Title VII claim based on alleged sex discrimination. ––– U.S. ––––, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). In that case, the court reinforced what the plain language of the statute makes clear: that the proper focus is on the protected characteristic of the individual employee bringing the claim. Id. at 1740–41. "[A]n employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII." Id. at 1740. Put another way, "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." Id. at 1741. A straightforward application of Bostock's rationale to this case leads to the conclusion that Plaintiffs have failed to state a claim for Title VII discrimination. They have not alleged that Defendants would have treated any individual plaintiff differently if that plaintiff were of a different race. To the contrary, their allegations demonstrate that Defendants treated all employees wearing BLM attire equally, regardless of race, see [Am. Compl. ¶¶ 4, 49], which demonstrates that the race of the individual employee subject to discipline was *not* a motivating factor in Defendants' decision. Further, Plaintiffs' proposed class, "all Whole Foods and Amazon employee who have been subject to Whole Foods' and Amazon's policy of not allowing employees to wear Black Lives Matter masks while working at Whole Foods locations," [id. ¶ 82], reinforces the fact that the race of the individual employee subject to discipline is irrelevant to Plaintiffs' claims. Even assuming that Defendants failed to discipline employees for violating the Policy by wearing non-BLM attire, [id. ¶¶ 44–45], this still does not suggest that any employee was treated differently "because of such individual's race." 42 U.S.C. § 2000e-2(a).

Plaintiffs attempt to bypass the plain language of Title VII by advancing an associational discrimination theory, but that fails as well. Although the parties cite no controlling First Circuit cases regarding associational discrimination under Title VII and the Court has not found any, federal courts of appeals that have considered the issue have held that Title VII prohibits associational discrimination. See, e.g., Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008); Johnson v. Univ. of Cincinnati, 215 F.3d 561 (6th Cir. 2000); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998), vacated in part on other grounds sub nom. Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999); Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878 (7th Cir. 1998); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986). Moreover, multiple courts within this district ***72** have acknowledged the theoretical availability of associational discrimination claims under Title VII. Baer v. Montachusett Reg. Tech. Sch. Dist., 380 F. Supp. 3d 143 (D. Mass. 2019); Persson v. Boston Univ., No. 15-cv-14037, 2019 WL 917205 (D. Mass. Feb. 25, 2019); Gallo v. W.B. Mason Co., No. 10-cv-10618, 2010 WL 4721064 (D. Mass. Nov. 15, 2010). A plaintiff advancing an associational discrimination claim, however, still must allege that they were discriminated against on the basis of race, rather than on the basis of race-related messaging.

Typically, plaintiffs assert associational discrimination when they are subjected to discrimination for maintaining a relationship with a member of another race. In that type of case, courts focus on the fact that when employers target employees for associating with members of a particular race, they are, in fact, discriminating on the basis of the employees' race. See, e.g., Deffenbaugh-Williams, 156 F.3d at 589 ("[A] reasonable juror could find that Deffenbaugh was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."); Holcomb, 521 F.3d at 139 ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."); Baer, 380 F. Supp. 3d at 154 ("Thus, in cases of associational discrimination, the plaintiff is discriminated against because of his or her *own* race."); Gallo, 2010 WL 4721064, at *1 ("Title VII does prohibit associational discrimination on the basis of race, when a person of one race associates with third persons of another race and is therefore subjected to discriminatory animus.").

Here, Plaintiffs have not alleged facts suggesting that any individual plaintiff associated with any other employee of a different race or that Defendants disciplined any individual employee because of a difference in race between that employee and another employee. Rather, Plaintiffs allege that Defendants disciplined employees for wearing BLM attire, which, in their view, is a manner of advocating for and associating with all Black Whole Foods employees. [Am. Compl. ¶¶ 68–69]. Plaintiffs, however, have cited no case where a court sanctioned a Title VII claim premised on a similar factual scenario and the cases that Plaintiffs do cite are factually distinguishable. Again, Title VII prohibits discrimination based on race. It cannot be read expansively enough to extend its protections to employees who have been disciplined for wearing clothes that violate a company dress code, even if that clothing is associated with individuals of a particular race. As examples, Plaintiffs cite Barrett v. Whirlpool Corp., but in that case, the plaintiffs were white women who alleged that they were discriminated against because they defended and supported their Black co-workers, who, themselves, were being subjected to race-based mistreatment (e.g., use of racial slurs, racial graffiti). 556 F.3d 502, 507–10 (6th Cir. 2009). Similarly, in Johnson v. University of Cincinnati, the plaintiff, a former Vice President of Human Resources at the University of Cincinnati alleged, among other things, that he had been discriminated against in violation of Title VII because of his advocacy on behalf of women and minorities, who, in his view, had been subjected to the university's discriminatory hiring practices. 215 F.3d 561, 575 (6th Cir. 2000). Here, Plaintiffs have not alleged that Defendants were mistreating the Black employees on whose behalf Plaintiffs were allegedly advocating because those employees were Black. Contra id. at 574 (noting that "Title VII [was designed] to protect individuals who are the victims of discriminatory animus towards ***73** third persons with whom the individuals associate") (quoting Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) (alteration in original)). The closest Plaintiffs come is alleging that they have "asked for the release of racial demographic data of Whole Foods employees and management, to help determine whether Black employees are receiving promotions fairly," [Am. Compl. ¶ 69], which is not a concrete allegation of discrimination. Barrett and Johnson hold that an employee can state a Title VII claim when they allege that they were discriminated against because they advocated for a victim of racial discrimination. They do not stand for the proposition that an employee generally advocating for employees of a particular race can state an associational discrimination claim and therefore do not support Plaintiffs' arguments.

To summarize, because no plaintiff alleges that he or she was discriminated against on account of his or her race or that he or she was discriminated against for advocating on behalf of a co-worker who had been subject to discrimination, Plaintiffs have failed to state a claim for discrimination under Title VII and Defendants' motions to dismiss, [ECF Nos. 31 (Whole Foods), 49 (Amazon)],[7] are GRANTED as to Count One of the Amended Complaint.

2. Retaliation

Title VII makes it unlawful "for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). "In Title VII, 'oppose,' being left undefined by the statute, carries its ordinary meaning: to resist or antagonize ...; to contend against; to confront; resist; withstand." Rodriguez-Vives v. Puerto Rico Firefighters Corps of Puerto Rico, 743 F.3d 278, 284 (1st Cir. 2014) (some internal quotation marks omitted). "Under the opposition clause, an employee who opposes employment discrimination 'need not prove that the conditions against which he protested actually amounted to a violation of Title VII,' but must demonstrate that he held a 'good faith reasonable belief that the underlying challenged actions of the employer violated the law.' " Ray v. Ropes & Gray LLP, 961 F. Supp. 2d 344, 358 (D. Mass. 2013) (quoting Fantini v. Salem State Coll., 557 F.3d 22, 32 (1st Cir. 2009), aff'd, 799 F.3d 99 (1st Cir. 2015)). "To engage the gears of [the] statute, a plaintiff must show that (i) she undertook protected conduct, (ii) she suffered an adverse employment action, and (iii) the two were causally linked." Noviello v. City of Boston, 398 F.3d 76, 88 (1st

Cir. 2005); see Mercedes v. Holder, No. 13-cv-12043, 2014 WL 2998988, at *2 (D. Mass. July 1, 2014).

With the exception of Plaintiff Kinzer, Plaintiffs' retaliation claims fail.

***74** Plaintiff Kinzer alleges three different potential protected activities that preceded her termination including leading employee protests in opposition to Whole Foods' enforcement of the Policy, which she perceived as discriminatory; wearing a BLM mask in opposition to Whole Foods' enforcement of the Policy; and filing charges with the EEOC and the NLRB, alleging discrimination and retaliation. [Am. Compl. ¶¶ 75–76]. There is no dispute that termination is an adverse employment action. See Ponte v. Steelcase, Inc., 741 F.3d 310, 321 (1st Cir. 2014) (noting that where employee alleging retaliation had been fired, "[t]here is no question that [she] suffered an adverse employment action"). Nor is there any debate that filing a formal complaint constitutes protected conduct under Title VII. See 42 U.S.C. § 2000e-3(a) (making it unlawful "for an employer to discriminate against any of his employees ... because he has made a charge ... under this subchapter"); Cherkaoui v. City of Quincy, 877 F.3d 14, 28 (1st Cir. 2017); Noviello, 398 F.3d at 88. Given her burden at this stage, Plaintiff Kinzer has alleged facts sufficient to plausibly infer that her termination was causally linked to protected activity. See [Am. Compl. ¶ 76 (alleging that she was fired an hour after informing management that she had filed charges with the EEOC and NLRB)]. To prevail at summary judgment or at trial, she will have to prove that she would not have been terminated if she had not engaged in the protected conduct.

With respect to the remaining plaintiffs, they argue that wearing BLM attire is protected conduct under Title VII, [ECF No. 42 at 14–16], because they were doing so to protest racism and police violence against Black people and to show support for Black employees, [Am. Compl. ¶ 1], and later to challenge perceived racism and discrimination based on Whole Foods not allowing them to wear BLM masks, [id. ¶ 70 ("as the protest has proceeded ... employees are wearing the masks in order to challenge what they perceive to be racism and discrimination by Whole Foods for not allowing employees to wear the [BLM] masks")]. First, wearing BLM attire to protest racism and police violence against Blacks and to show support for Black employees cannot support a Title VII retaliation claim because it is not done to oppose "any practice made an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-3(a). Nation-wide racism and police brutality are not proscribed by Title VII and, "show[ing] support for Black employees," [Am. Compl. ¶ 1], is too vague to constitute actionable opposition to any unlawful practice. Second, wearing BLM attire to "challenge what they perceive to be racism and discrimination ... for not allowing employees to wear the [BLM] masks," [id. ¶ 70], is a somewhat circular theory. Essentially, Plaintiffs assert that they wore BLM masks to protest not being permitted to wear those masks. Even assuming that allegation is true, as the Court must at this stage, it cannot save the remaining plaintiffs' retaliation claims. For one, there is the issue of timing. The amended complaint contains only two dates: Plaintiffs began wearing BLM masks to work "[a]round June 2020" and Plaintiff Kinzer was fired on July 18, 2020. [Id. ¶¶ 49, 75]. To support Plaintiffs' retaliation theory, the sequence of events would have to be as follows: (1) Whole Foods employees wore BLM masks, (2) Whole Foods disciplined them for wearing BLM masks, (3) Plaintiffs formed a good faith, reasonable belief that this discipline was unlawful discrimination under Title VII, (4) Plaintiffs continued to wear BLM masks in "opposition" to the perceived discrimination, and (5) Whole Foods disciplined Plaintiffs again for opposing the perceived discrimination. ***75** In other words, to state a claim for retaliation, each plaintiff must allege facts sufficient to suggest that he or she was disciplined *after* wearing the BLM masks in opposition to what he or she believed to be unlawful discrimination, otherwise there could be no causal relationship between the protected activity and the discipline. Posada v. ACP Facility Servs., Inc., 389 F. Supp. 3d 149, 158 (D. Mass. 2019) ("To prevail on a retaliation claim, the plaintiff must also establish a but-for causal connection between the protected activity and the adverse employment action." (citing Univ. of Tx. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013))). Although each plaintiff has alleged that he or she wore a BLM mask and was disciplined for doing so, [Am. Compl. ¶¶ 54–64], the Amended Complaint does not provide enough information to support the inference that each individual plaintiff wore a BLM mask in "opposition" to perceived discrimination and was then disciplined for doing so. Further, Plaintiffs face a more fundamental roadblock in that as Plaintiffs now admit and knew at the time, Defendants were disciplining any employee wearing BLM attire regardless of that employee's race. The Court therefore finds that Plaintiffs could not have formed a good faith, reasonable belief that Defendants' conduct ran afoul of Title VII because Title VII forbids treating employees differently on the basis of race.[8]

Thus, other than Plaintiff Kinzer, Plaintiffs have failed to state a claim for retaliation under Title VII.

* * *

It would, of course, be more honorable for Defendants to enforce their policies consistently and without regard for the messaging, particularly where the messaging selected for discipline conveys a basic truth. Nevertheless, not all conduct that touches on race is actionable under Title VII. Here, even assuming the truth of the allegations in the complaint, Defendants did not discriminate on the basis of race. Rather, at worst, they were selectively enforcing a dress code to suppress certain speech in the workplace. However unappealing that might be, it is not conduct made unlawful by Title VII. Title VII prohibits discrimination against a person because of race. It does not protect one's right to associate with a given social cause, even a race-related one, in the workplace.[9] Whole Foods employees that are not happy with the Policy can find someplace else to work, express themselves outside the workplace, work with Whole Foods to change the Policy, and/or publicize the Policy in an effort to get consumers to spend their dollars elsewhere, but, under the facts alleged here, their redress does not lie with Title VII.

***76 IV. CONCLUSION**

Accordingly, for the reasons set forth above, Amazon's motion to dismiss, [ECF No. 49], is GRANTED in its entirety. Whole Foods' motion, [ECF No. 31], is GRANTED except as to Count II (retaliation) as alleged by Plaintiff Kinzer.

SO ORDERED.

All Citations

517 F.Supp.3d 60, 105 Empl. Prac. Dec. P 46,696

Footnotes

1 There are twenty-eight named plaintiffs: Suepriya Adhi, Abdulai Barry, Samantha Berimbau, Kirby Burt, Ana Belen Del Rio-Ramirez, Haley Evans, Suverino Frith, Kayla Greene, Britney Ifebohr, Cedrick Juarez, Savannah Kinzer, Yurin London, Leaver Michel, Justine O'Neill, Jennifer Osayande, Kelly Rigler, Sharie Robinson, Kanaya Ryland, Corey Samuel, Mackenzie Shanahan, Lylah Styles, Charles Thompson, Alice Tisme, Camille Tucker-Tolbert, Cassidy Visco, Lindsay Vuong, Faith Walsh, and Sarita Wilson (collectively, "Plaintiffs"). If reference to an individual plaintiff is necessary, the Court will use the construction "Plaintiff [last name]."

2 Each plaintiff works for Whole Foods except Plaintiff Tisme, who works for Amazon as a Prime Shopper at a Whole Foods store in Cambridge, Massachusetts. [Am. Compl. ¶ 81]. The others work at Whole Foods stores in California, Georgia, Indiana, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Virginia, and Washington but seek to represent employees of Whole Foods or Amazon in other states as well. See [id. ¶¶ 7–34, 82].

3 Although the operative complaint contains no allegations regarding specific plaintiffs' races, it makes clear that Plaintiffs come from a variety of racial backgrounds. See [Am. Compl. ¶ 49 ("many Black Whole Foods employees and their non-Black coworkers began wearing [BLM] masks"); id. ¶ 68 ("Whole Foods' policy ... is discriminatory, both against Black employees ... and against other employees who are associating with and advocating for Black Whole Foods employees ... by wearing the masks"); id. ¶ 82 (Plaintiffs' proposed class includes "all Whole Foods and Amazon employees" and does not mention race)]. The fact that Plaintiffs are of multiple races is confirmed by filings made in connection with Plaintiffs' since-withdrawn request for a preliminary injunction. See [ECF No. 3-1 ¶ 3; ECF No. 3-2 ¶ 3; ECF No. 3-4 ¶ 3; ECF No. 3-5 ¶ 2]. Plaintiffs do not allege that Whole Foods or Amazon treated Black employees who wore BLM masks any differently than non-Black employees who wore them.

4 Plaintiff Kinzer alleges that she was terminated for the additional reason of "being a leader in organizing the employees to wear the masks and protesting the company's policy of disciplining employees for wearing the masks." [Am. Compl. ¶ 75]. She alleges further that just before she was fired, she informed Whole Foods management that she had filed charges with the Equal Employment Opportunity Commission and the National Labor Relations Board. [Id. ¶ 76].

5 With regard to Amazon employees, Plaintiffs allege that Amazon did not require its employees working in Whole Foods stores to comply with Whole Foods' dress code policy until employees started wearing BLM attire. [Am. Compl. ¶¶ 78–80].

6 Plaintiffs filed a motion for a preliminary injunction on July 20, 2020, [ECF No. 3], but withdrew it on August 25, 2020, see [ECF No. 44].

7 With regard to Amazon, Plaintiff Tisme alleges that: (1) Amazon employs Prime Shoppers at Whole Foods stores; (2) she is a Prime Shopper at the Whole Foods store on River Street in Cambridge, Massachusetts; (3) Amazon began requiring its Prime

Shoppers to comply with the Policy only after Whole Foods began disciplining employees for wearing BLM attire; and (4) she was sent home without pay for wearing a BLM mask to work. [Am. Compl. ¶¶ 3, 22, 79–81]. Like the Whole Foods Plaintiffs, Plaintiff Tisme has failed to allege that she was subject to any race-based discrimination, associational or otherwise. See generally [id.]. Thus, for the same reasons the Whole Foods Plaintiffs have failed to state a claim for discrimination against Whole Foods, Plaintiff Tisme has similarly failed to state a claim for discrimination against Amazon.

8 As to Amazon, the Amended Complaint does not provide enough information to support the inference that Plaintiff Tisme wore a BLM mask in "opposition" to perceived discrimination and was then disciplined for doing so. Likewise, she cannot meet the good faith reasonable belief requirement discussed above. Accordingly, her retaliation claim against Amazon fails as well.

9 At heart, this is a First Amendment claim that Plaintiffs are trying to shoehorn into Title VII in recognition of the fact that there is no right to free speech in a private workplace. In this same vein, the case recently provided to the Court by Plaintiffs, Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty, No. 20-cv-01471, 2021 WL 164315 (W.D. Pa. Jan. 19, 2021), is inapposite because it concerns the First Amendment and speech in a public workplace. There, the Court did not find, nor was it seemingly asked to find, that the policy against BLM masks was race-based discrimination. The preliminary injunction in that case was awarded solely on the basis of an impermissible abridgement of speech, with no finding of discrimination.

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2010 WL 4721064
United States District Court, D. Massachusetts.

Christopher GALLO

v.

W.B. MASON COMPANY, INC.

Civil Action No. 10–10618–RWZ.
|
Nov. 15, 2010.

Attorneys and Law Firms

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ORDER

ZOBEL, District Judge.

***1** Plaintiff Christopher Gallo sues his former employer, defendant W .B. Mason Company, Inc., for gender discrimination and unlawful retaliation prohibited by federal and state law. Gallo alleges that he witnessed his supervisor verbally harass several female employees, that he made repeated attempts to stop the harassment, and that "he was ultimately terminated ... based upon his reporting and resisting discrimination and harassment." (Compl. ¶ 6, Docket # 1.) Gallo also alleges that he was asked to participate in illegal attempts to put competitor companies out of business, that defendant was illegally recording the conversations of employees, and that his resistance to this illegal conduct further contributed to his wrongful termination.

He brings a five-count complaint asserting (1) unlawful gender discrimination under Title VII, 42 U.S.C. § 2000e–2; (2) unlawful retaliation under Title VII, *id.* at § 2000e–3; (3) unlawful gender discrimination under Mass. Gen. Laws ch. 151 B; (4) unlawful retaliation under Mass. Gen. Laws ch. 151 B; and (5) wrongful termination in violation of public policy. Defendants move to dismiss Count I.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* –– U.S. ––––, ––––, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). The facts must allow the court to draw a reasonable inference that defendant is liable for the alleged misconduct. *Id.* A simple recitation of elements, or statements of legal conclusion, will not suffice. *Id.*

Gallo argues that Count I of his complaint states a Title VII claim for gender discrimination on a theory of associational discrimination. (Pl.'s Mem. in Opp'n 4–5, Docket # 7.) It is an unsettled legal question whether Title VII prohibits gender-based associational discrimination, but, as a point of comparison, Title VII does prohibit associational discrimination on the basis of race, when a person of one race associates with third persons of another race and is therefore subjected to discriminatory animus. *See, e.g., Barrett v. Whirlpool Corp.,* 556 F.3d 502, 512 (6th Cir.2009). Such conduct falls within Title VII's prohibition of racial discrimination because the difference in race between the Title VII plaintiff and the third persons is the motivation for the discrimination. *Id.*

Assuming, arguendo, that Title VII prohibits gender-based associational discrimination, Gallo's complaint falls to state such a claim. The complaint alleges, expressly and repeatedly, that Gallo was fired because he protested discrimination against female employees, not because he was a male associating with females. There is no allegation that he was discriminated against on the basis of *his* gender.

Defendant's motion to dismiss Count I (Docket # 5) is ALLOWED.

All Citations

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Troutman v. Hydro Extrusion USA, LLC, M.D.Pa., May 24, 2019

853 F.3d 339
United States Court of Appeals, Seventh Circuit.

Kimberly HIVELY, Plaintiff-Appellant,
v.
IVY TECH COMMUNITY COLLEGE OF INDIANA, Defendant-Appellee.

No. 15-1720
|
Argued November 30, 2016
|
Decided April 4, 2017

Synopsis
Background: Part-time adjunct professor brought action against community college, alleging she was denied full-time employment and promotions based on sexual orientation in violation of Title VII. The United States District Court for the Northern District of Indiana, No. 3:14-cv-1791, Rudy Lozano, J., dismissed complaint, and professor appealed. The Court of Appeals, 830 F.3d 698, affirmed. Rehearing en banc was granted, 2016 WL 6768628.

The Court of Appeals, Wood, Chief Judge, held that person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes; overruling *Doe v. City of Belleville, Ill.*, 119 F.3d 563, *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701, *Spearman v. Ford Motor Co.*, 231 F.3d 1080.

Reversed and remanded.

Posner, Circuit Judge, concurred and filed opinion.

Flaum, Circuit Judge, concurred and filed opinion in which Ripple, Circuit Judge, joined.

Sykes, Circuit Judge, dissented and filed opinion in which Bauer and Kanne, Circuit Judges, joined.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

***340** Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:14-cv-1791—**Rudy Lozano**, *Judge*.

Attorneys and Law Firms

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Evan Chesler, Attorney, Cravath, Swaine & Moore, New York, NY, for Amicus Curiae Five Members of Congress.

Before Wood, Chief Judge, and Bauer, Posner, Flaum, Easterbrook, Ripple, Kanne, Rovner, Williams, Sykes, and Hamilton, Circuit Judges.

Opinion

Wood, Chief Judge.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person's "race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a ***341** fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court's judgment dismissing Kimberly Hively's suit against Ivy Tech Community College and remand for further proceedings.

I

Hively is openly lesbian. She began teaching as a part-time, adjunct professor at Ivy Tech Community College's South Bend campus in 2000. Hoping to improve her lot, she applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful; worse yet, in July 2014 her part-time contract was not renewed. Believing that Ivy Tech was spurning her because of her sexual orientation, she filed a pro se charge with the Equal Employment Opportunity Commission on December 13, 2013. It was short and to the point:

> I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated.

After receiving a right-to-sue letter, she filed this action in the district court (again acting pro se). Ivy Tech responded with a motion to dismiss for failure to state a claim on which relief can be granted. It argued that sexual orientation is not a protected class under Title VII or 42 U.S.C. § 1981 (which we will disregard for the remainder of this opinion). Relying on a line of this court's cases exemplified by *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), the district court granted Ivy Tech's motion and dismissed Hively's case with prejudice.

Now represented by the Lambda Legal Defense & Education Fund, Hively has appealed to this court. After an exhaustive exploration of the law governing claims involving discrimination based on sexual orientation, the panel affirmed. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016). It began its analysis by noting that the idea that discrimination based on sexual orientation is somehow distinct from sex discrimination originated with dicta in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *Ulane* stated (as if this resolved matters) that Title VII's prohibition against sex discrimination "implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* at 1085. From this truism, we deduced that "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination...." *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997), *cert. granted, judgment vacated sub nom. City of Belleville v. Doe*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

Later cases in this court, including *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003), *Hamner*, and *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000), have accepted this as settled law. Almost all of our sister circuits have understood the law in the same way. See, *e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); ***342** *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997). A panel of the Eleventh Circuit, recognizing that it was bound by the Fifth Circuit's precedent in *Blum*, 597 F.2d 936, recently reaffirmed (by a 2–1 vote) that it could not recognize sexual orientation discrimination claims under Title VII. *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017). On the other hand, the Second Circuit recently found that an openly gay male plaintiff pleaded a claim of gender stereotyping that was sufficient to survive dismissal. The court observed that one panel lacked the power to reconsider the court's earlier decision holding that sexual orientation discrimination claims were not cognizable under Title VII. *Christiansen v. Omnicom Group, Inc.*, No. 16-748, 852 F.3d 195, 2017 WL 1130183 (2d Cir. Mar. 27, 2017) (per curiam). Nonetheless, two of the three judges, relying on many of the same arguments presented here, noted in concurrence that they thought their court ought to consider revisiting that precedent in an appropriate case. *Id.* at 198–99, 2017 WL 1130183 at *2 (Katzmann, J., concurring). Notable in its absence from the debate over the proper interpretation of the scope of Title VII's ban on sex discrimination is the United States Supreme Court.

That is not because the Supreme Court has left this subject entirely to the side. To the contrary, as the panel recognized, over the years the Court has issued several opinions that are relevant to the issue before us. Key among those decisions are *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). *Price Waterhouse* held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination, and *Oncale* clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim. Our panel frankly acknowledged how difficult it is "to extricate the gender nonconformity claims from the sexual orientation claims." 830 F.3d at 709. That effort, it commented, has led to a "confused hodge-podge of cases." *Id.* at 711. It also noted that "all gay, lesbian and bisexual persons fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men." *Id.* Especially since the Supreme Court's recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, *Obergefell v. Hodges*, ––– U.S. ––––, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), bizarre results ensue from the current regime. As the panel noted, it creates "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." 830 F.3d at 714. Finally, the panel highlighted the sharp tension between a rule that fails to recognize that discrimination on the basis of the sex with whom a person associates is a form of sex discrimination, and the rule, recognized since *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), that discrimination on the basis of the race with whom a person associates is a form of racial discrimination.

Despite all these problems, the panel correctly noted that it was bound by this court's precedents, to which we referred ***343** earlier. It thought that the handwriting signaling their demise might be on the wall, but it did not feel empowered to translate that message into a holding. "Until the writing comes in the form of a Supreme Court opinion or new legislation," 830 F.3d at 718, it felt bound to adhere to our earlier decisions. In light of the importance of the issue, and recognizing the power of the full court to overrule earlier decisions and to bring our law into conformity with the Supreme Court's teachings, a majority of the judges in regular active service voted to rehear this case en banc.

II

A

The question before us is not whether this court can, or should, "amend" Title VII to add a new protected category to the familiar list of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.[1] This is a pure question of statutory interpretation and thus well within the judiciary's competence.

Much ink has been spilled about the proper way to go about the task of statutory interpretation. One can stick, to the greatest extent possible, to the language enacted by the legislature; one could consult the legislative history that led up to the bill that became law; one could examine later actions of the legislature (*i.e.* efforts to amend the law and later enactments) for whatever light they may shed; and one could use a combination of these methods. See, *e.g.*, William Eskridge, Jr., & Philip Frickey, *Legislation and Statutory Interpretation* (2d ed. 2007); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012); Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (2006); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70 (2012); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407 (1989).

Few people would insist that there is a need to delve into secondary sources if the statute is plain on its face. Even if it is not pellucid, the best source for disambiguation is the broader context of the statute that the legislature—in this case, Congress—passed. This is uncontroversial when the reading seems consistent with the conventional wisdom about the reach of the law. It becomes somewhat harder to swallow if the language reveals suspected or actual unintended consequences. It is then that some have thought that legislative history should be used to block a particular reading of a statute. Legislative history, however, is notoriously malleable. Even worse is the temptation to try to divine the significance of unsuccessful legislative efforts to change the law. Those failures can mean almost anything, ranging from the lack of necessity for a proposed change because the law already accomplishes the desired goal, to the undesirability of the change because a majority of the legislature is happy with the way the courts are currently interpreting ***344** the law, to the irrelevance of the non-enactment, when it is attributable to nothing more than legislative logrolling or gridlock that had nothing to do with its merits.

Ivy Tech sets great store on the fact that Congress has frequently considered amending Title VII to add the words "sexual orientation" to the list of prohibited characteristics, yet it has never done so. Many of our sister circuits have also noted this fact. In our view, however, it is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them. The goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no *sex* discrimination.

The dissent makes much of the fact that Congresses acting more than thirty years after the passage of Title VII made use of the term "sexual orientation" to prohibit discrimination or violence on that basis in statutes such as the Violence Against Women Act and the federal Hate Crimes Act. But this gets us no closer to answering the question at hand, for Congress may certainly choose to use both a belt and suspenders to achieve its objectives, and the fact that "sex" and "sexual orientation" discrimination may overlap in later statutes is of no help in determining whether sexual orientation discrimination *is* discrimination on the basis of sex for the purposes of Title VII. See, *e.g.*, *McEvoy v. IEI Barge Servs., Inc.*, 622 F.3d 671, 677 (7th Cir. 2010) ("Congress may choose a belt-and-suspenders approach to promote its policy objectives....").

Moreover, the agency most closely associated with this law, the Equal Employment Opportunity Commission, in 2015 announced that it now takes the position that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). Our point here is not that we have a duty to defer to the EEOC's position. We assume for present purposes that no such duty exists. But the Commission's position may have caused some in Congress to think that legislation is needed to carve sexual orientation *out* of the statute, not to put it *in*. In the end, we have no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member's votes, much less what explains the failure of the body as a whole to change this 1964 statute.

Our interpretive task is guided instead by the Supreme Court's approach in the closely related case of *Oncale*, where it had this to say as it addressed the question whether Title VII covers sexual harassment inflicted by a man on a male victim:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] ... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

***345** 523 U.S. at 79–80, 118 S.Ct. 998. The Court could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.

It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose. Indeed, in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B. The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, see *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), including same-sex workplace harassment, see *Oncale*; it reaches discrimination based on actuarial assumptions about a person's longevity, see *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978); and it reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes, see *Hopkins*. It is quite possible that these interpretations may also have surprised some who served in the 88th Congress. Nevertheless, experience with the law has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination.

B

Hively offers two approaches in support of her contention that "sex discrimination" includes discrimination on the basis of sexual orientation. The first relies on the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way? The second relies on the *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), line of cases, which she argues protect her right to associate intimately with a person of the same sex. Although the analysis differs somewhat, both avenues end up in the same place: sex discrimination.

1

It is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed to change. The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once. Framing the question that way swaps the critical characteristic (here, sex) for both the complainant and the comparator and thus obscures the key point—whether the complainant's protected characteristic played a role in the adverse employment decision. The counterfactual we must use is a situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner.

Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. (We take the facts in the light most favorable to her, because we are here on a Rule 12(b)(6) dismissal; naturally nothing we say will prevent Ivy Tech from contesting these points in later proceedings.) This describes paradigmatic sex discrimination. To use the phrase from *Ulane*, Ivy Tech is disadvantaging her *because she is a woman*. ***346** Nothing in the complaint hints that Ivy Tech has an anti-marriage policy that extends to heterosexual relationships, or for that matter even an anti-partnership policy that is gender-neutral.

Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

This was the critical point that the Supreme Court was making in *Hopkins*. The four justices in the plurality and the two justices concurring in the judgment recognized that Hopkins had alleged that her employer was discriminating only against women who behaved in what the employer viewed as too "masculine" a way—no makeup, no jewelry, no fashion sense.[2] And even before *Hopkins*, courts had found sex discrimination in situations where women were resisting stereotypical roles. As far back as 1971, the Supreme Court held that Title VII does not permit an employer to refuse to hire women with pre-school-age children, but not men. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971). Around the same time, this court held that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), and struck down a rule requiring only the female employees to be unmarried. In both those instances, the employer's rule did not affect every woman in the workforce. Just so here: a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex.[3] The discriminatory ***347** behavior does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways.

The virtue of looking at comparators and paying heed to gender non-conformity is that this process sheds light on the interpretive question raised by Hively's case: is sexual-orientation discrimination a form of sex discrimination, given the way in which the Supreme Court has interpreted the word "sex" in the statute? The dissent criticizes us for not trying to *rule out* sexual-orientation discrimination by controlling for it in our comparator example and for not placing any weight on the fact that if someone had asked Ivy Tech what its reasons were at the time of the discriminatory conduct, it probably would have said "sexual orientation," not "sex." We assume that this is true, but this thought experiment does not answer the question before us—instead, it begs that question. It commits the logical fallacy of assuming the conclusion it sets out to prove. It makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is *whether* that type of discrimination is nothing more or less than a form of sex discrimination. Repeating that the two are different, as the dissent does at numerous points, also does not advance the analysis.

2

As we noted earlier, Hively also has argued that action based on sexual orientation is sex discrimination under the associational theory. It is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits. This line of cases began with *Loving*, in which the Supreme Court held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S. at 12, 87 S.Ct. 1817. The Court rejected the argument that miscegenation statutes do not violate equal protection because they "punish equally both the white and the Negro participants in an interracial marriage." *Id.* at 8, 87 S.Ct. 1817. When dealing with a statute containing racial classifications, it wrote, "the fact of equal application does not immunize the statute from the very heavy burden of justification" required by the Fourteenth Amendment for lines drawn by race. *Id*. at 9, 87 S.Ct. 1817.

In effect, both parties to the interracial marriage were being denied important rights by the state solely on the basis of their race. This point by now has been recognized for many years. For example, in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), the Eleventh Circuit considered a case in which a white man (Parr) married to an African-American woman was denied employment by an insurance company because of his interracial marriage. He sued under Title VII, but the district court dismissed the complaint on the ground that it failed to describe discrimination on the basis of race. The court of appeals reversed. It held that "[w]here a plaintiff ***348** claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Id.* at 892. It also rejected the employer's somewhat bizarre argument that, given the allegation that it discriminated against all African-Americans, Parr could not show that it would have made a difference if he also had been African-American. *Id.* The court contented itself with describing that as a lawsuit for another day.

The Second Circuit took the same position two decades later in *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008), in which a white former employee of the college sued, alleging that it fired him from his job as associate coach of the men's basketball team because he was married to an African-American woman. The court held "that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 132. It stressed that the plaintiff's case did not depend on third-party injury. To the contrary, it held, "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139. Had the plaintiff been African-American, the question whether race discrimination tainted the employer's action would have depended on different facts.

We have not faced exactly the same situation as that in *Parr* and *Holcomb*, but we have come close. In *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1998), we encountered a case in which white employees brought an action under Title VII on the theory that they were being subjected to a hostile working environment and ultimately discharged because of their association with African-American co-workers. Because the defendant conceded that an employee can bring an associational race discrimination claim under Title VII, we had no need to say much on that point. Instead, we assumed for the sake of argument that an associational race discrimination claim is possible, and that the key inquiries are whether the employee has experienced discrimination and whether that discrimination was because of race. *Id.* at 884. This is consistent with *Holcomb*.

The fact that we now accept this analysis tells us nothing, however, about the world in 1967, when *Loving* reached the Supreme Court. The dissent implies that we are adopting an anachronistic view of Title VII, enacted just three years before *Loving*, but it is the dissent's understanding of *Loving* and the miscegenation laws that is an anachronism. Thanks to *Loving* and the later cases we mentioned, society understands now that such laws are (and always were) inherently racist. But as of 1967 (and thus as of 1964), Virginia and 15 other states had anti-miscegenation laws on the books. *Loving*, 388 U.S. at 6, 87 S.Ct. 1817. These laws were long defended and understood as non-discriminatory because the legal obstacle affected *both* partners. The Court in *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on "distinctions drawn according to race," which were unjustifiable and racially discriminatory.[4] ***349** *Loving*, 388 U.S. at 11, 87 S.Ct. 1817. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.

The dissent would instead have us compare the treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women. But even setting to one side the logical fallacy involved, *Loving* shows why this fails. In the context of interracial relationships, we could just as easily hold constant a variable such as "sexual or romantic attraction to persons of a different race" and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations.

The fact that *Loving*, *Parr*, and *Holcomb* deal with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses—a fact recognized by the *Hopkins* plurality. See 490 U.S. at 244 n.9, 109 S.Ct. 1775. This means that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.

III

Today's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. We already have discussed the employment cases, especially *Hopkins* and *Oncale*. The latter line of cases began with *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect "homosexual, lesbian, or bisexual" persons, *id.* at 624, 116 S.Ct. 1620, violated the federal Equal Protection Clause. *Romer* was followed by *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came *United States v. Windsor*, ––– U.S. ––––, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of "spouse" in other federal statutes. The Court held that this part of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." *Id.* at 2693. Finally, the Court's decision in *Obergefell*, *supra*, held that the right to marry is a fundamental liberty right, protected by the ***350** Due Process and Equal Protection Clauses of the Fourteenth Amendment. 135 S.Ct. at 2604. The Court wrote that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality." *Id.*

It would require considerable calisthenics to remove the "sex" from "sexual orientation." The effort to do so has led to confusing and contradictory results, as our panel opinion illustrated so well.[5] The EEOC concluded, in its *Baldwin* decision, that such an effort cannot be reconciled with the straightforward language of Title VII. Many district courts have come to the same conclusion. See, *e.g.*, *Boutillier v. Hartford Pub. Sch.*, No. 3:13-CV-01303-WWE, 221 F.Supp.3d 255, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); *U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Ctr., P.C.*, No. CV 16-225, 217 F.Supp.3d 834, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F.Supp.3d 1334 (N.D. Fla. 2016); *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190 (M.D. Ala. 2015); see also *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151 (C.D. Cal. 2015) (Title IX case, applying Title VII principles and *Baldwin*). Many other courts have found that gender-identity claims are cognizable under Title VII. See, *e.g.*, *Rosa v. Park W. Bank & Tr. Co.*, 214

F.3d 213, 215–16 (1st Cir. 2000) (claim for sex discrimination under Equal Credit Opportunity Act, analogizing to Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (relying on Title VII cases to conclude that violence against a transsexual was violence because of gender under the Gender Motivated Violence Act); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016); *Schroer v. Billington*, 577 F.Supp.2d 293, 308 (D.D.C. 2008).

This is not to say that authority to the contrary does not exist. As we acknowledged at the outset of this opinion, it does. But this court sits en banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago.[6] The ***351** logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.

For the sake of comprehensiveness, we note that Ivy Tech presents two technical reasons why it thinks this case should not be heard: waiver and sovereign immunity. Neither one persuades us. Though Hively (acting pro se) did not advance the same arguments to the district court, that court would have been powerless to overturn precedent. We, in contrast, are proceeding on a de novo basis, and we have the discretion to address issues for the first time on appeal. *Kaczmarek v. Rednour*, 627 F.3d 586, 595 (7th Cir. 2010). We often exercise that discretion to entertain arguments that turn on pure issues of law. See, *e.g.*, *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 750 (7th Cir. 1993) (concluding "[t]here will be no better time to resolve the issue than now."). There was no waiver. As for sovereign immunity, Ivy Tech acknowledges that federal courts have long concluded that Congress validly abrogated the state's immunity with respect to intentional discrimination claims under Title VII. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Nanda v. Bd. of Trs. of Univ. of Ill.*, 303 F.3d 817, 831 (7th Cir. 2002). There is no merit whatsoever to that point.

We close by noting that we have decided only the issue put before us. Additional complications can be saved for another day, when they are actually involved in the case. Ivy Tech did not contend, for example, that it was a religious institution and the positions it denied to Hively related to a religious mission.[7] See 42 U.S.C. § 2000e-1(a). Nor have we had any occasion to consider the meaning of discrimination in the context of the provision of social or public services. We hold only that a person who alleges that she experienced employment discrimination on the basis of ***352** her sexual orientation has put forth a case of sex discrimination for Title VII purposes. It was therefore wrong to dismiss Hively's complaint for failure to state a claim. The judgment of the district court is Reversed and the case is Remanded for further proceedings.

Posner, Circuit Judge, concurring.

I agree that we should reverse, and I join the majority opinion, but I wish to explore an alternative approach that may be more straightforward.

It is helpful to note at the outset that the interpretation of statutes comes in three flavors. The first and most conventional is the extraction of the original meaning of the statute—the meaning intended by the legislators—and corresponds to interpretation in ordinary discourse. Knowing English I can usually determine swiftly and straightforwardly the meaning of a statement, oral or written, made to me in English (not always, because the statement may be garbled, grammatically intricate or inaccurate, obtuse, or complex beyond my ability to understand).

The second form of interpretation, illustrated by the commonplace local ordinance which commands "no vehicles in the park," is interpretation by unexpressed intent, whereby we understand that although an ambulance is a vehicle, the ordinance was not intended to include ambulances among the "vehicles" forbidden to enter the park. This mode of interpretation received its definitive statement in Blackstone's analysis of the medieval law of Bologna which stated that "whoever drew blood in the streets should be punished with the utmost severity." William Blackstone, *Commentaries on the Laws of England* *60 (1765). Blackstone asked whether the law should have been interpreted to make punishable a surgeon "who opened the vein of a person that fell down in the street with a fit." (Bleeding a sick or injured person was a common form of medical treatment in those days.) Blackstone thought not, remarking that as to "the effects and consequence, or the spirit and reason of the law ... the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them." *Id.* *59–60. The law didn't mention surgeons, but Blackstone thought it obvious that the legislators, who must have known something about the medical activities of surgeons, had not intended the law to apply to them. And so it is with ambulances in parks that prohibit vehicles.

Finally and most controversially, interpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text)—a meaning that infuses the statement with vitality and significance today. An example of this last form of interpretation—the form that in my mind is most clearly applicable to the present case—is the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition. Times have changed; and for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics. The Act has thus been updated by, or in the name of, judicial interpretation—the form of interpretation that consists of making old law satisfy modern needs and understandings. And a common form of interpretation it is, despite its flouting "original meaning." Statutes and constitutional provisions frequently are interpreted on the basis of present need and present understanding rather than original meaning—constitutional provisions even more frequently, ***353** because most of them are older than most statutes.

Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted. But I need to emphasize that this third form of interpretation—call it judicial interpretive updating—presupposes a lengthy interval between enactment and (re)interpretation. A statute when passed has an understood meaning; it takes years, often many years, for a shift in the political and cultural environment to change the understanding of the statute.

Hively, the plaintiff, claims that because she's a lesbian her employer declined to either promote her to full-time employment or renew her part-time employment contract. She seeks redress on the basis of the provision of Title VII that forbids an employer "to fail or refuse to hire[,] or to discharge[,] any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex...." 42 U.S.C. § 2000e-2(a)(1).

The argument that firing a woman on account of her being a lesbian does *not* violate Title VII is that the term "sex" in the statute, when enacted in 1964, undoubtedly meant "man or woman," and so at the time people would have thought that a woman who was fired for being a lesbian was not being fired for being a woman unless her employer would not have fired on grounds of homosexuality a man he knew to be homosexual; for in that event the only difference between the two would be the gender of the one he fired. Title VII does not mention discrimination on the basis of sexual orientation, and so an explanation is needed for how 53 years later the meaning of the statute has changed and the word "sex" in it now connotes both gender *and* sexual orientation.

It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. I had graduated from law school two years before the law was enacted. Had I been asked then whether I had ever met a male homosexual, I would have answered: probably not; had I been asked whether I had ever met a lesbian I would have answered "only in the pages of *À la recherche du temps perdu*." Homosexuality was almost invisible in the 1960s. It became visible in the 1980s as a consequence of the AIDS epidemic; today it is regarded by a large swathe of the American population as normal. But what is certain is that the word "sex" in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality.

A diehard "originalist" would argue that what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by Congress's amending or replacing the statute. But as I noted earlier, statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning. Think for example of Justice Scalia's decisive fifth vote to hold that burning the American flag as a political protest is protected by the free-speech clause of the First Amendment, provided that it's your flag and is not burned in circumstances in which the fire might spread. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). Burning a flag is not speech in the usual sense and there is no indication that the framers or ratifiers of the First Amendment thought that the ***354** word "speech" in the amendment embraced flag burning or other nonverbal methods of communicating.

Or consider the Supreme Court's holding that the Fourth Amendment requires the issuance of a warrant as a precondition to searching a person's home or arresting him there. E.g., *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). There is nothing in the amendment about requiring a warrant *ever*. All that the amendment says about warrants is that general warrants, and warrants that are vague or issued without probable cause, are invalid. In effect the Supreme Court rewrote the Fourth Amendment, just as it rewrote the First Amendment in the flag-burning cases, and just as it rewrote the Sherman Act, and just as today we are rewriting Title VII. We are Blackstone's heirs.

And there is more: think of how the term "cruel and unusual punishments" has morphed over time. Or how the Second Amendment, which as originally conceived and enacted was about arming the members of the state militias (now the National Guard), is today interpreted to confer gun rights on private citizens as well. Over and over again, old statutes, old constitutional provisions, are given new meaning, as explained so eloquently by Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433–34, 40 S.Ct. 382, 64 L.Ed. 641 (1920):

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.... The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. *We must consider what this country has become in deciding what that amendment has reserved* (emphasis added).

So by substituting Title VII for "that amendment" in Holmes's opinion, discrimination on grounds of "sex" in Title VII receives today a new, a broader, meaning. Nothing has changed more in the decades since the enactment of the statute than attitudes toward sex. 1964 was more than a decade before Richard Raskind underwent male-to-female sex reassignment surgery and took the name Renée Richards, becoming the first transgender celebrity; now of course transgender persons are common.

In 1964 (and indeed until the 2000s), and in some states until the Supreme Court's decision in *Obergefell v. Hodges*, ––– U.S. ––––, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), men were not allowed to marry each other, nor women allowed to marry each other. If in those days an employer fired a lesbian because he didn't like lesbians, he would have said that he was not firing her because she was a woman—he would not have fired her had she been heterosexual—and so he was not discriminating on the basis of sex as understood by the authors and ratifiers of Title VII. But today "sex" has a broader meaning than the genitalia you're born with. In *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), our court, anticipating *Obergefell* by invalidating laws in Indiana and Wisconsin that forbade same-sex marriage, discussed at length whether homosexual orientation is innate or chosen, and found that the scientific literature strongly supports the proposition that it is biological and innate, not a choice like deciding how to dress. The position of a woman discriminated against ***355** on account of being a lesbian is thus analogous to a woman's being discriminated against on account of being a woman. That woman didn't choose to be a woman; the lesbian didn't choose to be a lesbian. I don't see why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman.

But it has taken our courts and our society a considerable while to realize that sexual harassment, which has been pervasive in many workplaces (including many Capitol Hill offices and, notoriously, Fox News, among many other institutions), is a form of sex discrimination. It has taken a little longer for realization to dawn that discrimination based on a woman's failure to fulfill stereotypical gender roles is also a form of sex discrimination. And it has taken still longer, with a substantial volume of cases struggling and failing to maintain a plausible, defensible line between sex discrimination and sexual-orientation discrimination, to realize that homosexuality is nothing worse than failing to fulfill stereotypical gender roles.

It's true that even today if asked what is the sex of plaintiff Hively one would answer that she is female or that she is a woman, not that she is a lesbian. Lesbianism denotes a form of sexual or romantic attraction; it is not a physical sex identifier like masculinity or femininity. A broader understanding of the word "sex" in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains as a form of sex discrimination. That broader understanding is essential. Failure to adopt it would make the statute anachronistic, just as interpreting the Sherman Act by reference to its nineteenth-century framers' understanding of competition and monopoly would make the Sherman Act anachronistic.

We now understand that homosexual men and women (and also bisexuals, defined as having both homosexual and heterosexual orientations) are normal in the ways that count, and beyond that have made many outstanding intellectual and cultural contributions to society (think for example of Tchaikovsky, Oscar Wilde, Jane Addams, André Gide, Thomas Mann, Marlene Dietrich, Bayard Rustin, Alan Turing, Alec Guinness, Leonard Bernstein, Van Cliburn, and James Baldwin—a very partial list). We now understand that homosexuals, male and female, play an essential role, in this country at any rate, as adopters of children from foster homes—a point emphasized in our *Baskin* decision. The compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose "interpretation" of the word "sex" in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in light of (to quote Holmes) "*what this country has become*," or, in Blackstonian terminology, to embrace as a sensible deviation from the literal or original meaning of the statutory language.

I am reluctant however to base the new interpretation of discrimination on account of sex in Title VII on such cases as *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a case of sexual harassment of one man by other men, held by the Supreme Court to violate Title VII's prohibition of sex discrimination. The Court's opinion is rather evasive. I quote its critical language:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal ***356** evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] ... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id. at 79–80, 118 S.Ct. 998.

Consider the statement in the quotation that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately *the provisions of our laws* rather than the principal concerns of our legislators by which we are governed" (emphasis added). That could be thought "originalism," if by "provisions" is meant statutory language. Consider too the statement in *Oncale* that "Title VII prohibits 'discriminat[ion] ... because of ... sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." Although "of any kind" signals breadth, it is narrowed by the clause that follows: "that meets the statutory requirements." So we're back to the essential issue in this case, which is whether passage of time and concomitant change in attitudes toward homosexuality and other unconventional forms of sexual orientation can justify a fresh interpretation of the phrase "discriminat[ion] ... because of ... sex" in Title VII, which fortunately however is a half-century-old statute ripe for reinterpretation.

Another decision we should avoid in ascribing present meaning to Title VII is *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which Hively argues protects her right to associate intimately with a person of the same sex. That was a constitutional case, based on race. It outlawed state prohibitions of interracial marriage. It had nothing to do with the recently enacted Title VII.

The majority opinion in the present case states that "Ivy Tech is disadvantaging [Hively] *because she is a woman*," not a man, who wants to have romantic attachments with female partners (emphasis in original). In other words, Ivy Tech is disadvantaging her because she is a woman who is not conforming to its notions of proper behavior. That's a different type of sex discrimination from the classic cases of old in which women were erroneously (sometimes maliciously) deemed unqualified for certain jobs. That was the basis on which fire departments, for example, discriminated against women—an example of discrimination plainly forbidden by the language of Title VII.

The most tenable and straightforward ground for deciding in favor of Hively is that while in 1964 sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women, the concept of sex discrimination has since broadened in light of the recognition, which barely existed in 1964, that there are significant numbers of both men and women who have a sexual orientation that sets them apart from the heterosexual members of their genetic sex (male or female), and that while they constitute a minority their sexual orientation is not evil and does not threaten our society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase Holmes, "*We must consider* ***357** *what this country has become in deciding what that [statute] has reserved*."

The majority opinion states that Congress in 1964 "may not have realized or understood the full scope of the words it chose." This could be understood to imply that the statute forbade discrimination against homosexuals but the framers and ratifiers of the statute were not smart enough to realize that. I would prefer to say that theirs was the then-current understanding of the key word—sex. "Sex" in 1964 meant gender, not sexual orientation. What the framers and ratifiers understandably didn't understand was how attitudes toward homosexuals would change in the following half century. They shouldn't be blamed for that failure of foresight. *We* understand the words of Title VII differently not because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture. Congress in the 1960s did not foresee the sexual revolution of the 2000s. What our court announced in *Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997), is what Congress had declared in 1964: "the traditional notion of 'sex.' "

I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

Flaum, Circuit Judge, joined by Ripple, Circuit Judge, concurring.

I join Parts I and II of the majority opinion and agree that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), does not preclude Professor Hively's claim that Ivy Tech Community College engaged in unlawful employment discrimination. I find the issue before us is simply whether discriminating against an employee for being homosexual violates Title VII's prohibition against discriminating against that employee because of their sex. In my view, the answer is yes, and the statute's text commands as much.

Kimberly Hively, who is openly lesbian, taught as a part-time, adjunct professor at Ivy Tech Community College. Over the course of her tenure, Professor Hively applied for fulltime positions with the College, and it rejected each of her applications. After the College did not renew her contract, Professor Hively filed a *pro se* charge with the Equal Employment Opportunity Commission, alleging that Ivy Tech's refusal to promote her constituted discrimination "based on [her] sexual orientation." Ivy Tech denied having engaged in any discrimination and moved to dismiss Professor Hively's complaint for failing to state a claim on which relief could be granted. Throughout the course of this litigation, I understand the controlling question to have been the same: Does discrimination based on Professor Hively's "sexual orientation" constitute discrimination based on her "sex"? Under Title VII's text, it does.

Title VII provides:

> It shall be an unlawful employment practice for an employer—
>
>> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of ***358** employment, because of such individual's ... sex[.]

42 U.S.C. § 2000e-2(a)(1). To prove her case, an employee "must show that the employer actually relied on her gender[1] in making its decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Assuming the facts as pled are true, as we must at this stage of the litigation, Ivy Tech refused to promote Professor Hively because she is homosexual. Professor Hively argues that, in doing so, the College relied on her sex, because, but for her sex, she would not have been denied a promotion (*i.e.*, she would not have been denied a promotion if she were a *man* who was sexually attracted to women). She also argues that Ivy Tech's actions constituted associational discrimination: The College took issue with Professor Hively's intimate association with women and refused to promote her. There is no allegation, however, that the College refused to promote women; nor is there an allegation that it refused to promote those who associate with women. Rather, Ivy Tech's alleged animus was against Professor Hively's sexual orientation—a combination of these two factors—which the College argues is not a trait enumerated in Title VII.

Setting aside the treatment in the majority and dissenting opinions of sexual orientation as a freestanding concept, I conclude discrimination against an employee on the basis of their homosexuality is necessarily, in part, discrimination based on their sex. Fundamental to the definition of homosexuality is the sexual attraction to individuals of the "same sex." *Homosexual*, Merriam-Webster Dictionary Online, *available at* https://www.merriam-webster.com/dictionary/homosexual ("[O]f, relating to, or characterized by a tendency to direct sexual desire toward another of the *same sex*") (emphasis added) (last visited April 4, 2017); *see also Homosexual*, Black's Law Dictionary (10th ed. 2014) ("Of relating to, or characterized by sexual desire for a person of the *same sex*.") (emphasis added); *Homosexual*, Oxford English Dictionary (5th ed. 1964) ("Having a sexual propensity for persons of one's *own sex*.") (emphasis added). One cannot consider a person's homosexuality without also accounting for their sex: doing so would render "same" and "own" meaningless. As such, discriminating against that employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex*. And "sex," under Title VII, is an enumerated trait.

This raises the question: Does Title VII's text require a plaintiff to show that an employer discriminated against them *solely* "because of" an enumerated trait? Again, I turn to the text, which clearly states:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was *a motivating factor for any employment practice*, *even though other factors also motivated the practice*.

42 U.S.C. § 2000e-2(m) (emphasis added). Congress added this amendment to Title VII partially in response to the Supreme Court's plurality decision in *Hopkins*, in which the Court stated:

> [S]ince we know that the words "because of" do not mean "*solely* because of," we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate ***359** considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations.... We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

490 U.S. at 241–242, 109 S.Ct. 1775 (footnote omitted). The Court made clear that "[t]he critical inquiry ... is whether gender was *a factor* in the employment decision" when it was made. *Id.* at 241, 109 S.Ct. 1775 (emphasis added). So if discriminating against an employee because she is homosexual is equivalent to discriminating against her because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex. That is all an employee must show to successfully allege a Title VII claim.[2]

Cases analyzing employment actions based on interracial relationships provide an apt illustration. Although this Circuit has not yet addressed whether claims based on a theory of associational discrimination are cognizable under Title VII, I agree with the majority that the Second Circuit's analysis in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), is persuasive. There, the court concluded that the college had violated Title VII after firing a white basketball coach because of his marriage to a black woman. The court explained, "[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139. This comports with Title VII's text. Interracial relationships are comprised of (A) an individual of one race, and (B) another individual of a *different race*. Without considering the first individual's race, the word "different" is meaningless. Consequently, employment discrimination based on an employee's interracial relationship is, in part, tied to an enumerated trait: the employee's race. This type of discrimination is prohibited by Title VII.

The same principle applies here. Ivy Tech allegedly refused to promote Professor Hively because she was homosexual—or (A) a woman who is (B) sexually attracted to women. Thus, the College allegedly discriminated against Professor Hively, at least in part, because of her sex. I conclude that Title VII, as its text provides, does not allow this.

Sykes, Circuit Judge, with whom Bauer and Kanne, Circuit Judges, join, dissenting.

Any case heard by the full court is important. This one is momentous. All the ***360** more reason to pay careful attention to the limits on the court's role. The question before the en banc court is one of statutory interpretation. The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

In a handful of statutory contexts, Congress has vested the federal courts with authority to consider and make new rules of law in the common-law way. The Sherman Act is the archetype of the so-called "common-law statutes," but there are very few of these and Title VII is not one of them. *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95–97, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981); *id.* at 98 n.42, 101 S.Ct. 1571. So our role is interpretive only; we lack the discretion to ascribe to Title VII a meaning it did not bear at its inception. Sitting en banc permits us to overturn our own precedents, but in a statutory case, we do not sit as a common-law court free to engage in "judicial interpretive updating," as Judge Posner calls it,[1] or to do the same thing by pressing hard on tenuously related Supreme Court opinions, as the majority does.

Judicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design. The Constitution establishes a procedure for enacting and amending statutes: bicameralism and presentment. *See* U.S. Const. art. I, § 7. Needless to say, statutory amendments brought to you by the judiciary do not pass through this process. That is why a textualist decision method matters: When we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours. The Constitution assigns the power to make and amend statutory law to the elected representatives of the people. However welcome today's decision might be as a policy matter, it comes at a great cost to representative self-government.

I

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual orientation is not on the list of forbidden categories of employment discrimination, ***361** and we have long and consistently held that employment decisions based on a person's sexual orientation do not classify people on the basis of sex and thus are not covered by Title VII's prohibition of discrimination "because of sex." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). This interpretation has been stable for many decades and is broadly accepted; all circuits agree that sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination. *See* Majority Op. at pp. 341–42 (collecting cases).

Today the court jettisons the prevailing interpretation and installs the polar opposite. Suddenly sexual-orientation discrimination *is* sex discrimination and thus is actionable under Title VII. What justification is offered for this radical change in a well-established, uniform interpretation of an important—indeed, transformational—statute? My colleagues take note of the Supreme Court's "absence from the debate." *Id.* at p. 342. What debate? There is no debate, at least not in the relevant sense. Our long-standing interpretation of Title VII is not an outlier. From the statute's inception to the present day, the appellate courts have unanimously and repeatedly read the statute the same way, as my colleagues must and do acknowledge. *Id.* at pp. 341–42. The Supreme Court has had no need to weigh in, and the unanimity among the courts of appeals strongly suggests that our long-settled interpretation is correct.

Of course there *is* a robust debate on this subject in our culture, media, and politics. Attitudes about gay rights have dramatically shifted in the 53 years since the Civil Rights Act was adopted. Lambda Legal's proposed new reading of Title VII—offered on behalf of plaintiff Kimberly Hively at the appellate stage of this litigation—has a strong foothold in current popular opinion.

This striking cultural change informs a case for legislative change and might eventually persuade the people's representatives to amend the statute to implement a new public policy. But it does not bear on the sole inquiry properly before the en banc court: Is the prevailing interpretation of Title VII—that discrimination on the basis of sexual orientation is different in kind and not a form of sex discrimination—*wrong as an original matter*?

A

On that question Lambda Legal has not carried its burden of legal persuasion. To be clear, I agree with my colleagues that the proposed new interpretation is not necessarily incorrect simply because no one in the 1964 Congress that adopted Title VII intended or anticipated its application to sexual-orientation discrimination. The subjective intentions of the legislators do not matter. Statutory interpretation is an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment. The objective meaning of the text is not delimited by what individual lawmakers specifically had in mind when they voted for the statute. The Supreme Court made this point clear in *Oncale* when it said that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Broadly worded ***362** statutes are regularly applied to circumstances beyond the subjective contemplation of the lawmakers who adopted the text.

That much is uncontroversial. Indeed, it derives from a foundational rule-of-law principle:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.... [Ours is a] government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (Amy Gutmann ed., 1997).

So as a matter of interpretive method, I agree with my colleagues that the scope of Title VII is not limited by the subjective intentions of the enacting legislators. Or as Chief Judge Wood puts it in her elegant opinion for the en banc majority, the expectations of the enacting legislators "cannot stand in the way of the provisions of the law that are on the books."[2] Majority Op. at p. 345.

B

That is where our agreement ends. The en banc majority rests its new interpretation of sex discrimination on a thought experiment drawn from the "tried-and-true" comparative method of proof often used by plaintiffs in discrimination cases. *Id.* at p. 345. The majority also invokes *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), the Supreme Court's historic decision striking down Virginia's miscegenation laws under the Fourteenth Amendment's Equal Protection Clause, as well as cases involving sex stereotyping, most prominently *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

But the analysis must begin with the statutory text; it largely ends there too. Is it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination "because of sex" also banned discrimination because of sexual orientation? The answer is no, of course not.

"It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, ––– U.S. ––––, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014) (internal quotation marks omitted). The word "contemporary" as used here means *contemporaneous with the statute's enactment*, not "contemporary" as in "now." *Id.* at 876–77; *see also Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016) (citing *Sandifer* and explaining that statutory interpretation "look[s] to the meaning of the word[s] at the time the statute was enacted"). The interpretive inquiry looks to the original public meaning of the statutory text.

Title VII does not define discrimination "because of sex." In common, ordinary usage in 1964—and now, for that matter—the word "sex" means biologically *male* or *female*; it does not also refer to sexual orientation. *See, e.g.*, *Sex*, The American Heritage Dictionary of the English Language (1st ed. 1969) (defining "sex" as "[t]he property or quality by which organisms ***363** are classified according to their reproductive functions[;] [e]ither of two divisions, designated *male* and *female*, of this classification"); *Sex*, New Oxford American Dictionary (3d ed. 2010) (defining "sex" as "either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions"); *Sex*, The American Heritage Desk Dictionary (5th ed. 2013) (defining "sex" as "[e]ither of the two divisions, female and male, by which most organisms are classified on the basis of their reproductive organs and functions[;] [t]he condition or character of being female or male").

To a fluent speaker of the English language—then and now—the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation."[3] The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. Contrary to the majority's vivid rhetorical claim, it does not take "considerable calisthenics" to separate the two. Majority Op. at p. 350. The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination "because of sex" is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here.

Accordingly, as we said more than three decades ago in *Ulane*, Title VII's prohibition of discrimination "because of sex" makes it unlawful for an employer "to discriminate against women because they are women and against men because they are men." 742 F.2d at 1085. Because sexual-orientation discrimination is not synonymous with sex discrimination in ordinary usage, Title VII does not prohibit sexual-orientation discrimination. Not expressly (obviously), and not by fair implication either.

C

This commonsense understanding is confirmed by the language Congress uses when it *does* legislate against sexual-orientation discrimination. For example, the Violence Against Women Act prohibits funded programs and activities from discriminating "on the basis of actual or perceived race, color, religion, national origin, *sex*, gender identity, ... *sexual orientation*, or disability." 42 U.S.C. § 13925(b)(13)(A) (emphases added). If sex discrimination is commonly understood to encompass sexual-orientation discrimination, then listing the two categories separately, as this statute does, is needless surplusage. The federal Hate Crimes Act is another example. It imposes a heightened punishment for causing or attempting to cause bodily injury "to any person, because of the actual or perceived religion, national origin, *gender*, *sexual orientation*, gender identity, or disability of any person." 18 U.S.C. § 249(a)(2)(A) (emphases added).[4]

***364** Other examples can be found elsewhere in the U.S. Code. *See, e.g.*, 42 U.S.C. § 3716(a)(1)(C) (providing federal assistance to state and local authorities for the investigation and prosecution of certain crimes "motivated by prejudice based on the actual or perceived race, color, religion, national origin, *gender*, *sexual orientation*, gender identity, or disability of the victim") (emphases added); 20 U.S.C. § 1092(f)(1)(F)(ii) (requiring colleges and universities to collect and report information regarding crimes on campus, including "crimes involving bodily injury to any person, in which the victim is intentionally selected because of the actual or perceived race, *gender*, religion, national origin, *sexual orientation*, gender identity, ethnicity, or disability of the victim") (emphases added); 42 U.S.C. 294e-1(b)(2) (requiring applicants for a federal mental-health education-grant program to demonstrate participation "of individuals and groups from different racial, ethnic, cultural, geographic, religious, linguistic, and class backgrounds, and *different genders* and *sexual orientations*") (emphases added).

State and local antidiscrimination laws likewise distinguish between sex discrimination and sexual-orientation discrimination by listing them separately as distinct forms of unlawful discrimination. *See, e.g.*, Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/1-103(Q) (defining "unlawful discrimination" as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, *sex*, marital status, order of protection status, disability, military status, *sexual orientation*, pregnancy, or unfavorable discharge from military service") (emphases added); Iowa Civil Rights Act, Iowa Code § 216.7(1)(a) (prohibiting discrimination in public accommodations "because of race, creed, color, *sex*, *sexual orientation*, gender identity, national origin, religion, or disability") (emphases added); Wis. Stat. § 106.52(3) (using similar language to prohibit discrimination in public accommodations); Minnesota Human Rights Act, Minn.

Stat. § 363A.11(1)(a)(1) (same); Or. Rev. Stat. § 659A.403(1) (same); Washington Civil Rights Act, Wash. Rev. Code § 49.60.030(1) (declaring as a civil right the "right to be free from discrimination because of race, creed, color, national origin, *sex*, honorably discharged veteran or military status, *sexual orientation*, or the presence of any ... disability") (emphases added); D.C. Code § 2-1402.31(a) (forbidding certain forms of discrimination "based on the actual or perceived: race, color, religion, national origin, *sex*, age, ... [or] *sexual orientation* ... of any individual") (emphases added); Bloomington, Ind., Code § 2.21.030(10) (defining a "discriminatory practice" as "the exclusion of a person by another person from equal opportunities because of race, religion, color, *sex*, national origin, ancestry, *sexual orientation*, gender identity, disability, housing status or status as a veteran") (emphases added); Indianapolis, Ind., Code § 581-101 (defining prohibited "discriminatory practices" to include denying employment and educational opportunity, access to public accommodations, and acquisition of real estate "based on race, color, religion, ancestry, age, national origin, disability, *sex*, *sexual orientation*, gender identity, or United States military service veteran status") (emphases added).

I could go on, but the point has been made. This uniformity of usage is powerful objective evidence that sexual-orientation discrimination is broadly recognized as an ***365** independent category of discrimination and is *not* synonymous with sex discrimination.

II

My colleagues in the majority superficially acknowledge *Ulane*'s "truism" that sex discrimination is discrimination based on a person's biological sex. Majority Op. at p. 341. As they see it, however, even if sex discrimination is understood in the ordinary way, sexual-orientation discrimination *is* sex discrimination because "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." *Id.* at p. 351.

Not true. An employer who refuses to hire homosexuals is not drawing a line based on the job applicant's sex. He is not excluding gay men because they are men and lesbians because they are women. His discriminatory motivation is independent of and unrelated to the applicant's sex. Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics. Simply put, sexual-orientation discrimination doesn't classify people by sex; it doesn't draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women.

The majority opinion merges these two distinct categories of discrimination by misapplying the comparative method of proof often used by plaintiffs in discrimination cases. As a threshold matter, it's important to note that as used here, the comparative method is not serving its usual and intended purpose; it is not invoked as a *method of proof* or a technique for evaluating the sufficiency of the plaintiff's allegations or evidence. That's because Hively has not, of course, raised a claim of sex discrimination. She does not allege that Ivy Tech refused to promote her to full-time professor and canceled her part-time teaching contract *because of her sex*; she does not claim that she was treated differently than a similarly situated man. She alleges that Ivy Tech took these adverse actions against her because she is a lesbian, *not* because she is a woman. So the majority's discussion of what Hively "alleges," *id.* at p. 345, followed by an incantation of the Rule 12(b)(6) standard for evaluating the sufficiency of the plaintiff's factual allegations ("[w]e take the facts in the light most favorable to her"), *id.* is seriously misleading.

This appeal has nothing to do with Hively's factual allegations. We have only a legal question about the meaning of Title VII. Lambda Legal is advancing a creative new *legal* argument for *reinterpreting* Title VII, deploying the comparative method not as a method of proof (its normal and intended function) but as a thought experiment with the end of imbuing the statute with a new meaning that it did not bear at its inception.

This highlights a deeper problem with the court's comparative analysis. The purpose of the comparative method is to isolate whether a statutorily forbidden motivation is at work *as a factual matter*—in a sex-discrimination case, to isolate whether the defendant employer took a particular adverse employment action against a particular female employee because she is a woman or against a particular male employee because he is a man. Title VII's "intentional discrimination provision prohibits certain *motives*" for taking adverse job actions, *EEOC v. Abercrombie & Fitch Stores, Inc.*, ––– U.S. ––––, 135 S.Ct. 2028, 2033, 192 L.Ed.2d 35 (2015), so as a required factual element of the claim, the plaintiff must prove that the employer actually acted with the intent or motive to discriminate on the basis of a statutorily ***366** protected trait when he made the employment decision in question, *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)).

The comparative method of proof is a useful technique for uncovering the employer's real motive for taking the challenged action. Comparing the plaintiff to a similarly situated employee of the opposite sex can help the fact finder determine whether the employer was actually motivated by the plaintiff's sex or acted for some other reason. It's a device for ferreting out a prohibited discriminatory motive as an actual cause of the adverse employment action; it does this by controlling for other possible motives. If a female plaintiff can point to a male employee who is identical to her in every material respect and was treated more favorably, then the fact finder can draw an inference that the unfavorable treatment was actually motivated by the plaintiff's sex.

Here the majority is not using the comparative method to isolate whether Ivy Tech was *actually* motivated by Hively's sex when it refused to promote her to full-time professor and canceled her part-time teaching contract. To repeat, Hively does not make that allegation. Her factual claim is that Ivy Tech refused to promote her and canceled her contract because she is a lesbian. The only question for us is whether *that* claim—her *real* claim—is actionable under Title VII *as a matter of law*. That's a pure question of statutory interpretation.

But the comparative method of proof is an evidentiary test; it is not an interpretive tool. It tells us *nothing* about the meaning or scope of Title VII. In ordinary English usage, sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination. That's the plain meaning of Title VII's text as originally understood. An *evidentiary test* like the comparative method of proof has no work to do here and is utterly out of place.

Moreover, the majority distorts the comparative method by opportunistically framing the comparison. If the aim is to isolate actual discriminatory motive based on the plaintiff's sex, then we must hold everything constant *except* the plaintiff's sex. But my colleagues load the dice by changing *two* variables—the plaintiff's sex *and* sexual orientation—to arrive at the hypothetical comparator. The court's reasoning essentially distills to this: If we compare Hively, a homosexual woman, to hypothetical Professor A, a heterosexual man, we can see that Ivy Tech is actually disadvantaging Hively because she is a woman. Majority Op. at pp. 345–46.

As a test for isolating an *actual* case of *sex* discrimination, that way of framing the comparative question doesn't do the trick. Simply put, the comparison can't do its job of *ruling in* sex discrimination as the actual reason for the employer's decision (by *ruling out* other possible motivations) if we're not scrupulous about holding *everything* constant except the plaintiff's sex. That includes the plaintiff's sexual orientation. If we're really serious about trying to isolate whether sex discrimination played a role in a specific employment decision, the test must exclude other factors that may have been decisive.

For the comparison to be valid as a test for the role of sex discrimination in this employment decision, the proper comparison is to ask how Ivy Tech treated qualified gay men. If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination. If, on the other hand, an employer hires only heterosexual men and women and rejects all homosexual ***367** applicants, then no inference of sex discrimination is possible, though we could perhaps draw an inference of sexual-orientation discrimination.

But of course my colleagues are not actually trying to isolate sex discrimination as the *real* motivation for Ivy Tech's decision. They are not, that is, testing for a *true* case of sex discrimination. They are using the comparative method as a rhetorical device to conjure an entirely new understanding of the term "sex discrimination" for use in the Title VII context, one that denies the reality that sex and sexual orientation are different traits and that classifying people by sexual orientation is not the same as classifying them by sex. This is artifice, not interpretation.

My colleagues insist that "[t]he virtue of looking at comparators ... is that this process sheds light on the interpretive question raised by Hively's case: is sexual-orientation discrimination a form of sex discrimination, given the way in which the Supreme Court has interpreted the word 'sex' in the statute?" Majority Op. at p. 347. I have two responses. First, at the risk of repeating myself, the point of "looking at comparators" in Title VII cases is to see if the evidentiary record permits a *factual* inference of *actual* discriminatory motive; the comparative method has no *interpretive* function. Second, the Supreme Court has never deployed an abstract version of the comparative method of proof to illuminate the original meaning or scope of Title VII, nor has it even *hinted* that such an abstraction is a proper interpretive tool. For good reason. Ordinary people do not use abstract thought experiments to ascribe meaning to texts.[5]

III

A

The majority also draws on *Loving*, the Supreme Court's iconic decision invalidating Virginia's miscegenation statutes on equal-protection grounds. This case is not a variant of *Loving*. Miscegenation laws plainly employ invidious racial classifications; they are inherently racially discriminatory. In contrast, sexual-orientation discrimination springs from a wholly different kind of bias than sex discrimination. The two forms of discrimination classify people based on different traits and thus are not the same.

In *Loving*, Virginia tried to defend its antimiscegenation regime by insisting that miscegenation statutes do not actually discriminate based on race because both the black and white spouses in an interracial ***368** marriage are punished equally. 388 U.S. at 8, 87 S.Ct. 1817 ("[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications[,] do not constitute an invidious discrimination based upon race."). The Supreme Court made short work of that specious argument: "[W]e deal [here] with statutes containing racial classifications, and the fact of equal application does not immunize the statute[s] from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9, 87 S.Ct. 1817.

The Court went on to explain that the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Id.* at 10, 87 S.Ct. 1817. The Court continued with this: "There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races." *Id.* at 11, 87 S.Ct. 1817. After explaining that the "[p]enalties for miscegenation arose as an incident to slavery," *id.* at 6, 87 S.Ct. 1817, and are "designed to maintain White Supremacy,"[6] *id.* at 11, 87 S.Ct. 1817, the Court announced its holding: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause," *id.* at 12, 87 S.Ct. 1817.

As these passages from the Court's opinion make clear, *Loving* rests on the inescapable truth that miscegenation laws are inherently racist. They are premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy. Sexual-orientation discrimination, on the other hand, is not inherently *sexist*. No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex. In short, *Loving* neither compels nor supports the majority's decision to upend the long-settled understanding that sex discrimination and sexual-orientation discrimination are distinct.

For the same reason, the majority's reliance on *Parr*, *Holcomb*, and *Drake*, which translated *Loving* to the Title VII context, is entirely inapt. An employer who refuses to hire or fires an employee based on his interracial marriage is obviously drawing invidious racial classifications akin to those inherent in Virginia's miscegenation laws. *Loving*'s equal-protection holding extends to Title VII racial-discrimination claims because those claims share the same contextual foundation. They arise in a nation whose original sin is slavery, where some states sought to perpetuate white supremacy as recently as a half century ago, and where the vestiges of this iniquitous history persist in our workplaces and in other institutions of our society. The Equal Protection Clause and Title VII's prohibition of racial discrimination in the workplace *both* operate to curtail the evil of racism inherent in antimiscegenation. That explains why *Loving* applies to Title VII racial-discrimination claims but is not a ***369** warrant for reading sexual-orientation discrimination into the statute.

B

The majority also relies on cases involving sex stereotyping, most notably the Supreme Court's decision in *Price Waterhouse v. Hopkins*. More specifically, my colleagues conclude that a claim of sexual-orientation discrimination is indistinguishable from a claim involving sex stereotyping. Majority Op. at pp. 345–47. I disagree. Nothing in *Hopkins* altered the traditional understanding that sexual-orientation discrimination is a distinct type of discrimination and is not synonymous with sex discrimination.

As a preliminary matter, neither *Hopkins* nor any other decision of the Supreme Court establishes an independent cause of action for, or "doctrine" or "theory" of, "sex stereotyping."[7] *Hopkins* held only that the presence of sex stereotyping by an employer "can certainly be *evidence*" of sex discrimination; to prove her case, the plaintiff must always prove that "the employer *actually* relied on her gender in making its decision." 490 U.S. at 251, 109 S.Ct. 1775 (second emphasis added).

It's also often overlooked that the lead opinion in *Hopkins* was a four-Justice plurality, not a majority opinion. *Id.* at 231, 109 S.Ct. 1775. Two Justices concurred in the judgment only, and they said nothing about sex stereotyping as a "theory" of sex discrimination. *Id.* at 258–61, 109 S.Ct. 1775 (White, J., concurring in the judgment); *id.* at 261–79, 109 S.Ct. 1775 (O'Connor, J., concurring in the judgment). Here's another point that's often missed: Although the facts in *Hopkins* involved sex stereotyping, the actual legal issue dealt with the allocation of burdens of proof on the element of causation in a mixed-motives Title VII case. The plurality opinion made that clear in its very first paragraph: "We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives." *Id.* at 232, 109 S.Ct. 1775. The plurality devised a burden-shifting approach for use in mixed-motive cases. *Id.* at 258, 109 S.Ct. 1775. Justices White and O'Connor concurred in the judgment, each filing a separate opinion agreeing with the burden-shifting method but taking issue with the plurality's discussion of the substantive standard of causation. *Id.* at 258–61, 109 S.Ct. 1775 (White, J., concurring in the judgment); *id.* at 261–79, 109 S.Ct. 1775 (O'Connor, J., concurring in the judgment).

Only a very short passage in the very long plurality opinion actually addresses the subject of sex stereotyping. The plurality simply accepted the district court's factual finding that sex stereotyping played a role in Price Waterhouse's decision to place Ann Hopkins's bid for partnership on hold. *Id.* at 236–37, 109 S.Ct. 1775 (describing the trial judge's factual findings); *see also id.* at 251, 109 S.Ct. 1775 ("As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work."). Regarding the *legal* significance of sex stereotyping as evidence of sex discrimination, the plurality had only this to say:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its ***370** reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. 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.
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> ....
>
> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 [98 S.Ct. 1370, 55 L.Ed.2d 657] (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22; out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Id. at 250–51, 109 S.Ct. 1775 (footnote omitted). Nothing in this passage casts any doubt on the settled, long-understood distinction between sex discrimination and sexual-orientation discrimination.[8]

To put the matter plainly, heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation *regardless of their sex*. Sexual-orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all.

The point is easy to see if we take the question posed by the plurality opinion in *Hopkins* and map it onto this case. Hively suspects that the real reason Ivy Tech rejected her repeated applications for promotion is her sexual orientation. Assume for the moment that her suspicion is correct. If we asked Ivy Tech "at the moment of the decision what its reasons were and if we received a truthful response," *id.* at 250, 109 S.Ct. 1775, would it be reasonable to expect Ivy Tech to respond that it rejected her applications because she is a woman? No. If Ivy Tech responded truthfully, it would confess that its decisions were based on Hively's sexual orientation, not her sex.

***371** So it's a serious mistake to think that *Hopkins* either supports or requires a new interpretation of Title VII that equates sexual-orientation discrimination with sex discrimination. To the contrary, *Hopkins* does not even gesture in that direction. If the lower-court decisions involving "sex stereotyping" are a confusing hodgepodge—and I agree that they are—the confusion stems from an unfortunate tendency to read *Hopkins* for more than it's worth. That's not a reason to embed the confusion in circuit law.

C

Neither does *Oncale* compel or support today's decision. *Oncale* held only that same-sex sexual harassment may, in an appropriate case, support a claim under Title VII *provided* that it "meets the statutory requirements." 523 U.S. at 79–80, 118 S.Ct. 998. The Court reiterated that in *all* sex-discrimination cases, including sexual-harassment cases, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80, 118 S.Ct. 998 (quotation marks omitted).

The plaintiff in *Oncale*, a male roustabout on an oil platform in the Gulf of Mexico, alleged that his male coworkers regularly subjected him to "sex-related, humiliating" verbal and physical harassment. *Id.* at 77, 118 S.Ct. 998. The lower courts dismissed his claim based on an approach that categorically rejected same-sex harassment cases under Title VII. The Supreme Court reversed, holding that "nothing in Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Id.* at 79, 118 S.Ct. 998.

To sketch the circumstances in which evidence of same-sex harassment might support a claim of sex discrimination, the Court first explained how evidence of workplace harassment permits an inference of sex discrimination as a general matter. The Court explained, for example, that in an opposite-sex harassment case involving "explicit or implicit proposals of sexual activity," an inference of sex discrimination is easy to draw because "it is reasonable to assume those proposals would not have been made to someone of the same sex." *Id.* at 80, 118 S.Ct. 998. But the same is not true in a case involving same-sex harassment *unless* the evidence shows that the harasser is homosexual; only then would it be reasonable to infer that the victim was targeted because of his sex.[9] *Id.*

The Court offered two other examples of conduct that might support an inference of sex discrimination in a same-sex harassment case. The first is when a harasser uses "such sex-specific and derogatory terms" as to make it clear that he "is motivated by general hostility to the presence of [members of the same sex] in the workplace." *Id.* The second is when the plaintiff offers "direct comparative evidence ***372** about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* at 80–81, 118 S.Ct. 998. Because the record was undeveloped on these points, the Court remanded for further proceedings. *Id.* at 82, 118 S.Ct. 998.

In short, in authorizing claims of same-sex harassment as a theoretical matter, the Court carefully tethered *all* sexual-harassment claims to the statutory requirement that the plaintiff prove discrimination "because of sex." Nothing in *Oncale* eroded the distinction between sex discrimination and sexual-orientation discrimination or opened the door to a new interpretation of Title VII.

Oncale was not a revolutionary decision. In contrast, today's decision by the en banc court works a profound transformation of Title VII by any measure.

D

The majority also finds support for its decision in "the backdrop of the Supreme Court's decisions ... in the area of broader discrimination on the basis of sexual orientation," citing *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003);

United States v. Windsor, ––– U.S. ––––, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013); and *Obergefell v. Hodges*, ––– U.S. ––––, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). Majority Op. at pp. 349–50.

But the majority's position is actually irreconcilable with these cases. First, *Lawrence* was decided solely under the Due Process Clause; it was not an equal-protection case. 539 U.S. at 564, 123 S.Ct. 2472. In the other cases, far from collapsing the well-understood distinction between sex discrimination and sexual-orientation discrimination, the Court actually preserved it. The Court assigned these two distinct forms of discrimination to different analytical categories for purposes of equal-protection scrutiny. If sex discrimination and sexual-orientation discrimination were really one and the same, then the Court would have applied the intermediate standard of scrutiny that governs judicial review of laws that classify people by sex. *See United States v. Virginia*, 518 U.S. 515, 531, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). It did not do so.

E

Finally, drawing especially on *Obergefell*, my colleagues worry that adhering to the long-settled interpretation of Title VII "creates 'a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.' " Majority Op. at p. 342 (quoting *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 714 (7th Cir. 2016)). The concern is understandable, but my colleagues conflate the distinction between state action, which is subject to constitutional limits, and private action, which is regulated by statute. The Due Process and Equal Protection Clauses are constitutional restraints on government. Title VII is a statutory restraint on employers. The legal regimes differ accordingly. Any discrepancy is a matter for legislative, not judicial, correction.

* * *

If Kimberly Hively was denied a job because of her sexual orientation, she was treated unjustly. But Title VII does not provide a remedy for this kind of discrimination. The argument that it *should* must be addressed to Congress.

IV

This brings me to my last point, which concerns the principle of *stare decisis*. The general rule is that "*stare decisis* ... has ***373** 'special force' " in the domain of statutory interpretation "for 'Congress remains free to alter what we have done.' " *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989)). Special force or no, the foundational assumptions of the rule of law and due regard for the prudential virtues of stability, reliability, and predictability should inspire some caution here. A decision to upend settled precedent "demands special justification." *Michigan v. Bay Mills Indian Cmty.*, ––– U.S. ––––, 134 S.Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)). That "special justification" must *at least* begin with a convincing case that the challenged precedent is gravely wrong.

As I've explained, a convincing case has not been made. If more is needed, consider for a moment the next step in this litigation. When this case returns to the district court, it will not matter whether the evidence shows that Ivy Tech rejected Hively in favor of male applicants, female applicants, or a combination of men and women. If the facts show that Ivy Tech hired heterosexuals for the six full-time positions, then the community college may be found liable for discriminating against Hively *because of her sex*.[10] That will be so even if *all six positions were filled by women*. Try explaining that to a jury.

* * *

In the end, today's decision must be recognized for what it is: a new form of Title VII liability based on *imputed* motive, not *actual* motive. The majority's new rule—that sexual-orientation discrimination = sex discrimination—imputes to the employer a motive that is not, and need not be, present in fact. Liability under this new "theory" of sex discrimination does not require the jury to find that the employer's decision was *actually* motivated by the plaintiff's sex. That's a necessary predicate for liability in all other sex-discrimination cases, but not here. Discrimination "because of sex" need not be found as a fact; instead, the court will impute the statutorily forbidden motive to the employer if the plaintiff proves discrimination "because of sexual orientation."

* * *

This brings me back to where I started. The court's new liability rule is entirely judge-made; it does not derive from the text of Title VII in any meaningful sense. The court has arrogated to itself the power to create a new protected category under Title VII. Common-law liability rules may judicially evolve in this way,[11] but statutory law is fundamentally different. Our constitutional structure requires us to respect the difference.

It's understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act. Legislative change is arduous and can be slow to come. But we're not authorized to amend Title VII by interpretation. The ordinary, reasonable, and fair meaning of sex discrimination as that term is used in Title VII does not include discrimination based on sexual orientation, a wholly different kind of discrimination. Because Title VII does not by its terms prohibit sexual-orientation ***374** discrimination, Hively's case was properly dismissed. I respectfully dissent.

All Citations

853 F.3d 339, 130 Fair Empl.Prac.Cas. (BNA) 1, 101 Empl. Prac. Dec. P 45,770, 342 Ed. Law Rep. 40

Footnotes

1 For present purposes, we have no need to decide whether discrimination on the basis of "gender" is for legal purposes the same as discrimination on the basis of "sex," which is the statutory term. Many courts, including the Supreme Court, appear to have used "sex" and "gender" synonymously. Should a case arise in which the facts require us to examine the differences (if any) between the terms, we will do so then.

2 The dissent correctly points out that *Hopkins* was a plurality opinion, but that fact is of no moment in understanding what we are to take from the plurality's discussion of sex stereotyping. On the critical issue—whether the conduct about which Hopkins complained could support a finding of sex discrimination for purposes of Title VII—at least six justices were in agreement that the answer was yes. Justice Brennan's opinion for the four-person plurality was clear: "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." 490 U.S. at 250, 109 S.Ct. 1775. Justice White, concurring in the judgment, stated that he agreed that an unlawful motive was a substantial factor in the adverse employment action Hopkins suffered. *Id.* at 259, 109 S.Ct. 1775. Justice O'Connor, also concurring in the judgment, "agree[d] with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender." *Id.* at 261, 109 S.Ct. 1775. Justice Kennedy's dissenting opinion did not need to dwell on this point, because he found that Hopkins could not prove causation.

3 The dissent questions in its conclusion what a jury ought to do in the hypothetical case in which Ivy Tech hired six heterosexual women for the full-time positions. But, as we note, the Supreme Court has made it clear that a policy need not affect *every* woman to constitute sex discrimination. What if Hively had been heterosexual, too, but did not get the job because she failed to wear high heels, lipstick, or perfume like the other candidates? A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.

4 The dissent seems to imply that the discrimination in *Loving* was problematic because the miscegenation laws were designed to maintain the supremacy of one race—and by extension that sexual orientation discrimination is not a problem because it is not designed to maintain the supremacy of one sex. But while this was certainly a repugnant feature of Virginia's law, it was not the basis of the holding in *Loving*. Rather, the Court found the racial classifications to be at odds with the Constitution, "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11 n.11, 87 S.Ct. 1817.

5 The dissent contends that a fluent speaker of the English language would understand that "sex" does not include the concept of "sexual orientation," and this ought to demonstrate that the two are easily distinguishable and not the same. But this again assumes the answer to the question before us: how to interpret the statute in light of the guidance the Supreme Court has provided. The dissent is correct that the term "sexual orientation" was not defined in the dictionary around the time of Title VII's enactment, but neither was the term "sexual harassment"—a concept that, although it can be distinguished from "sex," has at least since 1986 been included by the Supreme Court under the umbrella of sex discrimination. See Webster's New Collegiate Dictionary (7th ed. 1963) (lacking an entry for "sexual harassment" or "sexual orientation"); The American Heritage Dictionary of the English Language (1st ed. 1969) (same). The dissent postulates that it is implausible that a reasonable person in 1964 could have understood discrimination based on sex to include sexual orientation discrimination. But that reasonable person similarly may not have understood it to include sexual harassment (and, by extension, not male-on-male sexual harassment). As *Oncale* said, we are concerned with the provisions of the law, not the principal concerns of those who wrote it. 523 U.S. at 80, 118 S.Ct. 998. The approach we have taken does just that.

6 The dissent criticizes us for this approach, but we find nothing surprising in the fact that lower courts may have been wrong for many years in how they understood the rule of law supplied by a statute or the Constitution. Exactly this has happened before. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), the Supreme Court disapproved a rule of statutory interpretation that all eleven regional courts of appeals had followed—most for over three decades. When the Court decided *Taniguchi v. Kan Pacific Saipan, Ltd.,* 566 U.S. 560, 132 S.Ct. 1997, 182 L.Ed.2d 903 (2012) (deciding that the provision for compensating interpreters in 28 U.S.C. § 1920(6) does not include costs for document translation), it rejected the views of at least six circuits with regard to the proper reading of the statute. 566 U.S. at 577, 132 S.Ct. 1997 (Ginsburg, J., dissenting). See also *Milner v. Dep't of the Navy*, 562 U.S. 562, 585, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011) (Breyer, J., dissenting) (noting that the Court's decision rejected the interpretation of Exemption 2 to the Freedom of Information Act that had been consistently followed or favorably cited by every court of appeals to have considered the matter over a 30-year period). It would be more controversial to assert that this is one of the rare statutes left for common-law development, as our concurring colleague does. In any event, that common-law development, both for the antitrust laws and any other candidates, is the responsibility of the Supreme Court. See *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (recognizing that only the Supreme Court could jettison the *per se* rule against maximum pricefixing). All we can do is what we have done here: apply the relevant Supreme Court decisions to the statute to the best of our ability.

7 Indeed, in contrast to cases in which a religious employer may be exempted from Title VII liability because they have a bona fide need to discriminate on the basis of a protected characteristic, we note that Ivy Tech's position does not seem to reflect any fundamental desire to be permitted to engage in discrimination on the basis of sexual orientation. To the contrary, Ivy Tech maintains that it has its own internal policy prohibiting such discrimination. It could repeal that policy tomorrow, however, and so we will not look behind its decision to contest Hively's claim.

1 As the majority notes, the Supreme Court has often treated "gender" and "sex" as synonymous. I agree that there is no need to inquire whether they are the same for legal purposes in this case.

2 The foregoing analysis should obtain even if an employer allegedly discriminates against all homosexual employees. In that case, the employer's discrimination across sexes does not demonstrate that sex is irrelevant, but rather that each individual has a plausible sex-based discrimination claim. *See City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 708, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) ("[Title VII] makes it unlawful 'to discriminate against any *individual* ... because of such *individual's* ... sex[.]' The statute's focus on the individual is unambiguous." (quoting 42 U.S.C. § 2000e-2(a)(1))). When confronting claims that are inherently based in part on sex, such as discrimination against homosexuals, each employee's claim satisfies Title VII on its face, no matter the sex of any other employee who experienced discrimination.

1 He describes this method of statutory interpretation throughout his opinion and gives it the name "judicial interpretive updating" on page 353.

2 Like my colleagues, I too decline to defer to the EEOC's decision in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). Majority Op. at pp. 344. This is not a case about agency deference.

3 The term "sexual orientation" does not appear in dictionaries at or around the time of Title VII's enactment. According to the current definition, it is not synonymous with "sex." *Sexual Orientation*, Oxford English Dictionary (2009 ed.) ("Originally: (the process of) orientation with respect to a sexual goal, potential mate, partner, etc. Later chiefly: a person's sexual identity in relation to the gender to whom he or she is usually attracted; (broadly) the fact of being heterosexual, bisexual, or homosexual.").

4 A different subsection of the hate-crimes law imposes the same heightened penalty for causing or attempting to cause bodily injury because of a person's race. 18 U.S.C. § 249(a)(1).

5 Judge Flaum's concurrence offers a somewhat different way to think about sexual-orientation discrimination: "Fundamental to the definition of homosexuality is the sexual attraction to individuals of the 'same sex.' ... One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' ... meaningless." Flaum, J., concurring, at p. 358. But an employer who categorically won't hire homosexuals is not "accounting for" a job applicant's sex in the sense meant by antidiscrimination law; a hiring policy of "no homosexuals need apply" is gender blind. The next sentence in the analysis likewise doesn't follow: "As such, discriminating against that employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex*." *Id.* Part (B) is true; part (A) is not. An employer who refuses to hire a lesbian applicant because she is a lesbian only "accounts for" her sex in the limited sense that he notices she is a woman. But that's not the object of the employer's discriminatory intent, not even in part. Her sex isn't a motivating factor for the employer's decision; the employer objects only to her sexual orientation. This attempt to conceptually split homosexuality into two parts—a person's sex and his or her sexual attraction to persons of the same sex—doesn't make sexual-orientation discrimination actionable as sex discrimination.

6 Virginia's highest court had identified what it said were the state's "legitimate purposes" for its miscegenation laws: " 'to preserve the racial integrity of [the state's] citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride.' " *Loving v. Virginia*, 388 U.S. 1, 7, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (quoting *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, 756 (1955)). This, the Supreme Court said, was "obviously an endorsement of the doctrine of White Supremacy." *Id.*

7 Some lower courts use the phrase "gender nonconformity" interchangeably with "sex stereotyping," but the Supreme Court has never used that term.

8 The two cases cited in this passage of the plurality opinion were straightforward cases of sex discrimination. *Manhart* was a challenge to an employer's policy that required female employees to make larger contributions to the employee pension fund than male employees. *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 704–06, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). The Court noted that the employer's policy was not based on sex stereotypes but rested on actuarial generalizations that "the parties accept as unquestionably true: Women, as a class, do live longer than men." *Id.* at 707, 98 S.Ct. 1370. Still, the Court held that requiring women to pay more into the fund than men was a plain case of sex discrimination. *Id.* at 707–10, 98 S.Ct. 1370. *Sprogis* was a challenge to an airline's rule that female flight attendants, but not male flight attendants, must be unmarried. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1196 (7th Cir. 1971). This too was a straightforward case of sex discrimination. *Id.* at 1198 (holding that "it is clear that United has contravened [Title VII] by applying one standard for men and one for women").

9 Note that the Court's focus is on the sexual orientation of the harasser, *not* the sexual orientation or attributes of the harassment victim. Some lower courts have missed this important point and mistakenly allowed same-sex harassment cases to proceed to the extent that the victim alleges he suffered harassment based on his supposed "gay behaviors." This has predictably drawn an objection that the law should not distinguish between claims of discrimination for "acting gay" and claims of discrimination for "being gay." Indeed it should not. On a proper understanding of the limits of *Hopkins* and *Oncale*, neither claim is actionable under Title VII. *Both* are claims of sexual-orientation discrimination, which is not covered by the statute.

10 Unless, of course, Ivy Tech can show that Hively was less qualified than the applicants who were hired.

11 Though the state supreme courts, not the federal courts, are empowered to adjust common-law rights and remedies.

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KeyCite history available

6 F.4th 531
United States Court of Appeals, Third Circuit.

Jeffrey KENGERSKI, Appellant
v.
Orlando HARPER; County of Allegheny

No. 20-1307
|
Argued on December 15, 2020
|
(Opinion filed July 29, 2021)

Synopsis

Background: White county employee brought Title VII action against county employer, alleging that he was terminated in retaliation for reporting superior's racist comments about employee's biracial relative and other racist text messages. The United States District Court for the Western District of Pennsylvania, J. Nicholas Ranjan, J., 435 F.Supp.3d 671, granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, Ambro, Circuit Judge, held that:

fact issues barred summary judgment;

Court of Appeals would address issue raised only by amici as to whether employee could be protected from retaliation under Title VII for reporting hostile work environment because of his association with persons of another race; and

as matter of apparent first impression, employees could not be discriminated against in violation of Title VII because of their interracial relationships with distant relatives such as a grand-niece.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***533** On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civil Action No. 2-17-cv-01048), District Judge: Honorable J. Nicholas Ranjan

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Before: AMBRO, BIBAS and ROTH, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

***534** Jeffrey Kengerski, a Captain at the Allegheny County Jail, made a written complaint to the jail Warden alleging that a colleague had called his biracial grand-niece a "monkey" and then sent him a series of text messages with racially offensive comments about his coworkers. Seven months later, Kengerski was fired. He contends the County fired him in retaliation for reporting his colleague's behavior and sued the County under Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). The District Court granted the County's motion for summary judgment, holding that Kengerski, who is white, could not maintain a claim for Title VII retaliation.

We disagree. Title VII protects all employees from retaliation when they reasonably believe that behavior at their work violates the statute and they make a good-faith complaint. As relevant here, harassment against an employee because he associates with a person of another race, such as a family member, may violate Title VII by creating a hostile work environment. Because a reasonable person could believe that the Allegheny County Jail was a hostile work environment for Kengerski, we vacate the District Court's grant of summary judgment.

This does not mean that Kengerski will ultimately succeed on his retaliation claim, or even that it must survive summary judgment on remand. The County claims that it fired him for an unrelated reason that is unquestionably serious: mishandling a sexual harassment claim. We therefore remand to the District Court to consider whether Kengerski has sufficiently shown that he was fired because of his Title VII complaint.

I. Background

In April 2015, Kengerski submitted a written complaint to Orlando Harper, Warden of the Allegheny County Jail. This complaint was against Robyn McCall, a white female employee at the jail who had been promoted to Major in December 2014. In his complaint, Kengerski detailed an event from over a year before (early in ***535** 2014) where he was discussing his grand-niece Jaylynn in the presence of then-Captain McCall and other officers. Kengerski told them he was preparing for the possibility he and his wife would take Jaylynn under their care because her mother was unable to maintain her parental responsibilities. McCall then purportedly interjected: "[W]hat kind of name is Jaylynn? Is she black?" J.A. at 236. After learning that Jaylynn was biracial, McCall allegedly responded that Kengerski "will be that guy in the store with a little monkey on his hip like Sam Pastor [another jail employee with a biracial child]." *Id.* Kengerski "asked her not to speak like that about [his] situation" and then left the room. *Id.*

Kengerski's complaint also mentioned and attached racially offensive text messages that McCall sent to him.[1] The District Court reviewed these messages and concluded that

> [t]hey were sent between February and June 2014 and depict unflattering photographs of African-Americans and Asians, often repeating offensive stereotypes. For instance, several of the photographs depict overweight African-American women, and one of the photographs depicts an Asian woman with enlarged teeth. Some of the photographs have captions comparing them to African-American and Asian employees at the jail.

Kengerski v. Allegheny Cnty., 435 F. Supp. 3d 671, 674 (W.D. Pa. 2020). After reporting McCall's comment and text messages, Kengerski's complaint asserts that he has "been harassed" and "feel[s] [he is] in a hostile environment and will be disciplined, harassed and possibly ridiculed by Major McCall on any occasion." J.A. at 236. Kengerski then concluded his complaint by detailing other managerial (but not explicitly racial) harassment he alleges suffering caused by McCall, including punitive assignment to the overnight shift.

The Warden subsequently referred Kengerski's complaint to the County law department. McCall was placed on administrative leave in May 2015 and resigned three months later. Kengerski claims that McCall was forced to resign because of his complaint. Following McCall's resignation, Kengerski reported several events he considered "retaliation" from other officers. J.A. at 394.

In November 2015, seven months after his complaint and three months after McCall's resignation, the County terminated Kengerski. It claims this was after he mishandled a sexual harassment complaint, including allegations that he told two subordinate officers to lie on their reports during the investigation. In this connection, the County asserts that Warden Harper stated Kengerski's conduct was "more egregious than anything [the Warden had] seen ... [i]n [his] 27 years of being a correctional professional." J.A. at 959. Kengerski challenges this reason as "pretextual," as the true motivation was retribution for reporting McCall and causing her resignation. J.A. at 1210.

In June 2017, the Equal Opportunity Employment Commission (EEOC) closed an investigation into Kengerski's termination and issued a right-to-sue letter. Kengerski filed suit two months later against Warden Harper and the jail. The initial complaint included claims for violation ***536** of due process, race and sex discrimination, and retaliation. An amended complaint filed in February 2018 continued to focus on race discrimination and associated retaliation under state, federal, and constitutional law, and also alleged retaliation for Family and Medical Leave Act complaints. After amendments to the pleadings and rulings on subsequent motions, the only remaining claim was Title VII retaliation against the County. *Kengerski*, 435 F. Supp. 3d at 675. The District Court granted the County's motion for summary judgment, holding that Kengerski's retaliation claim failed as a matter of law. *Id.* at 674. He appeals to us.

II. Discussion[2]

Title VII makes it unlawful for an employer to retaliate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter ...." 42 U.S.C. § 2000e-3(a). To survive summary judgment on a retaliation claim, a plaintiff must first make out a *prima facie* case. *Moore v. City of Philadelphia*, 461 F.3d 331, 340 (3d Cir. 2006).[3] This means that he must: "tender evidence that: '(1) [ ]he engaged in activity protected by Title VII; (2) the employer took an adverse employment action against [him]; and (3) there was a causal connection between [his] participation in the protected activity and the adverse employment action.' " *Id.* at 340-41 (quoting *Nelson v. Upsala Coll.*, 51 F.3d 383, 386 (3d Cir. 1995)).

Here, Kengerski contends that he meets all three elements for a *prima facie* case because (1) his complaint about McCall was protected conduct, and (2) he was fired (3) because of his complaint. Our review on appeal is plenary, which means we review each element anew. *Id.* at 340. We conclude that the District Court erred in granting summary judgment against Kengerski solely on the first element of the *prima facie* case. We need not address the second element, as the County concedes it is satisfied by Kengerski's termination. And because the District Court has yet to decide the third element, on remand it may consider causation in the first instance.

A. Kengerski Survives Summary Judgment on the First Element of His *Prima Facie* Case Because a Reasonable Person Could Believe McCall's Behavior Violated Title VII.

To satisfy the first element of his *prima facie* case, Kengerski must show that he held "an objectively reasonable belief, in good faith, that the activity [he opposed] is unlawful under Title VII." *Moore*, 461 F.3d at 341. Kengerski opposed McCall's behavior by sending a written letter to the jail's warden that said he "would like to make a complaint about Major McCall with regards to harassment and inappropriate racial text messages." App. at 236.[4] The question we ask is therefore ***537** a simple one: Could a reasonable person, standing in Kengerski's shoes, have believed McCall's behavior violated Title VII?[5]

Workplace behavior may violate Title VII in a variety of ways. As relevant here, the Title may be violated when an employee's racist behavior creates a hostile work environment for his colleagues.[6] Still, we must be careful to distinguish between a hostile-work-environment claim (which Kengerski is not bringing) and his retaliation claim. To succeed on the former, a plaintiff needs to show that the environment was actually hostile, *i.e.*, that the offensive conduct at work was either "severe" or "pervasive." *See Castleberry v. STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017). But for a retaliation claim a plaintiff need not show that his working environment in hindsight was actually hostile, only that he held an objectively reasonable belief that it was. The difference between these two standards reflects a part of Title VII's purpose to "encourage employees to report harassing conduct before it becomes severe or pervasive." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (explaining that the standard for an adverse employment action differs between retaliation claims and other discrimination claims because "differences in the purpose of the two provisions ... justify this difference of interpretation").

Still, a retaliation claim must be tied to Title VII. An employee must have complained about the type of conduct that is generally protected by that Title, such as discrimination on the basis of race. This includes discrimination because of an employee's association with a person of another race (such as a family member). But a complaint about workplace behavior that is so minor and isolated that it could not "remotely be considered 'extremely serious' "—that is not within some striking distance of an actual hostile work environment—is not protected because "[n]o reasonable person could have believed that [it] ... violated Title VII's standard." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam). Here, viewing McCall's comment and her text messages together, we conclude that a reasonable person could have believed the jail was a hostile work environment for Kengerski, and thus violated Title VII.

1. Employees Are Protected from Retaliation When

They Reasonably Believe Their Work Environment Is Hostile Because of Their Association with Others.

Amici (the United States and two Pennsylvania-based affiliates of the ***538** National Employment Lawyers Association) ask us to hold that an employee may be protected from retaliation when he reports a work environment that he reasonably believes is hostile *to him* because of his association with persons of another race. We ordinarily would not consider this argument, which was not raised explicitly by Kengerski in his opening brief, because an "amicus may not frame the issues for appeal." *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 731 (3d Cir. 1995) (quoting *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993)). Nonetheless, we are convinced that "substantial public interests" justify departing from this general rule because this issue could affect the behavior of countless employers and employees in situations ranging from interracial marriage to intra-office friendships. *Id.* Nor do we believe that the County will be "unduly prejudiced" by our consideration of this argument, which permeates the record in this case. County's Br. at 16 n.8, 39. The District Court considered and discussed the theory at length in its opinion, Kengerski's opening brief raised the general substance, if not the form, of the issue by emphasizing the comments McCall made to him based on his association with his biracial grand-niece, and his reply brief "raise[d] the issue by reference to the amicus brief." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997); *see* Kengerski Reply Br. at 18. The County could—and indeed did—argue in its response brief against the associational discrimination arguments made by Amici. Thus it was not prejudiced procedurally. *See United States v. Boggi*, 74 F.3d 470, 478 (3d Cir. 1996) (deviating from the general rule that an argument may not be raised for the first time in a reply brief where the other party "has had an opportunity to respond to the arguments raised in [the] reply brief ... [, and the] argument raises a question which we feel requires clarification in this circuit").

On the merits, we agree with our sister circuits that associational discrimination is well grounded in the text of Title VII. In a practical sense, the name is a misnomer because, when you discriminate against an employee because of his association with someone of a different race, you are in effect discriminating against him "because of [his own] race" in violation of Title VII. 42 U.S.C. § 2000e-2(a)(1). *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (concluding that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race"); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child."); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (concluding that "a reasonable juror could find that Deffenbaugh was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person"), *vacated in part on other grounds*, 182 F.3d 333 (5th Cir. 1999); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (concluding that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race," and noting favorably that "the EEOC, which Congress charged with interpreting, administering, and enforcing Title VII, has consistently held that an employer who takes ***539** adverse action against an employee or a potential employee because of an interracial association violates Title VII") (emphasis omitted).

This theory of discrimination is not limited to close or substantial relationships. While "one might expect the degree of an association to correlate with the likelihood of severe or pervasive discrimination on the basis of that association," the "degree of association is irrelevant" to whether a plaintiff "is eligible for the protections of Title VII in the first place." *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009); *accord Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998). Employees thus may not be discriminated against because of their interracial relationships with distant relatives such as a grand-niece.

2. A Reasonable Person Could Believe That the Jail Was a Hostile Work Environment for Kengerski.

Here, McCall's behavior was clear and consistent: she expressed racial animosity toward jail employees who either were black or associated with black persons, such as Sam Pastor (who raised a biracial child) and Kengerski (who was considering taking in his biracial grand-niece). Therefore, we simply ask whether the totality of McCall's conduct is serious enough that a reasonable person could conclude that Kengerski's work environment was hostile.

We first pause to make an important clarification about McCall's standing in the jail at the time of the relevant conduct. The parties—including Kengerski—state that at the time of McCall's comments she had not yet been promoted to Major, seemingly implying that at the time of this conduct she was Kengerski's coworker. But reading the record in the light most favorable to Kengerski compels a conclusion that McCall was Kengerski's superior at the jail at the time of her offensive conduct, because McCall was a Captain and Kengerski was a Sergeant. *See* J.A. at 83 (a County personnel file showing an effective date of Kengerski's promotion from Sergeant to Captain in September 2014); *id.* at 289 (the County's statement of facts acknowledging that "Kengerski was promoted from the position of sergeant to the position of captain on September 24, 2014"); *id.* at 236 (Kengerski's complaint alleging the comment made by "Captain McCall" occurred "over a year" before April 2015 and in any case prior to the text messages); *Kengerski*, 435 F. Supp. 3d at 674 (finding that the relevant text messages were sent between February and June 2014). The County itself acknowledges this distinction in rank is significant: "[S]ergeants and corrections officers [a]re subordinate to [captains]," who are "part of management." County's Br. at 4; *see also* J.A. at 290 (the County's statement of facts acknowledging that "sergeants are ... not a part of management," but "Captains and above are part of the Jail's management team"). This dispels framing this case as involving harassment by a mere coworker.[7]

While the County incredibly attempts to argue that the comment about Kengerski's grand-niece (and another jail employee's child) being monkeys was merely a harmless "zoomorphism," it is clear that this term was used in a racist manner. County's Br. at 17; s*ee* *Kengerski*, 435 F. Supp. 3d at 679 (finding that this comment was an "offhand, yet offensive, remark"). As the Fourth Circuit has recognized, "describing ***540** an African-American as a 'monkey' ... goes far beyond the merely unflattering; it is degrading and humiliating in the extreme." *Boyer-Liberto*, 786 F.3d at 280 (citation omitted). Indeed, that Court reasoned that the term "porch monkey" was "about as odious" as the use of the "n-word." *Id.* Consequently, it concluded that even two uses of that term, viewed as a single incident of harassment, could be found by a reasonable jury to be "severe enough to engender a hostile work environment." *Id.* When faced with a single use of a racial epithet by a supervisor, we rejected the District Court's conclusion that "it was unreasonable for Plaintiffs to believe that a single incident of a discriminatory remark ... could amount to unlawful activity." *Castleberry*, 863 F.3d at 267; *accord Rite Way*, 819 F.3d at 243 ("[Retaliation] claims grounded in isolated comments are not always doomed to summary judgment.").

Still, we need not decide whether this isolated comment, standing alone, is enough to support a reasonable belief of a Title VII violation because McCall subsequently made numerous additional racist comments in text messages over a period of several months. Though these comments did not directly refer to Kengerski or his grand-niece, the texts started coming "[n]ot long after" Kengerski stood up to McCall for making a racist comment about his grand-niece. Kengerski thus could reasonably believe that McCall's texts—particularly those with racist innuendos about black persons—were at least in part directed at him. J.A. at 236; *see generally Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000) ("In addressing a motion for summary judgment, the facts must be viewed in the light most favorable to [the non-moving party], and [ ]he is entitled to every reasonable inference that can be drawn from the record."). At a minimum, the comments made about other jail employees, at least some of whom Kengerski alleges were also McCall's subordinates, could have bolstered Kengerski's reasonable belief that McCall's conduct toward him was grounded in racial animosity and created a hostile work environment. *See Caver v. City of Trenton*, 420 F.3d 243, 263–64 (3d Cir. 2005) (although a hostile-work-environment claim may not be maintained "solely by pointing to comments that were directed at other individuals," "evidence of those comments may be considered in determining whether facially neutral conduct ... was actually based on [the plaintiff's] race"); *Moore*, 461 F.3d at 345 n.6 (explaining that "racial epithets of which the targets were not aware may well form the basis for a reasonable belief that discrimination has occurred or was occurring").

We express no view whether McCall's conduct would support a hostile-work-environment claim if Kengerski were to bring one. But employees "are not required to collect enough evidence of discrimination to put the discrimination case before a jury before they blow the whistle." *Moore*, 461 F.3d at 345. And we will not saddle the reasonable employee with all of the doctrinal twists and turns that a civil rights lawyer would need to navigate. *See E.E.O.C. v. Rite Way Serv., Inc.*, 819 F.3d 235, 242 (5th Cir. 2016) (asking whether "an employee ... not instructed on Title VII law[,] as a jury would be, [could] reasonably believe that she was providing information about a Title VII violation"); *Boyer–Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 290 (4th Cir. 2015) (en banc) (Wilkinson, J., concurring in part and dissenting in part) ("An employee is not an expert in hostile work environment law."); *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981) (holding that "a layperson should not be burdened with the 'sometimes impossible ***541** task' of correctly anticipating how a given court will interpret a particular statute"). McCall's conduct was serious enough that a reasonable employee in Kengerski's shoes could have believed his work environment was hostile.[8] We thus vacate the District Court's grant of summary judgment relying solely on the first element needed for a *prima facie* case.

B. The District Court Should Address Causation in the First Instance.

The County asks us to affirm the grant of summary judgment on the alternate ground that Kengerski has not shown a *prima facie* case of causation, the third element of a retaliation claim. The District Court discussed causation only in a footnote, noting that

> [b]ecause the Court finds that Mr. Kengerski cannot demonstrate protected activity, it need not address the issue of causation. That said, there was a seven-month gap between the complaint and termination. Usually, courts will dismiss retaliation claims as a matter of law where there is such a long gap. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 232 (3d Cir. 2007) ("Although there is no bright line rule as to what constitutes unduly suggestive temporal proximity, a gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation and defeat summary judgment."); *Andreoli v. Gates*, 482 F.3d 641, 650 (3d Cir. 2007) (holding five-month time period between complaint and first adverse action insufficient by itself to support inference of causation).

Kengerski, 435 F. Supp. 3d at 676 n.1. Because the District Court did not expressly rule on the causation issue, we "decline to consider [it,] ... choosing instead to allow that court to consider [it] in the first instance." *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395, 401 (3d Cir. 2010).[9] Of course, even if Kengerski establishes a *prima facie* case of retaliation, his claim does not necessarily survive summary judgment, as the Court may then determine whether the County's reason for Kengerski's firing (mishandling a sexual harassment claim) is legitimate or pretextual. *See Moore,* 461 F.3d at 342; ***542** *Martinez v. UPMC Susquehanna*, 986 F.3d 261, 266 (3d Cir. 2021).[10]

* * * * *

The crux of a retaliation claim is reasonableness: employees are protected from retaliation whenever they make good-faith complaints about conduct in their workplace they reasonably believe violates Title VII. Here, a reasonable employee could believe that McCall created a hostile work environment, in violation of Title VII, by calling Kengerski's biracial relative a "monkey" and then sending Kengerski a series of text messages with offensive racial stereotypes. We therefore remand to the District Court to consider whether the County fired him because of his complaint.

All Citations

6 F.4th 531, 105 Empl. Prac. Dec. P 46,802

Footnotes

1 The parties at times suggest that these text messages may have been sent in a group chat that involved Kengerski, McCall, and others, though they do so only by reference to each others' briefs and without record citation. The District Court did not make a finding of fact on this issue. Whether these texts were sent in a group chat or directly to Kengerski alone would not alter our conclusion in this case.

2 The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. The District Court had separate grounds for jurisdiction over a variety of other claims in the initial complaint. Kengerski only appeals the dismissal of his Title VII retaliation claim.

3 Under the *McDonnell Douglas* burden-shifting framework, after a plaintiff makes out a *prima facie* case, the burden of production shifts to the employer to provide a legitimate, non-retaliatory reason for its action against the plaintiff, and then the plaintiff may prevail at summary judgment only if he has evidence that the employer's response is merely a pretext. *Moore,* 461 F.3d at 342; *see generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

4 We are not persuaded by the County's argument that Kengerski did not sufficiently "oppose" McCall's racial comments because his letter was ambiguous or contained references to McCall's managerial failings unrelated to racial discrimination. We have resoundingly rejected arguments that additional non-discrimination claims in a complaint can "obscure" our analysis of Title VII issues. *Moore,* 461 F.3d at 343 n.4.

5 We leave out good faith here, as the District Court did not discuss that aspect of the first element, and the County does not

meaningfully contest it on appeal. We take no position on this issue.

6 Kengerski argues that he was opposing, in addition to McCall's behavior toward him, McCall's behavior directed at his coworkers of other races. In general, white plaintiffs are protected from retaliation when they blow the whistle on conduct "they reasonably perceived ... as violative of Title VII" because it was hostile for their black coworkers. *Moore*, 461 F.3d at 342. But because Kengerski's reasonable belief that his own work environment was hostile satisfies the first element of his *prima facie* case, we need not consider whether his letter also sufficiently opposed a hostile work environment for his coworkers.

7 We express no opinion on whether or the extent to which we would analyze the reasonableness of Kengerski's complaint differently if the comment came from a coworker of equal rank.

8 In light of this conclusion, we need not consider whether Kengerski's claim may stand solely on the ground that the Warden perceived him as having engaged in protected activity. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571 (3d Cir. 2002). Nor need we decide whether a plaintiff may maintain a claim simply because he "reasonably believes that a hostile work environment is in progress." *Boyer-Liberto*, 786 F.3d at 284; *see also* EEOC Enforcement Guidance on Retaliation and Related Issues at II(A)(2)(c) (instructing that "it is protected opposition if the employee complains about offensive conduct that, if repeated often enough, would result in an actionable hostile work environment").

9 We express no view on whether Kengerski can present a *prima facie* case of causation on remand, though we note that the District Court's singular focus on temporal proximity does not necessarily answer whether he has provided "sufficient [evidence] to raise the inference that [his] protected activity was the *likely reason* for the adverse [employment] action." *Carvalho-Grevious v. Delaware State Univ.*, 851 F.3d 249, 259 (3d Cir. 2017) (emphasis in original) (quotation and citation omitted). While a very long delay may "suggest[ ], by itself, no causality at all," *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam) (internal citations omitted), "[i]n the absence of ... temporal proximity, we consider the circumstances as a whole, including any intervening antagonism by the employer, inconsistencies in the reasons the employer gives for its adverse action, and any other evidence suggesting that the employer had a retaliatory animus when taking the adverse action," *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 196 (3d Cir. 2015).

10 We deny the County's motion to strike these portions of Kengerski's reply brief as well as its request to strike discussion of associational discrimination.

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KeyCite Yellow Flag - Negative Treatment
Criticized by Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., D.C.Cir., July 19, 1994

791 F.2d 888
United States Court of Appeals,
Eleventh Circuit.

Don L. PARR, Plaintiff-Appellant,
v.
WOODMEN OF THE WORLD LIFE INSURANCE COMPANY, Defendant-Appellee.

No. 85–8950
|
Non-Argument Calendar.
|
June 17, 1986.

Synopsis
White man alleged that insurance company failed to hire him as an insurance salesman due to his interracial marriage. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, dismissed the complaint, and white man appealed. The Court of Appeals, Hatchett, Circuit Judge, held that complaint, construed under rule of liberal construction as alleging that white man was not hired as insurance salesman due to his interracial marriage, stated cause of action under Title VII and federal statute guaranteeing equal rights under the law.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***888** David R. Sweat, Athens, Ga., for plaintiff-appellant.

Susan Buckingham Reilly, E.E.O.C., Washington, D.C., for amicus E.E.O.C.

Ginger S. McRae, Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before RONEY and HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

Opinion

***889** HATCHETT, Circuit Judge:

Appellant, Don L. Parr, a white man married to a black woman, seeks reversal of the judgment of the district court dismissing his complaint against Woodmen of the World Life Insurance Company (Woodmen), in which he alleged that the company discriminated against him "because of race" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e–17, and 42 U.S.C. § 1981. Finding that Parr's complaint set forth sufficient allegations to state a claim under both statutes, we reverse.

BACKGROUND

In late May or early June of 1982, Parr applied for a position as an insurance salesman with Woodmen. He had experience as an insurance salesman and was well-qualified for the position. The Woodmen manager who interviewed Parr told him that he would probably be hired, but that he would have to return for a second interview. The manager also told Parr that Woodmen did not employ or sell insurance to black people. Parr told the employment service which had set up his interview of the manager's remarks and informed the employment service that he was married to a black woman. A representative of the employment service told Woodmen of Parr's interracial marriage, whereupon Woodmen's manager informed the employment service that he would advise against hiring Parr. Parr was not hired.

Parr filed a charge of race discrimination against Woodmen with the Equal Employment Opportunity Commission (EEOC). The EEOC issued a Notice of Right to Sue, and on May 31, 1983, Parr filed this lawsuit.[1] On November 6, 1985, the district court held that Parr's complaint failed to state a claim upon which relief could be granted and dismissed his action.

Parr contends that the district court erred in dismissing his lawsuit because his complaint set forth sufficient allegations to state a claim of discrimination based on an interracial marriage. Such discrimination, Parr contends, is prohibited by section 1981 and Title VII. Woodmen contends that the issue of whether section 1981 and Title VII prohibit discrimination based on an interracial marriage or association is not presented because Parr's complaint did not allege that Woodmen discriminated against him because of his interracial marriage. Rather, Woodmen contends, Parr "alleged denial of employment because his wife was black and because Woodmen discriminated against blacks." Finally, Woodmen contends that even if Title VII proscribes discrimination based upon an interracial marriage, the literal language of Title VII precludes a finding that Parr states a claim because his race "was not even arguably a factor in the alleged discrimination."

Because the district court dismissed Parr's complaint for failure to state a claim upon which relief could be granted, we must deem Parr's material allegations as true. *McDonald v. Sante Fe Trail Transportation Co.,* 427 U.S. 273, 277, 96 S.Ct. 2574, 2577, 49 L.Ed.2d 493, 498 (1976); *Hospital Building Co. v. Rex Hospital Trustees,* 425 U.S. 738, 739, 96 S.Ct. 1848, 1850, 48 L.Ed.2d 338, 341 (1976).

DISCUSSION

At the outset, we reiterate the often quoted maxim that pleadings are to be liberally construed.

> [I]t is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader. '[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set ***890** of facts in support of his claim which would entitle him to relief.'

Scheuer v. Rhodes, 416 U.S. 232, 236–37, 94 S.Ct. 1683, 1686–87, 40 L.Ed.2d 90, 96–97 (1974) (quoting *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

The most significant question in this case is whether Parr alleged that Woodmen discriminated against him because of his interracial marriage. After setting forth the relevant "facts," Parr's complaint alleged that he "was not hired by the defendant because of race." The above-cited rule of liberal construction requires us to construe pleadings liberally not only on the ultimate issue of whether a claim for relief is established, but on ancillary issues as well. Thus, we view Parr's complaint as alleging discrimination based upon his interracial marriage. No requirement exists that a plaintiff specifically state that he was discriminated against because of an interracial marriage or that he was discriminated against because of *his* race to allege discrimination based on an interracial marriage.

A. *Section 1981 Claim*

In dismissing Parr's complaint, the district court failed to address his 42 U.S.C. § 1981 claim.[2] It is well settled that white persons have standing to sue under section 1981. *McDonald v. Santa Fe Trail Transportation Company,* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). It is also well settled that section 1981 and Title VII are not coextensive in coverage. *Johnson v. Railway Express Agency,* 421 U.S. 454, 459, 95 S.Ct. 1716, 1719, 44 L.Ed.2d 295, 301 (1975).

Parr's issue—whether a claim of discrimination based upon an interracial marriage is cognizable under section 1981—is not a novel one. This court's predecessor addressed the precise issue in *Faraca v. Clements,* 506 F.2d 956 (5th Cir.1975). Faraca, a white man married to a black woman, brought a section 1981 action against the director of the Georgia Mental Retardation Center. The director had refused to hire Faraca because of his interracial marriage. The former Fifth Circuit, holding that section 1981 proscribed such conduct, upheld the judgment of the district court awarding Faraca compensatory damages. *Faraca* is binding on this court.[3]

Other circuits that have considered the issue agree with the former Fifth Circuit that a claim of discrimination due to an interracial relationship is cognizable under section 1981. *See Fiedler v. Marumsco Christian School,* 631 F.2d 1144 (4th Cir.1980) (white female student expelled for dating a black male student denied the right to contract because of racial association in violation of section 1981); *DeMatteis v. Eastman Kodak Company,* 511 F.2d 306 (2d Cir.1975) (white man forced into early retirement because he sold his house to a black person allowed to maintain action pursuant to section 1981).

In light of this precedent, Woodmen only contends that we should not recognize a claim of discrimination based on an interracial marriage or association under section 1981 because such a claim should not be recognized under Title VII. This contention is without merit. We hold that section 1981 prohibits discrimination based upon an interracial marriage or association, and that the district court erred in dismissing Parr's complaint which alleged such discrimination.

***891** B. *The Title VII Claim*

Title VII prohibits racially discriminatory employment practices.[4] The statute has been held to prohibit discrimination against white as well as black persons. *McDonald v. Santa Fe Trail Transportation Company,* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976).

In dismissing Parr's action, the district court simply stated that "[t]he alleged discrimination complained of is not proscribed by Title VII." Woodmen contends that the district court's holding is correct because Parr did not allege that he was discriminated against because of *his* race. Parr contends that the district court erred because Title VII is to be broadly construed, and a party need not specifically allege that he was discriminated against because of *his* race, but only show that adverse actions taken against him involved racial considerations.

Courts that have considered the issue have gone both ways. In *Ripp v. Dobbs Houses, Inc.,* 366 F.Supp. 205 (N.D.Ala.1973), a white male who was discharged because of his association with black employees brought an action against his employer pursuant to Title VII. Stressing that Title VII prohibits discrimination against an individual because of "such individual's race," the court dismissed the complaint because "plaintiff makes no complaint that he has suffered any detriment on account of *his* race." *Ripp* at 208 (emphasis added). Similarly, in *Adams v. Governor's Committee on Post-Secondary Education,* 26 F.E.P. Cases 1348 (N.D.Ga.1981), the court, relying on *Ripp,* held that a white man who alleged that he was discharged because of his interracial marriage failed to state a claim under Title VII because he did not claim that he was discriminated against because of *his* race. And, in another case involving the present appellant, *Parr v. United Family Life Insurance Company,* 35 F.E.P. Cases 95 (N.D.Ga.1983), the court, also relying on *Ripp,* came to the same conclusion.

In *Whitney v. Greater New York Corporation of Seventh Day Adventists,* 401 F.Supp. 1363 (S.D.N.Y.1975), where a white woman claimed that she was discharged in violation of Title VII because she maintained a social relationship with a black man, the court expressly rejected the *Ripp* analysis, stating:

> Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was '[d]ischarged ... because of [her] race.'

Whitney at 1366. In *Reiter v. Center Consolidated School District, No. 26–JT,* 618 F.Supp. 1458 (D.Colo.1985), where the plaintiff alleged that she was refused employment because of her association with the Hispanic community, the court, relying on *Whitney,* held that "discriminatory employment practices based on an individual's association with people of a particular race or national origin are prohibited under Title VII." *Reiter* at 1460. The court stated that its rationale was that "the plaintiff was discriminated against on the basis of [her] race because [her] race was different from the race of the people [she] associated with." *Reiter* at 1460.

In *Gresham v. Waffle House, Inc.,* 586 F.Supp. 1442 (N.D.Ga.1984), where a white female filed a Title VII complaint alleging that she was discharged because of her marriage to a black man, the court discussed *Ripp* but chose to follow *Whitney,* and held that the plaintiff stated a claim under Title VII. The *Gresham* court found ***892** *Whitney* 's logic "irrefutable." *Gresham* at 1445.

We, too, find *Whitney's* logic irrefutable. Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race. It makes no difference whether the plaintiff specifically alleges in his complaint that he has been discriminated against because of *his* race. As this court's predecessor stated in *Culpepper v. Reynolds Metals Co.,* 421 F.2d 888, 891 (5th Cir.1970):

> Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in a *battle with semantics.* [Emphasis added.]

Woodmen contends that even if a claim of discrimination based upon an interracial marriage or association is cognizable under section 1981, Parr's claim should not be entertained. Woodmen argues that unlike the plaintiffs in *Whitney* and the other cases cited, Parr cannot claim that *but for* his race being different from his wife's, he would have been hired. In other words, Woodmen contends that Parr cannot state a claim based upon discrimination due to an interracial relationship because he also claimed that Woodmen discriminated against blacks. Woodmen argues that if Parr's allegations are true, had Parr been black, he still would not have been hired. Consequently, in Woodmen's view, Parr's race was of no significance in the hiring decision, and thus his claim should not be cognizable. Woodmen's contentions are not persuasive. Had Parr been black, he would not have been hired, but that is a lawsuit for another day. Parr alleged that he was discriminated against because of his interracial marriage. Title VII proscribes race-conscious discriminatory practices. It would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired.

Several factors make us resolute in our determination that Parr's complaint stated a claim under Title VII. First, we are obliged to give Title VII a liberal construction. *See Culpepper v. Reynolds Metals Co.,* 421 F.2d 888, 891 (5th Cir.1970).

Second, the EEOC, which Congress charged with interpreting, administering, and enforcing Title VII, has consistently held that an employer who takes adverse action against an employee or a potential employee because of an interracial association violates Title VII. *See* Decision 71–969, 1973 EEOC Dec. (CCH) ¶ 6193 (Dec. 24, 1970); Decision 71–1902, 1973 EEOC Dec. (CCH) ¶ 6281 (April 28, 1971; Decision 76–23, 1983 EEOC Dec. (CCH) ¶ 6615 (Aug. 25, 1975); Decision 79–03, 1983 EEOC Dec. (CCH) ¶ 6734 (Oct. 6, 1978). The EEOC's interpretation of Title VII is to be accorded "great deference." *Griggs v. Duke Power Co.,* 401 U.S. 424, 434, 91 S.Ct. 849, 855, 28 L.Ed.2d 158, 165 (1971).

Finally, while we have noted that section 1981 and Title VII are not coextensive in coverage, this court has held that when the two statutes are used as parallel bases of relief, their legal elements are identical. *Lincoln v. Board of Regents of Univ. System,* 697 F.2d 928, 935, n. 6 (11th Cir.1983) (citing *Whiting v. Jackson State Univ.,* 616 F.2d 116, 121 (5th Cir.1980)). Thus, it would be inconsistent to hold that Parr could state a claim of discrimination based upon an interracial marriage pursuant to section 1981, but not Title VII.

Accordingly, we reverse and remand.

REVERSED AND REMANDED.

All Citations

791 F.2d 888, 41 Fair Empl.Prac.Cas. (BNA) 22, 41 Empl. Prac. Dec. P 36,531

Footnotes

1 On May 25, 1984, the district court issued an order consolidating this case with Don L. Parr v. Life and Casualty Insurance Company of Tennessee. The district court dismissed both actions in its order of November 6, 1985.

2 Section 1981 provides:
All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3 In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

4 Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e–2(a)(1) provides:
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

KeyCite negative history or citing references available
Rejected by Parr v. Woodmen of the World Life Ins. Co., 11th Cir.(Ga.), June 17, 1986

366 F.Supp. 205
United States District Court, N.D. Alabama, Southern Division.

F. Paul RIPP, on behalf of himself and on behalf of all those similarly situated, Plaintiff, v. DOBBS HOUSES, INC., et al., Defendants.

Civ. A. No. 73-368.
|
Sept. 14, 1973.

Synopsis
Civil rights action was brought on theory that defendants maintained employment practices and policies which operated to discriminate against employment opportunities of blacks. On motions of defendants to dismiss, the District Court, J. Foy Guin, Jr., J., held that plaintiff alleged unlawful employment practices which were subject to remedy in federal courts, but that plaintiff was not a member of group which was affected by alleged disparate treatment, that he failed to state a claim for relief against any defendant, and that his real grievance, which appeared to be that employer had abridged his freedom of association, was not cognizable under any of the cited civil rights statutes.

Motions granted; complaint dismissed.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

***207** William B. Pugh, Dawson & Pugh, Birmingham, Ala., for plaintiff.

Allen Poppleton, James P. Alexander, Bradley, Arant, Rose & White, Birmingham, Ala., for defendants.

MEMORANDUM OF OPINION AND ORDER

GUIN, District Judge.

On April 13, 1973, F. Paul Ripp commenced this action in the Southern Division of the United States District Court for the Northern District of Alabama, against some five defendants-Dobbs Houses, Inc., Squibb-Beech-Nut, Inc., Airline Services Division of Dobbs Houses, Inc., Dobbs Houses Flight Kitchen of Birmingham, and an individual, identified as Jim Shaner, "Manager", of the Dobbs House Flight Kitchen. Plaintiff seeks to assert claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq.; the Civil Rights Act of 1866, 42 U.S.C. § 1981; and the Civil Rights Act of 1871, 42 U.S.C. § 1985.

According to the allegations in plaintiff's complaint, during 1970 plaintiff, a white person, was employed at the Dobbs House Flight Kitchen at the Birmingham Municipal Airport. On December 22, 1970, he alleges that he was "illegally discharged because of his association and sociable attitudes toward his fellow employees who were of the Black race". Plaintiff further alleges that defendants maintained employment practices and policies which operated to discriminate against the employment opportunities of blacks.

Pursuant to F.R.Civ.P. Rule 12(b), defendants moved separately and severally, to dismiss plaintiff's complaint on the ground that it fails, for several reasons, to state claims against defendants upon which relief can be granted. Defendants make several contentions. First, all defendants urge that plaintiff's complaint does not state a cause of action under Title VII of the Civil Rights Act of 1964, as amended (the "Act"), because plaintiff does not claim to have been discriminated against on account of his race. Defendant Shaner, the individual defendant, who apparently was plaintiff's immediate supervisor, urges that no claim under Title VII may be stated with respect to him, in any event, because he is not an "employer" within the meaning of the Act.

Second, all defendants urge that plaintiff may not complain of discrimination under 42 U.S.C. § 1981, since that statute is limited in application by its terms, to racial discrimination. Third, defendants contend that no claim has been stated under 42 U.S.C. § 1985, because plaintiff has not averred that any defendants conspired to deprive plaintiff of protected rights, and because the white plaintiff cannot complain of invidious discrimination against blacks. Finally, with respect to the claims under both 42 U.S.C. §§ 1981 and 1985, defendants urge that any possible cause of action which conceivably may have been ***208** stated is barred by the applicable one-year Alabama statute of limitations, with respect to all defendants except Dobbs Houses, Inc.

Having considered the pleadings, briefs, oral argument, and the affidavit of Larry D. Stebbins, the Court is prepared to decide the various issues raised by the motions.

In reaching its decisions, the Court is mindful of the fact that, for purposes of the motions to dismiss, the well-pleaded allegations of plaintiff's complaint are taken as admitted. Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967). Furthermore, the Court is cognizant of the Fifth Circuit's admonition that "procedural technicalities" should not operate to deprive a Title VII plaintiff of an opportunity to vindicate rights protected by the Act. Sanchez v. Standard Brands, Inc., 431 F.2d 455, 461 (5th Cir. 1970); Burns v. Thiokol Chemical Corp., 483 F.2d 300, 305 (5th Cir. 1973). With these considerations in view, the Court will consider the issues raised by defendants' motions to dismiss.

PLAINTIFF'S TITLE VII CLAIMS

The fundamental prohibition which Title VII directs toward employers is found in Section 703(a) of the Act. In pertinent part that section provides:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to *his* compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual's* race, color, religion, sex, or national origin (emphasis added).

The statutory language makes abundantly clear that an employer may not arbitrarily penalize any employee because of his race, or any other protected characteristic.

Significantly, plaintiff makes no complaint that he has suffered any detriment on account of his race. In paragraph 3 of his complaint, for example, plaintiff alleges that he was "employed by Defendant Dobbs House at its Birmingham Airport Facility until, to-wit, 22 December, 1970, when he was illegally discharged because of his association and sociable attitude toward his fellow employees who were of the Black race". The class, which plaintiff seeks to represent, is that group of persons which is affected by defendant's employment practices, which "tend to unlawfully restrict the free association of individuals" (paragraph 5 of plaintiff's complaint).

In paragraph 6 of his complaint, plaintiff alleges that he was discharged because he refused to discriminate against black employees; further, he alleges he was ordered "not to associate with black employees". While plaintiff makes these allegations concerning his allegedly restricted associations, he also avers that the defendant engaged in unlawful employment practices which operate to discriminate against black employees. Fairly stated, the gravamen of plaintiff's complaint is that defendants have abridged his freedom to associate with persons of his own choosing. See, *e. g.,* Langford v. City of Texarkana, 478 F.2d 262 (8th Cir. 1973). The question is whether plaintiff has stated a claim for relief under Title VII which this Court may consider. The Court concludes that plaintiff has failed to do so.

The employment practices which plaintiff attacks in his complaint are practices which result in disparate treatment of black employees. Plaintiff avers that he is a white citizen. The ***209** employment practices, subject to challenge in this action, have no impact upon plaintiff. It appears that plaintiff is without standing, and, further, that plaintiff is not a "person aggrieved" within the contemplation of the Act.

Neither counsel nor the court have found any cases which have directly dealt with a white plaintiff's Title VII challenge to employment practices which discriminate against blacks. However, in determining a class action issue, Judge Robinson touched upon the question of standing. In Martin v. Safeway Trails, Inc., 59 F.R.D. 683 (D.D.C.1973), the court held that a black male plaintiff could not appropriately represent a class attacking allegedly discriminatory employment practices, based upon both sex and national origin.

It further appearing that the appropriate standards for determination for the class was set forth in Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), to the effect that the action must meet the criteria of Rule 23 and that the Plaintiff must have standing and be aggrieved as to each issue sought to be raised, and it further appearing that the Plaintiff has no such standing or grievance as to discrimination based on sex or national origin and would not be a proper class representative with respect thereto under Rule 23(a) ... *Id.* at 684.

It seems clear to the Court that if a black male plaintiff cannot represent a class of allegedly aggrieved females, a white plaintiff cannot represent allegedly aggrieved blacks.

The question of standing has its origin in the requirement for a "case or controversy". Article III, Section 2, of the United States Constitution limits the judicial power to cases and controversies. *See generally,* 6 A. J. Moore, Federal Practice § 5711. That is, there must be an adversary interest between the parties before a federal court has the power to reach a decision.

As the Supreme Court noted in United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947):

The constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government, remains unimpaired. *Id.* at 89-90, 67 S.Ct. at 564-565.

In *Mitchell,* the Supreme Court refrained from considering whether the Hatch Act was constitutional, since none of the plaintiff's actions had subjected them to the prohibition of that act. In the instant case, the Court can conceive of no circumstances in which the plaintiff can bring himself within the purported class, which is allegedly affected by the practices which he currently is challenging.

This Court is especially chary of entrusting the enforcement of important rights, guaranteed by Title VII, to a person who is not affected by the employment practices which he alleges to be discriminatory. Indeed, not only is plaintiff not subject to the practices in which he asserts that defendants engage, but he is a member of the class (*i.e.,* white persons) which he avows that defendants favor. While the Court does not impugn the motives of the plaintiff, a holding which would permit a white plaintiff to attack practices which allegedly disadvantage blacks ***210** would open Title VII to dangerous abuse. A Title VII plaintiff with no personal incentive to enforce the Act (or possibly an incentive to subvert it), would destroy the Act's enforcement mechanism.

In short, the Court believes that if defendants maintain practices which discriminate against blacks as plaintiff avers, the persons who are best situated to attack those practices are those persons who are in fact aggrieved. The Court believes that there can be no better insurance of vigorous enforcement of Title VII than the litigant who is genuinely aggrieved by the practices under attack. Paul Ripp is not that plaintiff.

Plaintiff, both in his oral argument and in his brief, urges that, even if he fails to state a claim under Section 703(a) of the Act, he has stated a claim under Section 704(a).

Section 704(a) provides: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... because he has opposed any practice made an unlawful employment practice by the sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this sub-chapter.

The Court concludes that Section 704(a) provides no comfort to the plaintiff for two reasons.

First, the statutory scheme is such that it is clear that Section 704(a) exists to protect an employee's avenue to complain to the Equal Employment Opportunity Commission of practices which are prohibited by Section 703. No doubt, the framers were keenly aware of the fact that, in order for the Act to be effective, an employee must have protected access to the enforcement machinery. This is a familiar provision in federal laws governing the relationship between employer and employee. See, *e.g.,* the National Labor Relations Act, 29 U.S.C.A. § 158(a)(4), and the Fair Labor Standards Act, 29 U.S.C.A. § 215(a)(3). The Fifth Circuit has interpreted Section 704(a) in this fashion. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1004-1007 (5th Cir. 1969). The plaintiff makes no claim that any defendant interfered with his access to the Equal Employment Opportunity Commission.

Second, even if the Court assumes that Section 704(a) of the Act is as broad as the plaintiff urges, the Court would still be obligated to dismiss the Title VII claim. Construing plaintiff's allegations most favorably to him, the Court concludes that his claim is basically that his employer allegedly deprived him of the freedom to associate with black employees. That claim is not protected by Section 704(a) of the Act in any respect. The Court concludes that plaintiff's claims under Title VII are due to be dismissed.

In view of the Court's decision with respect to plaintiff's Title VII claims, it is unnecessary to decide the other Title VII issues which the defendants have raised. Some comment, however, is appropriate.

It is not contested that the only defendant against whom unfair employment practice charges were filed with the Equal Employment Opportunity Commission was defendant Dobbs Houses, Inc. The record reflects that neither the individual defendant, Jim Shaner, nor Dobbs Houses' parent, the Squibb Corporation (erroneously described in the complaint as Squibb-Beech-Nut, Inc.) were served with Equal Employment Opportunity Commission charges. Furthermore, two of the defendants, Airlines Services Division of Dobbs Houses and Dobbs House Flight Kitchen of Birmingham, are not business entities at all.

The only defendant which was charged before the Equal Employment Opportunity Commission is Dobbs Houses, Inc. Plaintiff makes no claim that the other named defendants are necessary parties under F.R.Civ.P. Rule 19, ***211** and the Court, based upon its consideration of Mr. Stebbins' affidavit, understands no justification for retaining the remaining four defendants as necessary parties. Unless a co-defendant is a necessary party under Rule 19, this Court will continue to hold that the filing of an unfair employment practice charge is an absolute predicate for an action under Title VII of the Civil Rights Act of 1964. Thus, even if the Court had found a cause of action under Title VII, Dobbs Houses, Inc., is the only defendant which the Court would have retained[1] upon the proper motion.

CLAIMS UNDER 42 U.S.C. § 1981

Plaintiff also seeks to state a claim under the Civil Rights Act of 1866, 42 U.S.C. § 1981. That statute provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and the exactions of every kind, and to no other (emphasis added).

This statute, enjoying a judicial resurrection in the 1970's, has been extended to encompass contracts with respect to private employment. See, *e. g.,* Waters v. Wisconsin Steel Works of International Harvester Company, 427 F.2d 476 (7th Cir. 1970), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151. Plaintiff seeks to utilize this statute, which is not available to "white citizens", to support this Court's jurisdiction to hear his freedom of association claims. The Court will decline plaintiff's invitation to extend this statute beyond its reach.

Even in its resurrected state, Civil Rights Act of 1866 has been generally limited to its unequivocal terms. For example, in Perkins v. Banster, 190 F.Supp. 98 (D.Md.1960), affirmed, 285 F.2d 426 (4th Cir. 1960), the court held:

The complaint in this case claims jurisdiction under Title 42 U.S.C.A. §§ 1981 and 1983. Section 1981 is the equal rights section giving to nonwhite persons the same rights which are enjoyed by white persons. Since the plaintiff, obviously and admittedly, is a white person, § 1981 serves as no basis for jurisdiction in this case. *Id.* at 99.

Attempts to expand Section 1981 beyond its terms have generally met with failure. See, *e. g.,* Marshall v. Plumbers and Steamfitters Local Union No. 60, 343 F.Supp. 70 (E.D.La.1972); Schetter v. Heim, 300 F.Supp. 1070 (E.D.Wis.1969). See also, *e. g.,* Abshire v. Chicago and Eastern Ill. R. R., 352 F.Supp. 601 (N.D.Ill.1972); Fitzgerald v. United Methodist Community Center, 335 F.Supp. 965 (D.Neb.1972); Williams v. School District, 340 F.Supp. 438 (D.C.Cal.1972); Harris v. International Tea Co., 4 FEP 5 (N.D.Ill.1971), affirmed, 454 F.2d 307 (7th Cir. 1972).[2]

In summary, the Court concludes that a white plaintiff cannot rely upon 42 U.S.C. § 1981 to press claims with respect to his private employment.

***212** CLAIMS UNDER 42 U.S.C. § 1985

The plaintiff also asserts that this Court has jurisdiction under 42 U.S.C. § 1985. Section 1985 is divided into three paragraphs. The first paragraph gives to any person the right to be free from conspiracies to prevent either the acceptance or performance of duties relating to any federal office. The second paragraph permits all persons to be free from conspiracies which would deter or intimidate them from serving as witnesses. Neither paragraph can have any applicability to the case at hand.

Presumably, the plaintiff is relying upon 42 U.S.C. § 1985(3) which provides in pertinent part:
If two or more persons in any State or Territory conspire or go into disguise on the highway or the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

At first blush, it is difficult for the Court to understand how this provision, enacted to remedy the evils of night riding in the 1870's, has any application to an employee's claim against his employer in the 1970's. Again, the Court concludes that plaintiff has failed to state a claim upon which relief can be granted.

Significantly, there is no averment that any of the defendants conspired with any other defendant (or co-conspirator) to deprive plaintiff of any right, incident to his employment, protected by federal law. Such an averment is necessary in order to state a cause of action. See, *e. g.,* Griffin v. Breckenridge, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); Carroll v. Andrews, 438 F.2d 1221, 1222 (5th Cir. 1971).

Apart from plaintiff's failure to allege a conspiracy, as required by statute, the Court has grave doubts as to whether the plaintiff could state a claim in any event. Again, the Court faces the fact that plaintiff, in effect, is seeking redress for statutory rights which are not personal to him. In Griffin v. Breckenridge, *supra,* the Supreme Court outlined the elements of a cause of action under § 1985(3). The court noted:
The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the Congressional purpose by requiring, as an element of the cause of action, a kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment ... The language requiring intent to deprive of *equal* protection, or *equal* privileges or immunity, means that there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's actions (emphasis in original and footnote omitted). *Id.* at 102, of 403 U.S., at 1798 of 91 S.Ct.

***213** The Court finds, taking plaintiff's complaint on its face, no allegation that plaintiff has been the victim of invidious discrimination. Indeed, by plaintiff's own averment, he is not a member of the class which is reached by the invidious discrimination which he alleges in his complaint. Thus, the Court holds that plaintiff has failed to state a claim under § 1985(3).

THE STATUTE OF LIMITATIONS QUESTION

With respect to the question of the running of the statute of limitations in this case, the Court, in view of its holding with respect to claims raised by § 1981 and § 1985, is not obligated to consider the question of the running of the statute. However, in the interest of possible judicial economy, the Court will render an alternative holding relative to the running of the statute under §§ 1981 and 1985.

Federal procedure permits the statute of limitations to be raised in Rule 12(b)(6) motion to dismiss. See, *e. g.,* Jones v. Rogers Memorial Hosp., 143 U.S.App.D.C. 51, 442 F.2d 773 (1971). As Professor Moore has observed:
It is now held that the defense of limitations may be raised by a motion to dismiss when the time alleged in the complaint shows that the action was not brought within the statutory period. Even where the defect does not appear on the face of the complaint, defendant should be able to raise it by motion to dismiss, accompanied by affidavits or other materials, which Rule 12(b) now permits the court to treat as motion for summary judgement. 2A J. Moore, Federal Practice ¶ 12.10, at pp. 2314-16 (footnotes omitted).

Thus, the question of the running of the statute of limitations is appropriately before the Court. Furthermore, plaintiff's complaint, coupled with the affidavit of Mr. Stebbins submitted by defendant, makes it clear that the statute has run, with respect to any colorable cause of action which might have been stated under §§ 1981 and 1985.

In his complaint, plaintiff avers that on December 22, 1970, he was discharged. Any possible cause of action which plaintiff may have had, came into effect at the time of his discharge in 1970. The Court's file indicates that this action was commenced on April 13, 1973, well over two years since plaintiff's discharge. The uncontested evidence before the Court reflects that the plaintiff filed charges with the Commission on January 7, 1971, against Dobbs Houses, Inc. There is no evidence in the record that plaintiff filed charges against any other defendant in this proceeding. Plaintiff has not filed an affidavit contesting the facts set out in the affidavit submitted by the defendant. The Court concludes, with respect to all claims under §§ 1981 and 1985(3), that the one-year Alabama statute of limitations bars plaintiff from proceeding against any defendant, save Dobbs Houses, Inc.

Neither 42 U.S.C. § 1981 or § 1985(3) provide limitations for the causes of action which they create. The federal courts, therefore, must look to the most nearly analogous state statute of limitation which will determine the time within which a cause of action may be commenced. 28 U.S.C. § 1652; 42 U.S.C. § 1988. The application of state limitation statutes for federally-created causes of action under the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981-1985 is well settled. O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914).

As the Fifth Circuit concluded in Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967):

Congress has created many federal rights without prescribing a period of enforcement. In such cases the federal courts borrow the limitations period prescribed by the state where the court sits. The applicable period of limitations is that which the state itself would enforce had an action seeking ***214** similar relief been brought in the court of that state.

We look first to federal laws to determine the nature of the claim and then to the state court interpretation of the state's "statutory catalogue" to see where the claim fits into the state's scheme. *Id.* at 688.

See also, *e. g.,* Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972); Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970); Knowles v. Carson, 419 F.2d 369 (5th Cir. 1969).

The next step in resolving the question of the appropriate statute of limitations is to examine the claim raised by the plaintiff under Alabama law. The Court of Appeals in Sewell v. Grand Lodge of Int'l. Assoc. of Machinists and Aerospace Workers, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972), carefully analyzed the applicable Alabama statute of limitations governing a federal statutory claim. In *Sewell,* a union business agent sued his employer labor organization for wrongful discharge. Plaintiff asserted that his discharge was unlawful because he had exercised his right of free speech, guaranteed to him under the provisions of the Labor Management Reporting and Disclosure Act of 1959. The defendant union raised the defense of the one-year Alabama statute of limitations. Judge Gewin, writing for a unanimous court, affirmed the district court's dismissal of plaintiff's complaint. In its decision, the Fifth Circuit determined that plaintiff's claim for violation of federal statutory law was essentially in the nature of a tort and concluded that Alabama's one-year statute would bar the case. The claims in this case also sound in tort.

The limitations statute, Title 7, Section 26, Code of Alabama, 1940 (Recomp. 1958), provides: "[A]ctions for any injury to the person or rights to another, not arising from contract, and not herein specifically enumerated", must be brought within one year.

This district court has determined that, with respect to 42 U.S.C. § 1981, the one-year statute applies. Buckner v. Goodyear Tire & Rubber Co., 339 F.Supp. 1108, 1117-1118 (N.D.Ala.1972), affirmed, 476 F.2d 1287 (5th Cir. 1973). Likewise, the Middle District of Alabama has also applied Alabama's one-year statute to a § 1981 claim. Henderson v. First National Bank of Montgomery, 344 F.Supp. 1373 (M.D.Ala.1972).

The one-year Alabama statute has been applied in actions brought under 42 U.S.C. § 1983. See, Boshell v. Alabama Mental Health Board, 473 F.2d 1369 (5th Cir. 1973) (per curiam); Johnson v. Yeilding, 165 F.Supp. 76 (N.D.Ala.1968). Neither the Court nor counsel have found any Alabama cases with respect to limitations for an action brought under 42 U.S.C. § 1985.

However, the cause of action under § 1985 is an action for the vindication of federally-created rights; there is no specific federal statute of limitations for actions brought under § 1985; and it is clearly not an action arising under contract. Therefore, under the guidance of *Sewell, supra,* the Court holds that the one-year Alabama statute of limitations applies to causes of action brought under 42 U.S.C. § 1985.

In actions brought under § 1981, the Fifth Circuit has recognized the salutary policy of encouraging plaintiffs to utilize administrative remedies. See, Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970). This principle extends to encouraging a party to utilize whatever remedies are available to him within the Equal Employment Opportunity Commission. Thus, plaintiff's filing a charge in January, 1971, will toll the running of the § 1981 statute with respect to Dobbs Houses, Inc. However, since no other defendant was charged before the Commission the Court will apply the statute to the claims arising against all other defendants.

In summary, the Court concludes that the plaintiff has failed to state a claim ***215** for relief against any defendant in this cause. Plaintiff has alleged unlawful employment practices, which would be subject to remedy in this Court. However, plaintiff simply is not a member of the group which is affected by the alleged disparate treatment. Plaintiff's real grievance appears to be that his employer has abridged his freedom of association. That complaint is not cognizable under Title VII of the Civil Rights Act of 1964, or the older Civil Rights Acts.

It is hereby ordered, adjudged and decreed that the complaint in this cause, be, and hereby is, dismissed. Each party shall bear its own costs.

All Citations

366 F.Supp. 205, 6 Fair Empl.Prac.Cas. (BNA) 566, 6 Fair Empl.Prac.Cas. (BNA) 1327, 6 Empl. Prac. Dec. P 8840

Footnotes

1 The Court does not deem it necessary to consider the defendant Jim Shaner's contention that an individual is not an "employer" under Title VII of the Act.

2 Counsel for both plaintiff and defendants have called the Court's attention to two cases which apparently permitted white plaintiffs to sue under 42 U.S.C. § 1981. Central Presbyterian Church v. Black Liberation Front, 303 F.Supp. 894 (E.D.Mo.1969); and Gannon v. Action, 303 F.Supp. 1240 (E.D.Mo.1969). In both cases, the trial judge permitted white church members to sue, under the Reconstruction Civil Rights Acts (including 42 U.S.C. § 1981), black militants who embarked upon a systematic program of disrupting church services. The Court believes that to the extent that the Missouri cases are based upon § 1981, they represent aberration from the prevailing authority. This Court will decline to follow the Missouri cases.

KeyCite history available

1989 WL 21158
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Virginia ROBINETT, Plaintiff,
v.
FIRST NATIONAL BANK OF WICHITA, and Sharon Martin, Defendants.

CIV. A. No. 87–2561–S.
|
Feb. 1, 1989.

Attorneys and Law Firms

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W. Stanley Churchill, Robert D. Overman/Ross A. Hollander, Martin, Churchill, Overman, Hill & Cole, Chartered, Wichita, Kan., for defendants.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

***1** This matter is before the court on defendants' motion for partial summary judgment and defendants' motion to designate Wichita, Kansas as the place of trial. In her complaint, plaintiff, Virginia Robinett, asserts various claims of discrimination and harassment because of her age, discrimination and harassment because of her association with a black co-worker, and constructive discharge. Plaintiff was an employee of defendant, First National Bank of Wichita (Bank). Plaintiff asserts these claims against defendant Bank and defendant, Sharon Martin, plaintiff's supervisor during the relevant time of her employment with the Bank. Defendants move for summary judgment on plaintiff's discrimination and harassment claims based on plaintiff's association with a black employee and summary judgment on plaintiff's age harassment claims.

At the time of the filing of this action, plaintiff was a forty-eight year old white female. From June 1968 to April 1, 1987, plaintiff was employed by defendant Bank. Plaintiff served in various positions at the Bank. In January 1974, she was head teller of the Bank's west branch. Sometime in 1980, she was promoted to the position of customer services representative. In 1985, she was assigned the position of assistant officer manager/head teller at the west branch. In late 1985 or early 1986, plaintiff requested a different position that would allow her to work different hours.

In April 1986, defendant Martin was hired to serve as assistant operations manager at the west branch. Plaintiff continued her employment with the Bank as head teller at the west branch. Defendant Martin, in her position as assistant operations manager, was responsible for seeing that employees adhered to the Bank's policies. Plaintiff alleges that defendants harassed her about her method of work performance, her style of dress, and by attempting to get her to socialize after hours.

Plaintiff was very supportive of a black co-worker, Linda Moore. Ms. Moore had problems relating to her job performance, her attendance, and her receipt of too many personal phone calls. Plaintiff had in fact placed Ms. Moore on probation before defendant Martin became assistant manager. Nevertheless, plaintiff was very supportive and provided assistance to Ms. Moore. Plaintiff alleges that she was harassed and discriminated against by defendants because of her association with Ms. Moore. On April 1, 1987, plaintiff quit her position with the Bank.

A moving party is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed.R.Civ.P. 56(c); *Maughan v. SW Servicing, Inc.,* 758 F.2d 1381, 1387 (10th Cir.1985). The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,,* 477 U.S. 242, 248 (1986). The moving party has the burden of showing the absence of a genuine issue of material fact. This burden "may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 474 U.S. at 256. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. *United States v. O'Block,* 788 F.2d 1433, 1435 (10th Cir.1986). The court must also consider the record in the light most favorable to the party opposing the motion. *Bee v. Greaves,* 744 F.2d 1387, 1396 (10th Cir.1984), *cert. denied,* 469 U.S. 1214 (1985).

A. *Claims based on association with black co-worker.*

***2** Many courts have recognized a cause of action against an employer for discrimination due to one's association with minorities under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *See Reiter v. Central Consolidated School District,* 39 F.E.P. cas. 833 (D.Colo.1985) (Title VII) and *Winston v. Lear–Siegler, Inc.,* 558 F.2d 1266, 1270 (6th Cir.1977) (section 1981). To maintain a claim of discrimination or harassment based on her association with a black person, plaintiff must show the existence of an association. The law requires something more than mere work-related friendship. There must be a significant connection between the plaintiff and the non-white person. *See Skinner v. Total Petroleum, Inc.,* 859 F.2d 1439, 1447 (10th Cir.1988) (white plaintiff may bring a section 1983 claim of retaliatory discharge based on his support of discharged black co-worker in bringing an EEOC charge against employer), *Gresham v. Waffle House, Inc.,* 586 F.Supp. 1442, 1445 (N.D.Ga.1984) (interracial marriage); *Winston, supra* (plaintiff protested the discriminatory discharge of a black co-worker); *Smithberg. v. Merceo, Inc.,* 38 F.E.P. cas. 1868 (C.D.Cal.1983) (plaintiffs attempted to vindicate minority employees' rights).

In the present case, plaintiff fails to provide sufficient evidence to establish an association with Ms. Moore to maintain actions under Title VII and section 1982 based on association. The association between plaintiff and Ms. Moore was that of co-workers who had a good friendship at work. Plaintiff, as head teller, worked with Moore, a teller, about her work-related problems. The court accepts as true plaintiff's allegations that she was more supportive and provided more assistance to Ms. Moore than any other white employee at the Bank's west branch. Although plaintiff was very supportive of her black co-worker, this is insufficient to establish the type of relationship between whites and non-whites necessary for a white person to maintain a cause of action of discrimination based on association. Plaintiff provides no evidence that she actively attempted to vindicate Ms. Moore's rights or protested against any discrimination against Ms. Moore.

Moreover, there is absolutely no evidence shown that any of defendants' alleged discriminatory or harassing actions against plaintiff were in any way based on or resulted from plaintiff's workplace friendship with the black co-worker. Plaintiff has failed to present any evidence linking her supportive friendship of Ms. Moore to the alleged discriminatory and harassing actions. Thus, the court will grant defendants' motion for summary judgment regarding the discrimination and harassment claims based on association. Therefore, it is unnecessary to address defendants' arguments that defendant Martin is not individually liable under Title VII or section 1983.

B. *Defendants' Motion for Attorneys' Fees.*

Defendants move for attorneys' fees resulting from defending against plaintiff's Title VII racial discrimination claims. Defendants argue the claims which were based on plaintiff's supportive friendship with a black co-worker were frivolous and without foundation. Plaintiff responds to this motion by espousing hyperboles.

***3** In Title VII actions, the court in its discretion may allow the prevailing party reasonable attorney's fees as part of the cost. 42 U.S.C. § 2000e–5(k). However, the court may allow a prevailing defendant in a Title VII case an award only if plaintiff's action "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1977).

The court finds defendants are entitled to recover attorney's fees incurred in defending against plaintiff's racial discrimination claims. Even if there was some legitimate disagreement over whether plaintiff's relationship with Ms. Moore constituted an association entitling the plaintiff to Title VII protection, plaintiff still failed to present any evidence of discriminatory acts or harassment against her because of her association with Ms. Moore. Plaintiff's racial discrimination and harassment claims are groundless and frivolous. The court limits the award of attorney's fees to only those fees defendants incurred in bringing this motion and only those fees relating to the racial discrimination claims in this motion (approximately half of the expense incurred in bringing this motion). Defendants may not recover fees incurred in defending against any of plaintiff's other claims.

C. *Age Harassment Claims*

Plaintiff claims she was harassed by defendants because of her age. Specifically, at her deposition, plaintiff testified that she was harassed about her business and employment practices, her style of dress, and her decision not to socialize with co-workers after business hours. Plaintiff states she was subjected to “nit-picky” verbal harassment, and harassment in the presence of other employees and customers. Also, plaintiff had heard she was on defendant Martin’s “hit list” and that Martin wanted to get rid of her. Defendants argue that plaintiff fails to link her perceived harassment to her age.

A factual issue remains on whether the conditions to which plaintiff states she was subjected were in fact age-related harassment. In determining a motion for summary judgment, the court must consider the record in a light most favorable to the nonmoving party. Although the court has doubts about whether plaintiff will be able to show Martin’s conduct was related to age discrimination, plaintiff has presented sufficient evidence to raise a question of fact to survive summary judgment.

Defendants argue that the conditions plaintiff complains of as harassment based on age have not been linked to plaintiff’s age. As one court has noted, however, an individual in age discrimination cases “must often rely on the interpretation of small bits of circumstantial evidence.” *Long v. First Family Financial Services, Inc.,* 677 F.Supp. 1226, 1229 (S.D.Ga.1987). Evidence similar to that relied on by plaintiff in the present case has been used to support a case of age discrimination and harassment. *See Lewis v. Federal Prison Industries, Inc.,* 786 F.2d 1537, 1539–40 (11th Cir.1986) (defendant harassed plaintiff by making him “follow the book to the letter” and verbally scolded plaintiff in presence of co-workers). It should be noted that in *Lewis,* there was other evidence of repeated incidents on which the court relied, including defendant’s outright suggestion that it was time for plaintiff to retire. Nevertheless in the present case, the court finds that plaintiff presents enough evidence to withstand summary judgment on her age harassment claim. Thus, defendants’ motion for summary judgment regarding the age harassment claims will be denied.

D. *Motion to Designate Wichita, Kansas as the Place of Trial.*

***4** Defendants move to have Wichita, Kansas designated as the place of trial for this case. On March 11, 1988, in response to defendants’ earlier and similar motion, the court took this matter under advisement. The court directed defendants to renew their motion after discovery was completed, provided legal grounds for doing so existed.

In support of this current motion, defendants state that the vast majority of witnesses on both parties’ lists of witnesses in the pretrial order reside in Wichita. Also, plaintiff resides in Wichita. Plaintiff has not responded to this renewed motion. However, she did object to the earlier motion. In her earlier objection, plaintiff’s only response was that plaintiff’s choice of trial site should be given substantial weight.

Regardless of where the trial is held, I will be the judge hearing this case. The court finds that for the convenience of the court, the place of trial should be Topeka, Kansas. Therefore, the court, pursuant to Local Rule 205, will designate Topeka as the place of trial for this case. This change in trial location will also be more convenient to both parties and their witnesses than would a trial in Kansas City.

IT IS BY THE COURT THEREFORE ORDERED that defendants’ motion for summary judgment on plaintiff’s Title VII and Section 1981 racial discrimination and harassment claims is granted. IT IS FURTHER ORDERED that defendants’ motion for attorneys’ fees for defending against the Title VII racial discrimination claims is granted, as more fully set out in this Memorandum and Order. IT IS FURTHER ORDERED that defendants’ motion for summary judgment on plaintiff’s age harassment claims is denied. IT IS FURTHER ORDERED that defendants’ motion to designate Wichita, Kansas as the place of trial is denied. However, the court, in its discretion, designates Topeka, Kansas the place of trial for this case.

All Citations

Not Reported in F.Supp., 1989 WL 21158

KeyCite history available

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Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Stephanie SALAZAR, Plaintiff,
v.
CITY OF COMMERCE CITY; Gerald M. Flannery, in his individual capacity; Paul Natale, in his individual capacity; Heather Olson, in her individual capacity; and Tom Acre, in his individual capacity, Defendants.

Civil Action No. 10–cv–01328–LTB–MJW.
|
May 1, 2012.

Attorneys and Law Firms

Donald C. Sisson, Elkus & Sisson, P.C., Denver, CO, for Plaintiff.

J. Andrew Nathan, Marni Nathan Kloster, Nathan, Bremer, Dumm & Myers, PC, Denver, CO, for Defendants.

ORDER

LEWIS T. BABCOCK, District Judge.

***1** This matter is before me on Defendants' Motion & Brief in Support of Summary Judgment **[Doc # 46]** filed by Defendant City of Commerce City (the "City"), and Defendants Gerald M. Flannery, Paul Natale, Heather Olson, and Tom Acre, in their individual capacities. Defendants seek dismissal of the claims filed against them by Plaintiff, Stephanie Salazar. Oral arguments will not materially aid in the resolution of this motion. After consideration of the parties' briefs, and for the reasons stated below, I GRANT IN PART AND DENY IN PART the motion as follows.

I. Background

In August of 2005, Plaintiff was hired by the City to be its Economic Development Director. In November of 2006, Plaintiff was provided a performance review in the form of a memorandum by her supervisor, the Acting Assistant City Manger, Roger Tinklenberg. [Doc # 45, Ex. H] At that time she was taken off probationary status and given a salary increase.

Thereafter, on November 20, 2006, Plaintiff sent a "strictly confidential" document to Defendant Paul Natale—who was then a Council Member and later elected Mayor of Commerce City—in which she discussed the "internal barriers to economic development initiatives for the city," and complained about several current and former City employees. [Doc # 45, Ex. J, Doc. # 58 Ex. N] While this document contains allegations of general workplace "harassment" of the Economic Development staff, it does not make specific allegations of gender or national origin discrimination.

Following her annual performance evaluation in the Fall of 2007, Plaintiff wrote a lengthy response to Defendant Gerald Flannery, the City Manager, dated December 21, 2007, indicating that she did not agree with the evaluation results. [Doc # 45, Ex. P, Doc # 57, Ex. W] Plaintiff concedes that this response was not a "formal complaint of discrimination" under the policies of the City, but asserts that it complained of "gender bias" by alleging unequal treatment between female and male managers at the City. [Doc # 57, Ex. W, pp. 27–31] In addition, she contends that she specifically opposed the treatment of a Hispanic employee (Building Official Leonard Lucero) by the City after he complained of discrimination [Doc # 57, Ex. W, pp. 13, 28, 34, 42], and notes a local media attack with "racial sentiment" on a development of a Spanish market in the City, and repeated use of her own Spanish surname therein. [Doc # 57, Ex. W, pg. 45] Defendants maintain that this document did not make a specific allegation that Plaintiff herself had been the subject of gender or national origin discrimination or retaliation by the City, but because it referenced the City's discrimination policies Defendant Heather Olson (now known as Heather Spenser), the Human Resources Director for Commerce City, conducted an investigation. [Doc # 45, Ex. U, V & Y] On March 6, 2008, Defendant Olson concluded that there had been no policy violations. [Doc # 57, Ex. CC]

***2** During this time, Plaintiff submitted a report to the City Council and Defendant Mayor Natale entitled "Report to Council on the Status of the Department of Economic Development" on January 7, 2008. [Doc # 45, Ex. Z, Doc # 57, Ex. AA] This report—which again related to the disfavored treatment of Plaintiff and the Economic Development Department—alleged that on November 9, 2007, Defendant Flannery made derogatory comments about Navajo people in general and about Lisa Wayne, a Navajo women who had been hired by Plaintiff. [Doc # 57, Ex. AA, pp. 4–5] Plaintiff also alleged that Mr. Tinklenberg and Gregg Clements—when acting as City Managers—had discriminated against minority employees; specifically, she alleged that they attempted to terminate Leonard Lucero "a Spanish surnamed employee of over 22 years with the City." [Doc # 57, Ex. AA, pg. 6] She again noted that she had been disparaged based on her own Spanish surname in media reports related to development of a Spanish market. [Doc # 57, Ex. AA, pg. 6] In response, the City hired Bob Bowman, a human resources consultant, to investigate the alleged comments made by Defendant Flannery about Navajo people related to Ms. Wayne. [Doc # 45, Ex. A–3, Doc # 58, Ex. EE] In April 2008, Mr. Bowman concluded that Defendant Flannery "may have made reference to Ms. Wayne's cultural heritage, but the there was no discrimination or harassment involved." [Doc # 45, Ex. A–3, pg.2]

In March and April of 2008, Plaintiff allegedly withheld business information about the City from Defendant Flannery, who was at that point her supervisor. As a result, she received a written reprimand from him on April 4, 2008. [Doc # 45, Ex. A–9, Doc # 57, Ex. FF] Also at that time Defendant Tom Acre, the Deputy City Manager, became her supervisor. [Doc # 58, Ex. D, pg. 153] Plaintiff responded to the reprimand by submitting a "Grievance Against Flannery and Acre" to the Human Resources Department, dated April 18, 2008, in which she complained that the reprimand was unwarranted and retaliatory. [Doc # 45, Ex. A–13, Doc # 57, Ex. MM]

The City investigated Plaintiff's Grievance by hiring an employment attorney, Marilee Langhoff. In her report dated June 22, 2008, Ms. Langhoff addressed the Grievance by grouping Plaintiff's alleged complaints into: 1) violations of the City's Employment and Performance Evaluation Guidelines related to "Problem Solving;" 2) violations of the City Handbook prohibitions against "Discrimination & Harassment" and "Work Place Violence;" and 3) actions contrary to the job description of the Director of Economic Development. [Doc # 45, Ex. A–16, Doc # 57, Ex. QQ] After finding no violations, the report concluded that "[i]n sum, despite her extensive litany, I do not find that Ms. Salazar's Grievance has merit or is worthy of any additional response or examination either internally or externally" and "[f]or various reasons, it is my opinion that at this juncture Ms. Salazar's behavior has become a serious disruption in the workplace ...". [Doc # 57, Ex. QQ, pg. 7]

***3** Plaintiff was subsequently notified that she would be terminated from her employment in a letter from her supervisor, Defendant Acre, dated July 2, 2008. [Doc # 45, Ex. A–20] The letter of termination indicated that "[a]lthough no reason must be given for the City's decision" based on her at-will status, it noted her unprofessional behavior in the past months, her continued "inability to work as part of the City team," her "inability to communicate effectively with [her] department," and Defendant Acre's concern about her judgment as evidenced by her keeping information confidential from the City Manager. The letter also relied upon her "extraordinarily lengthy, confrontational responses to comments made regarding her performance," which alleged serious wrongdoings, but she then "refused to participate in the investigation." The letter concluded that "I do not believe your work style, behavior and recent actions fit the needs of the City and your recent conduct has been quite problematic." [Doc # 45, Ex. A–20]

Plaintiff subsequently filed this lawsuit in which she asserts claims for Discrimination and Retaliation against the City in violation of Title VII, 42 U.S.C. § 2000e, *et seq.* (First Claim for Relief), as well as claims for Discrimination and Retaliation against all Defendants in violation of 42 U.S.C. § 1981 (Second Claim for Relief). She also brings claims against all Defendants pursuant to 42 U.S.C. § 1983 for Violation of her 14th Amendment Right to Equal Protection Based upon Gender (Third Claim for Relief), and Abridgement of her First Amendment Right to Freedom of Speech and Association (Fourth Claim for Relief). [Doc # 18]

II. Standard of Review

The purpose of a summary judgment motion under Fed.R.Civ.P. 56 is to assess whether trial is necessary. *White v. York Int'l Corp .,* 45 F.3d 357, 360 (10th Cir.1995). Fed.R.Civ.P. 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91

L.Ed.2d 265 (1986).

If a reasonable juror could not return a verdict for the non-moving party, summary judgment is proper and there is no need for a trial. *Celotex Corp. v. Catrett, supra,* 477 U.S. at 323. The operative inquiry is whether, based on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, summary judgment should not enter if, viewing the evidence in a light most favorable to the plaintiff and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for the plaintiff. *Id.* at 252; *Mares v. ConAgra Poultry Co.,* 971 F.2d 492, 494 (10th Cir.1992).

III. Title VII Claims

***4** The City argues that Plaintiff's Title VII claims against it should be dismissed. It first asserts that even if she can meet her burden to prove a *prima facie* case of gender discrimination, the City can proffer several nondiscriminatory reasons for her termination (as the challenged employment action), and there is no disputed issue of material fact supporting Plaintiff's burden to prove that the proffered reasons were merely pretextual. The City also argues that Plaintiff cannot make out a *prima facie* case of discrimination based on national origin in that it is undisputed that she is not a minority. Finally, with regard to her retaliation claim, the City asserts that Plaintiff cannot prove such claim in the she did not engage in a protected activity that, in turn, was casually connected to an adverse employment action.

A. Gender Discrimination:

To establish an inference of Title VII discrimination from circumstantial evidence, the court follows the burden shifting test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, the plaintiff must establish a *prima facie* case of employment discrimination. Next, the defendant must articulate a legitimate nondiscriminatory reason for its employment decision. Finally, the burden shifts back to the plaintiff to show that the stated nondiscriminatory reasons are mere pretext. *Id.*

As an initial matter, I note that to the extent the City argues that Plaintiff's claim of gender discrimination based on disparate treatment is untenable—by pointing to the high percentage of female employees at the City (including Directors), the fact that Plaintiff's position (both before and after she was employed at the City) was held by women, and that her claim that Defendant Natale made derogatory statements against women is undermined by the fact that Plaintiff confided in him and he was not involved in City personnel decisions—such arguments go to the weight of Plaintiff's discrimination claim.

However, for the purpose of this motion, the City does not challenge that Plaintiff can make out a *prima facie* case of gender discrimination. Rather, the City contends that Plaintiff cannot meet her burden to show a disputed issue of material fact that the nondiscriminatory reasons for her termination were pretextual. The City's position is that Plaintiff was terminated because she was confrontational, unable to work with others, and that she violated City policies. The reasons set forth in her letter of termination include: her recent unprofessional behavior; her inability to work as part of the City team and to communicate effectively with her department; her supervisor's concern about her judgment; and her lengthy, confrontational responses to comments made regarding about her performance, in which she made serious allegations while refusing to participate in the related investigations, and which alleged specious and frivolous complaints. These non-discriminatory reasons for termination are supported by evidence in the record. *See Elmore v. Capstan, Inc.,* 58 F.3d 525, 530 (10th Cir.1995); *EEOC v. Flasher Co., Inc.,* 986 F.2d 1312, 1316 (10th Cir.1992)(the defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceeding need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need prove that the reasoning was applied in a nondiscriminatory fashion).

***5** To show pretext, a plaintiff must demonstrate that the defendant was more likely motivated by a discriminatory reason, or that its proffered reason "is unworthy of credence." *Munoz v. St. Mary–Corwin Hosp.,* 221 F.3d 1160, 1167 (10th Cir.2000). Pretext may be shown "by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." *Rivera v. City & County of Denver,* 365 F.3d 912, 925 (10th Cir.2004) (citations omitted). "[T]he relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs." *Young v. Dillon Companies,* 468 F.3d 1243, 1250 (10th Cir.2006).

In support of her contention that her termination was actually improperly motivated by her gender, Plaintiff refers to the City's "pattern of sex discrimination" leading up to her termination—as evidenced by Defendant Natale's alleged statements against women, Defendant Flannery's termination of a female director a month after he became City Manager and his demotion of two other female mangers, and Plaintiff's negative evaluation that relied in part on her conflict with a male manager. To the extent that Plaintiff argues, in a footnote of her response brief, that this evidence supports a Title VII claim for hostile work environment, I note that such claim was not included in the parties' Final Pretrial order which merged the pleadings herein and controls the course of this action and trial. [Doc # 63] *See Hullman v. Board of Trustees of Pratt Community College,* 950 F.2d 665, 668 (10th Cir.1991)(ruling that an order entered pursuant to Rule 16(e) supersedes the pleadings and controls the subsequent course of litigation). Moreover, such evidence, even when viewed in the light most favorable to Plaintiff, does not amount to a "pattern of sex discrimination" leading to Plaintiff's termination. Contrary to her argument, I find that this evidence fails to support a determination that her termination was "more likely" motivated by her gender than the non-discriminatory reasons articulated by the City.

Plaintiff also argues that the reasons given in support of her termination are unworthy of credence in that the specific incidents cited in her termination letter were "never investigated" or brought to Plaintiff's attention in order to be responded to. She also asserts that one of the incidents took place several years ago, and that Defendant Acre could not recall in his deposition who had made the allegations. [Doc # 58, Ex G. pg. 238] Although she concedes that she was aware of her April 2008 written reprimand, she maintains—without further argument—that it was "purely pretextual" because it occurred on the same day that Defendant Acre became her new supervisor. Plaintiff also relies on opinions of co-workers that she was performing well. For example, Plaintiff refers to her initial performance review in November of 2006, when Tinklenberg noted that Plaintiff had the "potential to be a star for the City" [Doc # 57, Ex. B, pg. 2], and an affidavit from a former City employee that through August of 2006 it was his opinion that Plaintiff was intelligent and articulate, and she was "very effective" and "extremely professional." [Doc # 58, Ex. F, pg. 4] Plaintiff also relies upon evidence from co-workers in other departments that she seemed to be a good supervisor [Doc # 57, Ex. I, pp. 19–20] and she was positive, professional, and reasonable to deal with. [Doc # 58, Ex. KK, pg. 5]

***6** The evidence Plaintiff relies upon, however, does not undermine or question the nondiscriminatory reasons given by the City for her termination. Nor does it infer pretext for the purpose of gender discrimination. *See Holopirek v. Kennedy and Coe, LLC.,* 303 F.Supp.2d 1223, 1240 (D.Kan.2004)(finding that even if true, the evidence is simply not relevant to the issue of whether the plaintiff was terminated based on her gender). When viewing this evidence in Plaintiff's favor, I conclude that it is insufficient to met her burden to show a genuine issue of material fact whether the reasons given for her termination could be found by a jury to be pretextual for gender discrimination.

Thus, having failed to come forward with evidence that the proffered reasons for terminating her employment were a pretext for gender discrimination, Plaintiff cannot withstand the City's motion for summary judgment on this claim.

B. National Origin Discrimination:

The City next argues that Plaintiff cannot make out her *prima facie* case of Title VII discrimination based on national origin because it is undisputed that Plaintiff is not a minority by birth or heritage. To establish a *prima facie* case for discriminatory discharge based on national origin, a plaintiff must first establish that she was of a protected national origin; second, she must show that she was qualified to perform the job from which she was removed; and third, she must establish that she was discharged under circumstances giving rise to an inference of discrimination. *Metoyer v. State of Kan.,* 874 F.Supp. 1198, 1202 (D.Kan.1995) (citations omitted).

Plaintiff concedes that she cannot allege that she was directly subjected to national origin discrimination, but instead contends that she was terminated based on "her association with members of a protected class." Specifically, she contends she was discriminated against based on her Hispanic surname from her husband (Frank Salazar), her hiring of a Native American employee (Lisa Wayne), and her advocacy for a Hispanic employee (Leonardo Lucero). I note that the case law from the Tenth Circuit supporting a Title VII claim for national origin discrimination based on association—as opposed to direct discrimination of the charging party—is minimal, at best. *See Reiter v. Center Consol. School Dist. No. 26–JT,* 618 F.Supp. 1458, 1460 (D.C.Colo.1985), *overruled on other grounds by Drake v. City of Fort Collins,* 927 F.2d 1156, 1162 (10th Cir.1991)(finding no "Tenth Circuit decisions that discuss whether Title VII prohibits discriminatory employment practices based on an individual's association with people of a particular race or national origin"). Nonetheless, I agree with the City that the relationships alleged by Plaintiff are insufficient, as a matter of law, to meet her *prima facie* burden of national origin discrimination by association.

Plaintiff's evidence that she was discriminated against by anyone at the City based on her Spanish surname or her association with her husband is limited to her subjective impression that he was snubbed by City officials at a single social event. [Doc # 57, Ex. WW, pp. 45, 61–4] To the extent she maintains discrimination against her related to media accounts about the possible development of a Spanish market, she does not allege any involvement by City officials. [Doc # 58, Ex. N, pg. 12, Doc # 57, Ex. W, pg.45] In addition, although she did accuse the City of discriminatory actions toward Ms. Wayne and, perhaps, Mr. Lucero, she did not allege or assert any direct racial discrimination against her based on these relationships; rather, her claim is that she was retaliated against for complaining of such discrimination, as discussed below. I conclude that, even when viewed in her favor, Plaintiff's evidence is insufficient, as a matter of law, to make out a *prima facie* case that she was subjected to direct national origin discrimination, or discrimination based on association. The City is entitled to summary judgment on Plaintiff's Title VII claim for national origin discrimination.

C. Retaliation:

***7** With regard to her claim of Title VII retaliation, the City asserts that Plaintiff cannot show that she engaged in protected activity and, moreover, that she cannot show that any such activity caused her termination. And, even if she is able to make out her *prima facie* case of discriminatory retaliation, she cannot meet her burden to show evidence that the reasons offered by the City for her termination are merely pretextual.

In order to prove a retaliation claim, the shifting burden analysis of *McDonnell Douglas v. Green* applies. *See Kelley v. Goodyear Tire and Rubber Co.,* 220 F.3d 1174, 1179 (10th Cir.2000). The plaintiff bears the initial burden of proving a *prima facie* case by showing that: (1) she engaged in a protected opposition to discrimination or participated in a proceeding arising out of the discrimination, (2) the defendant took an adverse action against her after the protected activity, and (3) a causal connection exists between her activity and the adverse action. *Griffith v. State of Colo., Div. of Youth Services,* 17 F.3d 1323, 1331 (10th Cir.1994). If the plaintiff establishes a *prima facie* case, then the defendant must articulate, and support with some evidence, a legitimate, nondiscriminatory reason for the discharge. *Aramburu v. Boeing Co.,* 112 F.3d 1398, 1403 (10th Cir.1997). If it meets this burden, the plaintiff must then present evidence raising a genuine issue that the reasons offered for her termination are pretextual. *Id.*

Plaintiff first argues that she "repeatedly" engaged in protected activity. For purposes of Title VII retaliation claims, as relevant here, protected activity is defined as opposing any practice made unlawful under Title VII. 42 U.S.C.2000e–3(a); *Petersen v. Utah Dep't of Corr.,* 301 F.3d 1182, 1188 (10th Cir.2002). To be protected, the opposition must be against a "practice made an unlawful employment practice by Title VII." *Zokari v. Gates,* 561 F.3d 1076, 1081 (10th Cir.2009)(*quoting Petersen v. Utah, supra,* 301 F.3d at 1188). "Although no magic words are required to qualify as protected opposition, the employee must convey to the employer his or her concern that the employer has engaged in [an unlawful] practice." *Hinds v. Sprint/United Management Co.,* 523 F.3d 1187, 1203 (10th Cir.2008)(*citing Anderson v. Academy School Dist.,* 20, 122 Fed. App'x. 912, 916 (10th Cir.2004)(unpublished opinion)).

Plaintiff asserts that she engaged in protected activity by opposing discrimination in her various responses and complaints to the City. First, she refers me to her December 21, 2007 response to her performance review in which Plaintiff argues that she opposed discrimination when "alleging that [her] evaluation was an example of disparate treatment based on gender" by arguing that she was criticized for conflict with the City's Planning Department which, in fact, was created primarily by male managers. [Doc # 57, Ex. W, pg. 28] The response also raised allegations that both she and another female manager had been the subject of "gender bias against female managers and favored gender status of male managers." [Doc # 57, Ex. W, pg. 30] My review of this lengthy document—which specifically indicates is not to be construed as a complaint, and is to be kept confidential—is that it contains a large number of charges against both male and female employees. [Doc # 46, Ex. A, pp. 105–06] The clear purpose of the response is Plaintiff's assertion that her performance evaluation was the product of the disfavored status of the Economic Development Department. However, Plaintiff does allege, at the minimum, claims of discrimination against other employees.

***8** Next, in her written report to the City Council dated January 7, 2008, Plaintiff alleged—in a section titled "Discrimination Against ED Staff by CM Flannery"—that her employee Lisa Wayne, a Native American, had been subjected to "obvious racial discrimination" when Defendant Flannery made racially derogatory comments about Navajo people. [Doc # 57, Ex. AA, pp. 3–5] She also asserts that the City discriminated against minorities, as evidenced by the treatment of Hispanic employee Mr. Lucero, and she indicated that "it is reasonable to fear [Flannery's] reprisals if I were to file a complaint of discrimination ...". [Doc # 57, Ex. AA, pg. 6] Although the report again specifically indicates that it is not a complaint, and must kept confidential, Plaintiff clearly alleges and opposes discriminatory conduct. Plaintiff also relies on her April 18, 2008 Grievance that she filed with the City's Human Resources Department, which alleged that the written reprimand was taken "in retaliation against me." [Doc # 57, Ex. MM, pg. 27]

Finally, Plaintiff refers to a memo she wrote to Defendant Natale, dated May 21, 2008, responding to the fact that Defendant Flannery had been cleared of any wrongdoing related to his comments about Navajo people by the Bowman investigation, which concluded that there was no discrimination or harassment involved in his reference to Ms. Wayne's cultural heritage. [Doc # 45, Ex. A–5, Doc # 57, Ex. N] Plaintiff took issue with the investigation results by alleging a pattern discrimination; specifically, that "Mr. Flannery's employment discrimination based on race, color and national origin is not an isolated incident, as his bigoted practices also include a pattern of gender discrimination in personnel and employment matters. Mr. Flannery discriminates against classes of individuals in their employment with the City." [Doc # 57, Ex. NN, pg. 8]

I agree with the City that Plaintiff's various documents consisted primarily of generalized complaints against senior management at the City, and often specifically indicated they were not to be construed as "complaints." However, I find that Plaintiff has alleged discrimination in these documents sufficient enough to met her burden to show that she engaged in some protected activity by opposing discrimination under Title VII. *Compare Anderson v. Academy Sch. Dist. 20, supra,* 122 Fed. App'x at 916 ("vague reference to discrimination and harassment without any indication that this misconduct was motivated by [an improper criteria] does not constitute protected activity and will not support a retaliation claim"), *with McMillin v. Foodbrands Supply Chain Services, Inc.,* 272 F.Supp.2d 1211, 1219 (D.Kan.2003)(concluding that a plaintiff's informal statements that she was being treated unfairly because she was a woman sufficiently conveyed her concerns that Defendant was acting in an unlawful discriminatory manner when the evidence in viewed in the light most favorable to the plaintiff).

***9** To make out her *prima facie* case, Plaintiff must also show a causal connection between her protected activity and her termination. "A causal connection may be shown by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *O'Neal v. Ferguson Constr. Co.,* 237 F.3d 1248, 1253 (10th Cir.2001)(*quoting Burrus v. United Tel. Co. of Kan., Inc.,* 683 F.2d 339, 343 (10th Cir.1982)) The Tenth Circuit has "held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation." *O'Neal v. Ferguson, supra,* 237 F .3d at 1253 (*quoting Anderson v. Coors Brewing, Co.,* 181 F.3d 1171, 1179 (10th Cir.1999)). However, the Tenth Circuit has refused to recognize a presumption of causation in cases where the adverse actions were taken as few as three months after the protected activity. *EEOC v. C.R. England, Inc.,* 644 F.3d 1028, 1051 (10th Cir.2011).

Plaintiff asserts that she can show a causal connection by temporal proximity. She relies on the May 21, 2008 memo she wrote to Defendant Natale, in which she alleged that Defendant Flannery's "bigoted practices also include a pattern of gender discrimination in personnel and employment matters." [Doc # 57, Ex. NN, pg. 8] After sending this letter, Plaintiff was terminated approximately six weeks later, on July 2, 2008. The City maintains that Plaintiff's May 21, 2008 memorandum was only responsive to the investigation results, and did not raise any new issue or make any specific claims of discrimination. The City further argues that in order to show causation Plaintiff must rely on her only specific claim of discrimination—contained in her January 7, 2008 Report to City Council regarding Defendant Flannery's alleged racial comments related to Ms. Wayne and her Navajo heritage—as the relevant protected activity. Because that activity occurred six months prior to her termination, the City argues that she cannot establish causation.

However, regardless of whether the generalized allegation made in Plaintiff's May 21, 2008, memorandum is sufficient activity to establish causation based on timing, I find that Plaintiff has offered additional evidence in order to met her *prima facie* burden. *See O'Neal v. Ferguson, supra,* 237 F.3d at 1253 (finding that when there is no close temporal proximity between the protected activity and the alleged retaliatory conduct, the plaintiff may offer additional evidence to establish causation). Specifically, Plaintiff's termination letter—which cites to her "extraordinarily lengthy, confrontational responses to comments made regarding your performance" in which she "made serious allegations against the City" that were described as "repetitive" and "without merit"—constitutes additional evidence of causation. [Doc. # 45, Ex. A–20] In so doing, I reject the City's argument to the extent it maintains that Plaintiff's termination letter (and the reasons therein) are not relevant because she was an at-will employee. I conclude that this is sufficient evidence, when viewed in favor of Plaintiff, for a reasonable jury to find causation and, thus, Plaintiff has made out her *prima facie* case of retaliation.

***10** As discussed above, I have determined that the City has met its burden to articulate legitimate non-retaliatory reasons for Plaintiff's termination. *See Fye v. Oklahoma Corp. Comm'n,* 516 F .3d 1217, 1228 (10th Cir.2008)("[e]stablishing a legitimate, nondiscriminatory reason is a burden of production and can involve no credibility assessment")(*quoting Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). Thus, the burden shifts to Plaintiff to show that the non-discriminatory reasons given by the City for her termination were pretext for retaliation.

In order to show that the reasons were pretextual for retaliation, Plaintiff relies on deposition testimony in which Defendants Flannery and Acre described their reactions to her various allegations and complaints as being disappointed, upset, saddened, distraught, hurt and shocked, and Defendant Flannery's testimony that he could have felt a "tinge of anger" when she accused him of making discriminatory racial comments about Navajo people. [Doc # 58, Ex. D, pp. 96, 99, 114–117, 120–22, 186, 192, 206 & Ex. H, pg. 175] Defendant Natale testified that Defendant Flannery was not angry, but was upset because he believed Plaintiff's accusations were a misrepresentation. [Doc # 58, Ex. G, pg. 164] Defendant Flannery also testified that Plaintiff's various complaints "eroded his trust" in her. [Doc # 58, Ex. D, pg. 206]

Plaintiff also relies upon language in her termination letter for evidence that her termination was actually retaliatory for her various complaints. [Doc # 45, Ex. A–20] Specifically, the termination letter stated as follows:

> Finally, during the last several months you have submitted extraordinarily lengthy, confrontational responses to comments made regarding your performance. For instance, in response to your 2007 evaluation, in which you received a successful rating, you filed a response which was more than 50 pages long. In this response you made serious allegations against the City, yet you refused to substantiate the allegations and you refused to participate in an investigation into the allegations contained in your response. It is completely unproductive to allege wrongdoing and then refuse to participate when the City takes your allegations seriously and investigates them. Further, it is even more unproductive to criticize the City for investigating your allegations. It seems that any discussion about your performance, regardless of the content, causes you to lash out in a negative and unprofessional manner. As another example, in response to the City Manager's April reprimand, you filed an 8–page response which contained "specious" and "frivolous" complaints. Indeed, some of the complaints were so frivolous that the independent investigator noted that they "raise a question as to whether they were made in good faith or solely to disrupt the City's operations." It was also noted that your recent behavior has "become a serious disruption in the workplace." The City takes all complaints seriously, as is evidence by the significant money, and immeasurable staff time, spent investigating complaints you have raised. The problem is not the fact that you voiced concern, as the City specifically has policies in place to allow employees to raise concerns. What is problematic is how you have handled yourself and the fact that your complaints have been illogical and repetitive, and all have been found to be without merit. This type of behavior is disruptive and has led to a neutral third party concluding that you have not been acting in good faith. [Doc # 45, Ex. A–20, pg. 3]

***11** To the extent that Plaintiff argues that the termination letter knowingly misstates that her complaints were without merit, I note that employees may maintain retaliation claims based only on a "reasonable good-faith belief that the underlying conduct violated Title VII." *See Board of County Comm'rs, Fremont County v. U.S. EEOC,* 405 F.3d 840, 852 (10th Cir.2005).

While the letter specifically indicates that "[t]he problem is not the fact that you voiced concern," but rather "how you have handled yourself and the fact that your complaints have been illogical and repetitive, and all have been found to be without merit," I agree with Plaintiff that this language in the letter supports an inference by a jury that her termination was actually retaliatory for her discrimination complaints. As a result, Plaintiff has come forward with evidence of material issues of fact sufficient for a reasonable juror to find that the reasons given for her termination were false. And, as such, Plaintiff's claim for retaliation under Title VII against the City survives summary judgment.

IV. Discrimination and Retaliation under § 1981

Plaintiff also asserts a claim of national origin employment discrimination and retaliation under 42 U.S.C. § 1981. Plaintiff's § 1981 claims are raised against the City, as well as the other Defendants in their individual capacities.

In order to prove discrimination within the meaning of § 1981, a plaintiff must prove that she was discriminated against on the basis of his or her ancestry or ethnic characteristics and not solely on the place or nation of her origin. *Saint Francis College v. Al–Khazraji,* 481 U.S. 604, 613, 10 S.Ct. 2022, 95 L.Ed.2d 582 (1987). Plaintiff's evidence of national origin discrimination—which is based on her claims of association and not based on her own national origin or race—is untenable and insufficient as a matter of law to make out a § 1981 claim, as discussed above. *See Salguero v. City of Clovis,* 366 F.3d 1168, 1175 (10th Cir.2004)(*quoting Drake v. City of Fort Collins, supra,* 927 F.2d at 1162 ("[t]he elements of a plaintiff's case are the same ... whether that case is brought under § 1981 or Title VII").

However, an employee who believes that he or she has been retaliated against because of her efforts to vindicate the rights of a minority co-worker may bring an action against her employer under § 1981. *Twigg v. Hawker Beechcraft Corp.,* 659 F.3d 987, 997–98 (10th Cir.2011) (citations omitted). "The showing required to establish retaliation is identical under § 1981 and Title VII." *Id. (quoting Roberts v. Roadway Express, Inc.,* 149 F.3d 1098, 1110 (10th Cir.1998)). As discussed, I have determined that Plaintiff has met her *prima facie* burden under Title VII to prove that she was terminated by the City for making complaints of racial discrimination against others.

The City argues that in order for municipal liability to arise under § 1981, a plaintiff must demonstrate that the City's officials acted pursuant to a "policy" or "custom" of discriminatory employment practices. *Carney v. City and County of Denver,* 534 F.3d 1269, 1276 (10th Cir.2008) (citations omitted). It further asserts that Plaintiff has not alleged nor established there is a City policy or custom which indicates that engaging in discrimination based upon national origin is acceptable. However, an unconstitutional deprivation is caused by a municipal policy "if it results from decisions of a duly constituted legislative body or an official whose acts may fairly be said to be those of the municipality itself." *Id. (citing Marshall v. Columbia Lea Reg'l Hosp.,* 345 F.3d 1157, 1177 (10th Cir.2003)). Because Plaintiff has alleged and produced evidence that Defendant Flannery—in his position as City Manager—was a decision maker in her termination, I find his alleged acts constitute an official municipal policy for which municipal liability may be impose against the City on summary judgment. *See Melton v. City of Oklahoma City,* 879 F.2d 706, 723 (10th Cir.1989)(ruling that when the City Manager is the "final policymaking authority" over employment decisions affecting City personnel, § 1983 liability attaches to the City based on a termination that was "expressly approved" by the City Manager), *vacated on other grounds,* 928 F.2d 920 (10th Cir.1991)(*citing City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)).

***12** The individual Defendants also argue that this claim, raised against them in their individual capacities, should be dismissed under the defense of qualified immunity. The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)(*quoting Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Once a defendant asserts qualified immunity, the plaintiff bears the burden of satisfying a "strict two-part test." *McBeth v. Himes,* 598 F.3d 708, 716 (10th Cir.2010) (*quoting Bowling v. Rector,* 584 F.3d 956, 964 (10th Cir.2009)). That is, "[t]he plaintiff must establish (1) that the defendant violated a constitutional or statutory right, and (2) that this right was clearly established at the time of the defendant's conduct ...". *Id.*

Defendants do not contest that the law was clearly established that § 1983 allows a claim for retaliation by an employer against an employee for reporting racial discrimination against a minority employee. *See Patrick v. Miller,* 953 F.2d 1240, 1250 (10th Cir.1992)(ruling that retaliatory actions against a white employee because of his efforts to defend the rights of racial minorities may violate the employee's rights as enumerated in § 1981); *see also Hull v. Colorado Bd. of Governors of Colorado State University System,* 805 F.Supp.2d 1094, 1110 (D.Colo.2011). Rather, the individual Defendants assert that Plaintiff cannot establish they each acted to violate her constitutional rights.

I agree with Defendants that there is no evidence to support even an inference that Defendants Paul Natale and Heather Olson were aware of the alleged retaliatory termination; instead, the evidence is undisputed that they did not make any decision related to Plaintiff's employment. Although Defendant Natale testified in his deposition that he expected she would be terminated, the evidence is that he was not (and could not be) involved in the decision to terminate. [Doc # 58, Ex. H, pp. 39–42] Moreover, I reject that the evidence shows that Defendant Olson participated in the decision because she assisted in the drafting of the termination letter in her role as the director of the Human Resources Department for the City. [Doc # 58, Ex D, pg. 225, Doc. # 58, Ex. G, pp. 202–04] As such, there is no basis for Plaintiff to establish that Defendants Natale and Olson were involved in any improper retaliation against her because of her complaints about the treatment of a minority co-worker under § 1981. Thus, Plaintiff cannot met the burden of establishing that Defendants Natale and Olson violated a constitutional or statutory right in order to defeat their qualified immunity defense. *See Ramirez v. Department of Corrections,* Colo. 222 F.3d 1238, 1243 (10th Cir.2000)(affirming the district court's determination that the complaint alleged sufficient conduct by the individual defendants to defeat their qualified immunity defense to the plaintiffs' racial discrimination claim under § 1983); *see also Dockery v. Unified School Dist. No. 231,* 382 F.Supp.2d 1234, 1241–42 (D.Kan.2005).

***13** As to Defendants Gerald M. Flannery and Tom Acre, however, Plaintiff has met her burden to provide evidence to show that they were the decision makers who made the determination to terminate Plaintiff. [Doc # 58, Ex. D, pp. 152–53, 222–27, Doc. # 58, Ex. G, pp. 202–04]. As a result, Plaintiff has provided evidence to show personal involvement by Defendants Flannery and Acre sufficient to withstand their qualified immunity defense for retaliation pursuant to § 1981. *See Bruner–McMahon v. Hinshaw,* ––– F.Supp.2d ––––, 2012 WL 138607 (D.Kan., Jan. 12, 2012)(holding that personal liability must be based on personal involvement in the alleged constitutional violation).

V. § 1983 Claim of Equal Protection Violation Based on Gender

Plaintiff also makes a claim under 42 U.S.C. § 1983, against the City and the individual Defendants, that her right to equal protection was violated when she was discriminated against based on her gender. However, I have determined that Plaintiff cannot prove her Title VII claim for gender discrimination, and the elements of a disparate treatment claim are the same whether the claim is brought under § 1983 or Title VII. *See Maldonado v. City of Altus,* 433 F.3d 1294, 1307 (10th Cir.2006)("[i]n disparate-treatment discrimination suits, the elements of a plaintiff's case are the same whether that case is brought under § 1981 or § 1983 or Title VII"), *overruled on other grounds, Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006); *see also Weeks v. McLaughlin,* 2011 WL 2631831 (D.Kan.2011). Because Plaintiff does not argue there was a violation of the Equal Protection Clause separate from her Title VII gender discrimination claim, her § 1983 claim fails for the same reasons. *Etsitty v. Utah Transit Authority,* 502 F.3d 1215, 1227–28 (10th Cir.2007).

VI. First Amendment Claim

Plaintiff's final claim, also raised under § 1983, is that her right to free speech was violated by both the City and the individual Defendants on the basis that they retaliated against her for speaking out against discrimination of herself and others.

The Supreme Court has noted that an employee has a "right to protest racial discrimination [as] a matter inherently of public concern" when the "employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but arranges to do so privately." *Connick v. Myers,* 461 U.S. 138, 148 n. 8, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). However, in a freedom of speech retaliation claim, a citizen in government service must accept certain limitations on his or her freedom. *Brammer–Hoelter v. Twin Peaks Charter Academy,* 492 F.3d 1192, 1202 (10th Cir.2007)(*quoting Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct.1951, 164 L.Ed.2d 689 (2006)). At the same time, "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.*

***14** Thus, the ultimate question is whether the employee speaks as a citizen, or as a government employee—an individual acting "in his or her professional capacity"—which results in no constitutional protection. *Brammer–Hoelter v. Twin Peaks, supra,* 492 F.3d at 1202–03 (*quoting Garcetti v. Ceballos, supra,* 126 S.Ct. at 1960). "[I]f an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties." *Id. (citing Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689, 693 (5th Cir.2007) (per curiam)). However, not all speech that occurs at work is made pursuant to an employee's official duties. *Id. (citing Garcetti v. Ceballos, supra,* 126 S.Ct. at 1959). "Instead, we must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship ." *Garcetti v. Ceballos, supra,* 126 S.Ct. at 1961; *see also Patrick v. Miller,* 953 F.2d 1240, 1247 (10th Cir.1992)(speech touching on matters of public concern—as opposed to matters only of personal interest—is a question of law, not fact, and requires the court to consider "the content, form, and context of a given statement, as revealed by the whole record").

Defendants assert that the speech made by Plaintiff—specifically, her complaints of discrimination made during her employment with the City in her various reports and responses—were made pursuant to her official duties and, thus, is not protected speech. In response, Plaintiff argues that disputed issues fact demonstrate that her speech was not made pursuant to her official duties because a jury could conclude that Plaintiff was not expected to report discrimination. I disagree.

First, it cannot be disputed that the documents in which Plaintiff asserted her allegations of discrimination were clearly related to her position as the director of the Economic Development Department, or regarded her own job performance, and, thus, were "generally consistent with the type of activities the employee was paid to do." *Brammer–Hoelter v. Twin Peaks, supra,* 492 F.3d at 1202 (*quoting Green v. Board of County Comm'rs,* 472 F.3d 794, 801 (10th Cir.2007)). Moreover, I reject Plaintiff's argument that the City handbook—which contains a requirement, in the section entitled "Discrimination or Harassment" that supervisors report "possible sexual or other unlawful harassment"—does not require her to report discrimination or retaliation because it only requires that she report "harassment." [Doc # 46, Ex. E, pg. 17] I likewise reject her assertion that it is disputed whether she was "actually excepted" to report discrimination based on other supervisors' failure to report the incidents she complained of.

I conclude that when the facts and circumstances are viewed as a whole and in a practical manner, Plaintiff's allegations of discrimination contained in her reports and responses constituted speech as a government employee acting in her professional capacity, not as a citizen speaking on a matter of public concern. *See David v. City and County of Denver,* 101 F.3d 1344, 1355 (10th Cir.1996)("[t]he court will also consider the motive of the speaker to learn if the speech was calculated to redress personal grievances [and therefore spoken as an employee] or to address a broader public purpose [and therefore spoken as a citizen]")(*quoting Workman v. Jordan,* 32 F.3d 475, 483 (10th Cir.1994)). As a result, summary judgment enters in favor of Defendants, and against Plaintiff, on her § 1983 claim for violation of her right to free speech.

***15** ACCORDINGLY, I GRANT IN PART and DENY IN PART Defendants' Motion & Brief in Support of Summary Judgment **[Doc # 46]** as follows:

1) I DENY the motion as to Plaintiff's Title VII Claim for Retaliation against the City;

2) I DENY the motion as to Plaintiff's § 1981 Claim for Retaliation against the City, and Defendants Gerald M. Flannery and Tom Acre, in their individual capacities;

3) I GRANT the motion as to Plaintiff's remaining claims and, as such, I enter summary judgment in favor of Defendants on those claims; and

4) I DISMISS Defendants Paul Natale and Heather Olson (Spenser) as parties in this case as no claims remaining pending against them.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1520124

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Distinguished by Bowles v. City of Cleveland, 6th Cir.(Ohio), April 25, 2005

173 F.3d 988
United States Court of Appeals,
Sixth Circuit.

Fred E. TETRO, Jr., Plaintiff–Appellant, v. ELLIOTT POPHAM PONTIAC, OLDSMOBILE, BUICK, AND GMC TRUCKS, INC., Defendant–Appellee.

No. 98–5361.
|
Argued and Submitted March 10, 1999.
|
Decided April 6, 1999.

Synopsis
White former employee brought Title VII action alleging that former employer discriminated against him because he had biracial child. The United States District Court for the Middle District of Tennessee, Thomas A. Higgins, J., denied former employer's motion for summary judgment and subsequently dismissed action due to failure of former employee's counsel to appear at final pretrial conference. Both parties appealed. The Court of Appeals, Gilman, Circuit Judge, held that: (1) District Court abused its discretion in dismissing action due to counsel's failure to appear; (2) Court of Appeals would exercise jurisdiction over employer's appeal of denial of its summary judgment motion; and (3) discharge of white employee allegedly because his child was biracial was violation of Title VII.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***990** James L. Harris (briefed), Nashville, Tennessee, for Plaintiff–Appellant.

John T. Feeney, III (argued and briefed), Feeney & Murray, Nashville, Tennessee, for Appellee.

Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

Opinion

GILMAN, Circuit Judge.

Fred E. Tetro, a Caucasian male, claims that Elliott Popham Pontiac, Oldsmobile, Buick and GMC Trucks, Inc. (the "dealership") discriminated against him because he has a biracial child. The district court denied the dealership's motion for summary judgment on Tetro's racial discrimination claim, but subsequently dismissed Tetro's action with prejudice due to his counsel's failure to appear and prepare for the final pretrial conference. For the reasons set forth below, we **REVERSE** the district court's dismissal of Tetro's action, **AFFIRM** its denial of summary judgment to the dealership, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Elliott Popham hired Tetro as the finance manager for his automobile dealership on July 28, 1996. Tetro came highly recommended by Popham's General Manager, Brian McDonald. According to Tetro, he immediately began receiving praise from Popham and his coworkers for his job performance. All went well until the day that Tetro's family visited him at work. It was during this visit that Popham observed Tetro's biracial daughter for the first time. Tetro contends that the work atmosphere suddenly changed for the worse.

According to the affidavit of Wallace Scott McDonald, Tetro's former coworker at the dealership, Popham rolled his eyes in a derogatory manner and immediately walked back into the dealership upon seeing Tetro's family. Tetro alleges that Popham soon began ridiculing and insulting him about his weight in front of employees and customers. In addition, Tetro claims that he and Wallace Scott McDonald overheard Popham talking on the telephone approximately one month after Tetro's family visited the dealership. During that telephone conversation, Popham allegedly stated that "no one ever told me that he had a mixed race child and that this was going to hurt his [Popham's] image in the community and his dealership" and "I can't believe he has a mixed child and Brian [the General Sales Manager who recommended Tetro to

Popham] didn't tell [me].” Wallace Scott McDonald's affidavit corroborates Tetro's allegations.

On November 5, 1996, Tetro arrived at work wearing casual clothes. He claims that he dressed casually because he had scheduled a doctor's appointment, which the General Manager had already approved. Popham confronted Tetro regarding his casual attire. Tetro alleges that a heated argument quickly ensued regarding his clothes and his medical appointment. He admits that he became angry and called Popham a thief, liar, cheat, and hypocrite. Much of this argument took place in the showroom in the presence of other employees and customers. Tetro claims that Popham advised him that he should “get his fat a—out of the dealership” or else he would call the police. Tetro left ***991** the dealership and never returned. Wallace Scott McDonald's affidavit states that Popham's racially charged statements were made several days prior to Tetro's alleged discharge.

Tetro filed the instant action on April 18, 1997, alleging that the dealership discriminated against him because of Popham's racial animus directed at Tetro's having a biracial daughter. His claims are based on the dealership's alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(1)-e(17) (“Title VII”), the Tennessee Human Rights Act, Tenn.Code Ann. §§ 4–21–101 to 4–21–1004 (“THRA”), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (“ADA”).

Both parties attended the initial case management conference on June 13, 1997, at which time the final pretrial conference was set for February 9, 1998. In late September of 1997, the dealership moved for summary judgment on all claims. Tetro contested the challenge to his racial discrimination claim, but stated in his response that he no longer wished to pursue his ADA cause of action. The district court thereafter granted the dealership's motion for summary judgment as to the ADA claim. Without any analysis, the district court ruled in the same order that genuine issues of material fact precluded summary judgment on Tetro's allegations of racial discrimination. The dealership has filed a cross-appeal of this ruling.

On February 9, 1998, Tetro's counsel failed to appear for the final pretrial conference. He also failed to initiate preparation of the pretrial order as required by the district court. As a consequence of these two failures, the district court, without any warning, dismissed Tetro's action with prejudice. Tetro's counsel explained that the failures were the result of an erroneous entry on his calendar regarding the date of the pretrial conference. As soon as Tetro's counsel was informed of his mistake by the dealership's attorney, he immediately proceeded to the district court, arriving one hour late for the conference. He discovered that Tetro's action had already been dismissed. Tetro filed a motion to reconsider, which the district court denied. He now appeals the district court's dismissal of his action.

II. ANALYSIS

A. The district court's dismissal of Tetro's action

1. Standard of review

We “will reverse a dismissal for noncompliance with local rules only upon a finding of abuse of discretion.” *Stough v. Mayville Community Schools,* 138 F.3d 612, 614 (6th Cir.1998). An abuse of discretion exists when the district court's action leaves us with “a definite and firm conviction that the trial court committed a clear error of judgment.” *Id.* (citation omitted).

2. The district court abused its discretion when it dismissed Tetro's action

The local rules of the Middle District of Tennessee required Tetro's attorney to initiate preparation of a pretrial order. In addition, Rule 16(f) of the Federal Rules of Civil Procedure provides for sanctions in the event that a party fails to appear at a scheduling or pretrial conference. When Tetro's counsel failed to prepare for or attend the pretrial conference, the district court sanctioned Tetro in the most severe manner possible—dismissal of his complaint with prejudice.

In *Carver v. Bunch,* 946 F.2d 451, 453 (6th Cir.1991), this court acknowledged that district courts possess broad discretion to sanction parties for failing to comply with procedural requirements. *Carver* cautioned, however, that the sanction of dismissal for failure to prosecute “is a harsh sanction which the court should order only in extreme situations showing a ‘clear record of delay or contumacious conduct by the plaintiff.’ ” *Id.* at 454 (quoting ***992** *Carter v. City of Memphis,* 636 F.2d 159, 161 (6th Cir.1980)). As this court explained in *Stough,* 138 F.3d at 615, the *Carver* court concluded that a district court can dismiss an action for noncompliance with a local rule only if the behavior of the noncomplying party rises to the level of a failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure.

When contemplating dismissal of an action under Rule 41(b), a court must consider:

> (1) whether the party's failure to cooperate is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dilatory conduct of the party; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Stough, 138 F.3d at 615 (citing *Regional Refuse Sys., Inc. v. Inland Reclamation Co.,* 842 F.2d 150, 153–55 (6th Cir.1988)). In the instant action, the district court did not conduct any analysis concerning Tetro's procedural deficiencies, much less the analysis required by *Stough.*

An examination of the above elements as applied to the facts of the present case convinces us that the district court abused its discretion when it dismissed Tetro's action. First, the district court did not find that Tetro's counsel acted willfully or in bad faith. Rather, Tetro's counsel explained that the reason for his failure to appear at the pretrial conference was due to his erroneous entry of the date into his calendar. The behavior of Tetro's counsel clearly does not rise to the level of contumacious conduct. Second, there is no evidence that the dealership suffered any prejudice beyond wasting approximately one hour waiting for Tetro and his counsel to appear. Third, the district court failed to provide Tetro with any warning that a failure to comply with the procedural requirements could result in dismissal. Finally, despite the fact that his conduct surrounding the pretrial conference was the only incident of procedural noncompliance committed by Tetro's counsel, the district court did not even consider a less drastic sanction before it ordered that the case be dismissed with prejudice. For all of these reasons, we conclude that the district court committed a clear error of judgment when it dismissed Tetro's action.

B. Appellate jurisdiction over the dealership's cross-appeal

The dealership's cross-appeal arises in an unusual procedural posture. Ordinarily, a defendant who attempts to appeal a denial of summary judgment is either (1) barred from appealing the denial before a final judgment is entered because the denial is a non-appealable, interlocutory order, *see Pacific Union Conference of Seventh–Day Adventists v. Marshall,* 434 U.S. 1305, 1306, 98 S.Ct. 2, 54 L.Ed.2d 17 (1977), (2) allowed to appeal the interlocutory denial because it presents an appealable collateral order under 28 U.S.C. § 1291, *see, e.g., Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (establishing the collateral order doctrine), or (3) barred from appealing the denial because a full trial on the merits has occurred prior to the appeal, *see Jarrett v. Epperly,* 896 F.2d 1013, 1016 (6th Cir.1990) (holding "that where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed"). Here, the dealership appeals from the denial of its summary judgment motion after a final judgment was incorrectly ordered, but before a full trial on the merits occurred.

On the one hand, we could decline jurisdiction on the basis that our reversal of the district court's order of dismissal instantly reinstates the case, making the dealership's cross-appeal an impermissible appeal of a non-appealable, interlocutory order. ***993** On the other hand, an appeal from a final judgment generally brings up all prior interlocutory orders and rulings that were not reviewable until the entry of a final judgment. *See Jarrett,* 896 F.2d at 1016 n. 1 ("We recognize that decisions in this circuit generally state that interlocutory orders merge into the final judgment and may be presented on appeal of that final judgment...."). In *Jarrett,* this general rule was not applied because the appeal from the denial of summary judgment was brought after a full trial upon the merits had already occurred. *See id.* at 1016.

Here, a full trial has yet to occur, but the district court has entered a final judgment—dismissal with prejudice. The denial of the dealership's motion for summary judgment would therefore be reviewable along with Tetro's appeal from the order of dismissal. Considering that Tetro has appealed from the entry of a final judgment, we conclude that jurisdiction exists over the cross-appeal under the general rule that an appeal from such a final judgment brings with it all prior interlocutory orders. We also note that the policy of avoiding piecemeal litigation is not applicable in the present case because Tetro's appeal from a final order is already before the panel and the parties have fully briefed the dealership's cross-appeal. Furthermore, the only issue raised by the cross-appeal is the purely legal question of whether Tetro states a claim upon which relief can be granted under Title VII and the THRA.

C. Tetro's racial discrimination claim

1. The racial discrimination statutes at issue

Title VII prohibits racially discriminatory employment practices. Specifically, the statute provides in pertinent part as follows:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. § 2000e–2(a). Likewise, under the Tennessee Human Rights Act, it is unlawful for an employer "to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin." Tenn.Code Ann. § 4–21–401(a)(1). The Tennessee Supreme Court has held that THRA claims are analyzed in the same manner as Title VII claims. *See Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 31 (Tenn.1996) ("The stated purpose and intent of the [THRA] is to provide for execution within Tennessee of the policies embodied in the federal civil rights laws. Accordingly, our analysis of the issues in this appeal is the same under both the Tennessee Human Rights Act and Title VII of the Federal Civil Rights Act.") (internal citations omitted).

2. Tetro's allegations of racial discrimination state a claim upon which relief can be granted

The dealership argues on appeal that even if Tetro's factual allegations are true, he has still failed to state a claim upon which relief can be granted. It contends that neither Title VII nor the THRA provides relief for Tetro because the plain language of the statutes does not encompass a cause of action based on alleged discrimination due to the race of a third party. Both statutes prohibit discrimination "because of such individual's race," which at first glance might imply that Congress only intended to prohibit discrimination based upon the "individual's race," rather than on the race of a third person with whom the individual associates. The dealership in fact argues that this is an alternative ground to affirm the district court's dismissal of Tetro's action.

***994** This circuit has not addressed the issue at hand in a published opinion. Other courts, however, have broadly construed Title VII to protect individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate. *See, e.g., Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 890 (11th Cir.1986) (ruling that both Title VII and § 1981 prohibit hiring discrimination based on an individual's association with African–Americans, or based on interracial marriage); *Chacon v. Ochs,* 780 F.Supp. 680, 680–81 (C.D.Cal.1991) (holding that it is unlawful under Title VII to discriminate against a white woman married to a Hispanic man); *Whitney v. Greater N.Y. Corp. of Seventh–Day Adventists,* 401 F.Supp. 1363, 1366 (S.D.N.Y.1975) (ruling that Title VII provides a cause of action for a white plaintiff who is discriminated against because of the plaintiff's relationship with African–Americans).

In *Parr,* the Eleventh Circuit held that "[w]here a plaintiff claims discrimination [in a Title VII action] based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Parr,* 791 F.2d at 892. This court quoted *Parr* 's statement in an unpublished opinion and applied it to a similar claim brought under Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), 42 U.S.C. §§ 3601–3631. *See Troy v. Suburban Management Corp.,* 1990 WL 97490, at *5 n. 5 (6th Cir. July 13, 1990) ("While [plaintiff] herself is not a member of a racial minority, her allegation that her tenancy was terminated on account of her association with a black man is sufficient to state a cause of action under Title VIII.").

Similarly, we find that Tetro has stated a claim upon which relief can be granted under Title VII. A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child. As the Eleventh Circuit pointed out,

> "Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in battle with semantics."

Parr, 791 F.2d at 892 (quoting *Culpepper v. Reynolds Metals Co.,* 421 F.2d 888, 891 (5th Cir.1970)).

This approach is bolstered by the fact that the Equal

Employment Opportunity Commission ("EEOC"), "which Congress charged with interpreting, administering, and enforcing Title VII, has consistently held that an employer who takes adverse action against an employee or a potential employee because of an interracial association violates Title VII." *Parr,* 791 F.2d at 892 (citing multiple EEOC decisions). Moreover, the Supreme Court has declared that the EEOC's interpretation of Title VII is entitled to "great deference." *Griggs v. Duke Power Co.,* 401 U.S. 424, 434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

If Title VII stated that an employer could not discriminate based *directly* on such individual's race, then a fair reading would allow no recovery here. If, on the other hand, Title VII read that an employer could not discriminate based *directly or indirectly* on such individual's race, then a fair reading would clearly allow recovery. Recovery would be allowed under the latter language because the alleged discrimination in the present case was due to Tetro's race being different from his daughter's. If he had been African–American, presumably the dealership would not have discriminated because his daughter would also have been African–American. Or, if his daughter had been Caucasian, the dealership would not have discriminated because Tetro himself is Caucasian. So the essence of the alleged discrimination ***995** in the present case is the contrast in races between Tetro and his daughter. This means that the dealership has been charged with reacting adversely to Tetro because of Tetro's race in relation to the race of his daughter. The net effect is that the dealership has allegedly discriminated against Tetro because of his race.

Title VII as actually worded simply prohibits discrimination "because of such individual's race." There is no mention of the words "directly" or "indirectly" in the statute. Under these ambiguous circumstances, we look to the purpose of the statute for its proper interpretation. *See Nixon v. Kent County,* 76 F.3d 1381, 1394 (6th Cir.1996) (Keith, J., dissenting) ("Where the language of a statute is ambiguous, this Court reviews the legislative history because the 'cardinal canon of statutory construction [is] that statutes should be interpreted harmoniously with their dominant legislative purpose.' ") (brackets in original) (quoting *United States v. Barry,* 888 F.2d 1092, 1096 (6th Cir.1989)). In addition, we look to the interpretation of the government agency charged with enforcing the statute in question. *See Griggs,* 401 U.S. at 434 (stating that the EEOC's interpretation of Title VII is entitled to "great deference"). Because both the purpose of Title VII and the EEOC's interpretation are consistent with allowing a cause of action for the type of discrimination that Tetro has alleged, we conclude that this is the proper way to apply the statute. Accordingly, Tetro has stated a claim under Title VII upon which relief can be granted.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the district's dismissal of Tetro's action, **AFFIRM** its denial of summary judgment to the dealership, and **REMAND** the case for further proceedings consistent with this opinion.

All Citations

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Declined to Follow by Troutman v. Hydro Extrusion USA, LLC, M.D.Pa., May 24, 2019

883 F.3d 100
United States Court of Appeals, Second Circuit.

Melissa ZARDA, co-independent executor of the estate of Donald Zarda, and William Allen Moore, Jr., co-independent executor of the estate of Donald Zarda, Plaintiffs–Appellants,
v.
ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and Ray Maynard, Defendants–Appellees.

Docket No. 15-3775
|
August Term, 2017
|
Argued: September 26, 2017
|
Decided: February 26, 2018

Synopsis
Background: Gay former employee brought action against employer alleging, inter alia, gender stereotyping discrimination in violation of Title VII and sexual orientation discrimination in violation of New York law. The United States District Court for the Eastern District of New York, Bianco, J., granted summary judgment in favor of employer with respect to Title VII claim, and jury subsequently found for employer on state law claim. Executors of former employee's estate, who were substituted as plaintiffs when employee died before trial, appealed. The Court of Appeals, 855 F.3d 76, affirmed.

Holdings: On rehearing en banc, the Court of Appeals, Katzmann, Chief Judge, held that:

decision by Court of Appeals on question of whether Title VII applied to sexual orientation discrimination would not constitute advisory opinion;

sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination for purposes of Title VII, overruling *Simonton v. Runyon*, 232 F.3d 33, and *Dawson v. Bumble*, 398 F.3d 211; and

employee was entitled to bring Title VII claim for discrimination based on sexual orientation.

Affirmed in part, vacated in part, and remanded.

Dennis Jacobs, Circuit Judge, filed opinion concurring in part.

José A. Cabranes, Circuit Judge, filed opinion concurring in the judgment.

Sack, Circuit Judge, filed opinion concurring in part and in the judgment.

Raymond J. Lohier, Jr., Circuit Judge, filed opinion concurring in part.

Gerard E. Lynch, Circuit Judge, filed dissenting opinion in which Livingston, Circuit Judge, joined in part.

Debra Ann Livingston, Circuit Judge, filed dissenting opinion.

Reena Raggi, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

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Before: Katzmann, Chief Judge, Jacobs, Cabranes, Pooler, Sack, Raggi, Hall, Livingston, Lynch, Chin, Lohier, Carney, and Droney, Circuit Judges.[*]

Opinion

Katzmann, C.J., filed the majority opinion in which Hall, Chin, Carney, and Droney, JJ., joined in full, Jacobs, J., joined as to Parts I and II.B.3, Pooler, J., joined as to all but Part II.B.1.b, Sack, J., joined as to Parts I, II.A, II.B.3, and II.C, and Lohier, J., joined as to Parts I, II.A, and II.B.1.a.

Jacobs, J., filed a concurring opinion.

Cabranes, J., filed an opinion concurring in the judgment.

Sack, J., filed a concurring opinion.

Lohier, J., filed a concurring opinion.

Lynch, J., filed a dissenting opinion in which Livingston, J., joined as to Parts I, II, and III.

Livingston, J., filed a dissenting opinion.

Raggi, J., filed a dissenting opinion.

Katzmann, Chief Judge:

***105 *106 *107** Donald Zarda,[1] a skydiving instructor, brought a sex discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII") alleging that he was fired from his job at Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination "because of ... sex," we have previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII.[2] *See Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005).

At the time *Simonton* and *Dawson* were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission ("EEOC" or "Commission"). *See, e.g.*, *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999);[3] *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *see also Johnson v. Frank*, EEOC Decision No. 01911827, 1991 WL 1189760, at *3 (Dec. 19, 1991). But legal doctrine evolves and in 2015 the EEOC held, for the first time, that "sexual orientation is inherently a 'sex-based consideration;' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (quoting ***108** *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion)). Since then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by *Blum*, 597 F.2d at 938, which "ha[s] not been overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting *en banc*." *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir.), *cert. denied*, ––– U.S. ––––, 138 S.Ct. 557, 199 L.Ed.2d 446 (2017). One month later, the Seventh Circuit, sitting en banc, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades" and held that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively*, 853 F.3d at 340–41. In addition, a concurring opinion of this Court recently called "for the Court to revisit" this question, emphasizing the "changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued," and identifying multiple arguments that support the conclusion that sexual orientation discrimination is barred by Title VII. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, *C.J.*, concurring) ("Christiansen and *amici* advance three arguments, none previously addressed by this Court ...."); *see also id.* at 204 ("Neither *Simonton* nor *Dawson* addressed [the but-for] argument.").

Taking note of the potential persuasive force of these new decisions, we convened en banc to reevaluate *Simonton* and *Dawson* in light of arguments not previously considered by this Court. Having done so, we now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination "because of ... sex." To the extent that our prior precedents held otherwise, they are overruled.

We therefore **VACATE** the district court's judgment on Zarda's Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

Background

The facts and procedural history of this case are discussed in detail in our prior panel decision. *See Zarda v. Altitude Express*, 855 F.3d 76, 79–81 (2d Cir. 2017). We recite them only as necessary to address the legal question under consideration.

In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay "and ha[d] an ex-husband to prove it." J.A. 400 ¶ 23. Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda's alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda's boss, who fired shortly Zarda thereafter. ***109** Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

One month later, Zarda filed a discrimination charge with the EEOC concerning his termination. Zarda claimed that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." Special Appendix ("S.A.") 3. In particular, he claimed that "[a]ll of the men at [his workplace] made light of the intimate nature of being strapped to a member of the opposite sex," but that he was fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." S.A. 5.

In September 2010, Zarda brought a lawsuit in federal court alleging, *inter alia*, sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of New York law. Defendants moved for summary judgment arguing that Zarda's Title VII claim should be dismissed because, although "Plaintiff testifie[d] repeatedly that he believe[d] the reason he was terminated [was] because of his sexual orientation ... [,] under Title VII, a gender stereotype cannot be predicated on sexual orientation." Dist. Ct. Dkt. No. 109 at 3 (citing *Simonton*, 232 F.3d at 35). In March 2014, the district court granted summary judgment to the defendants on the Title VII claim. As relevant here, the district court concluded that, although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping discrimination under Title VII.

While Zarda's remaining claims were still pending, the EEOC decided *Baldwin*, holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." 2015 WL 4397641 at *10. The Commission identified three ways to illustrate what it described as the "inescapable link between allegations of sexual orientation discrimination and sex discrimination." *Id.* at *5. First, sexual orientation discrimination, such as suspending a lesbian employee for displaying a photo of her female spouse on her desk while not suspending a man for displaying a photo of his female spouse, "is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* Second, it is "associational discrimination" because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex." *Id.* at *6. Lastly, sexual orientation discrimination "necessarily involves discrimination based on gender stereotypes," most commonly "heterosexually defined gender norms." *Id.* at *7–8 (internal quotation marks omitted). Shortly thereafter, Zarda moved to have his Title VII claim reinstated based on *Baldwin*. But, the district court denied the motion, concluding that *Simonton* remained binding precedent.

Zarda's surviving claims, which included his claim for sexual orientation discrimination under New York law, went to trial, where defendants prevailed. After judgment was entered for the defendants, Zarda appealed. As relevant here, Zarda argued that *Simonton* should be overturned because the EEOC's reasoning in *Baldwin* demonstrated that *Simonton* was incorrectly decided. By contrast, defendants argued that the court did not need to reach that issue because the jury found that they ***110** had not discriminated based on sexual orientation.

The panel held that "Zarda's [federal] sex-discrimination claim [was] properly before [it] because [his state law claim was tried under] a higher standard of causation than required by Title VII." *Zarda*, 855 F.3d at 81. However, the panel "decline[d] Zarda's invitation to revisit our precedent," which "can only be overturned by the entire Court sitting in banc." *Id.* at 82. The Court subsequently ordered this rehearing en banc to revisit *Simonton* and *Dawson*'s holdings that claims of sexual orientation discrimination are not cognizable under Title VII.

Discussion

I. Jurisdiction

We first address the defendants' challenge to our jurisdiction. Article III of the Constitution grants federal courts the authority to hear only "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. As a result, "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' " *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971)). The defendants argue that any decision on the merits would be an advisory opinion because Zarda did not allege sexual orientation discrimination in his EEOC charge or his federal complaint and therefore the question of whether Title VII applies to sexual orientation discrimination is not properly before us.

Irrespective of whether defendants' argument is actually jurisdictional,[4] its factual premises are patently contradicted by both the record and the position defendants advanced below. Zarda's EEOC complaint explained that he was "making this charge because, in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." S.A. 3.[5] Zarda specified that his supervisor "was hostile to any expression of [his] sexual orientation that did not conform to sex stereotypes," and alleged that he "was fired ... because ... [he] honestly referred to [his] sexual orientation and ***111** did not conform to the straight male macho stereotype." S.A. 3, 5. Zarda repeated this claim in his federal complaint, contending that he was "an openly gay man" who was "discharge[ed] because of a homophobic customer" and "because his behavior did not conform to sex stereotypes," in violation of Title VII. J.A. 65, 69, 75.

Defendants plainly understood Zarda's complaint to have raised a claim for sexual orientation discrimination under Title VII. In their motion for summary judgment, defendants argued that Zarda's claim "relies on the fact that Plaintiff is homosexual, not that he failed to comply with male gender norms. Thus, Plaintiff[ ] merely attempts to bring a defective sexual orientation claim under Title VII, which is legally invalid." Dist. Ct. Dkt. No. 109 at 9 (citing *Dawson*, 398 F.3d at 221). The district court ultimately agreed.

Having interpreted Zarda's Title VII claim as one for sexual orientation discrimination for purposes of insisting that the claim be dismissed, defendants cannot now argue that there is no sexual orientation claim to prevent this Court from reviewing the basis for the dismissal. Both defendants and the district court clearly understood that Zarda had alleged sexual orientation discrimination under Title VII. As a result, Zarda's Title VII claim is neither unexhausted nor unpled, and so it may proceed.[6]

II. Sexual Orientation Discrimination

A. The Scope of Title VII

"In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 239, 109 S.Ct. 1775. The text of Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge ... or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin ....

42 U.S.C. § 2000e-2(a)(1). This "broad rule of workplace equality," *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), "strike[s] at the entire spectrum of disparate treatment" based on protected characteristics, *L.A. Dep't of Water & Power v. Manhart,* 435 U.S. 702, 707 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)), "regardless of whether the discrimination is directed against majorities or minorities," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71–72, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). As a result, we have stated that "Title VII should be interpreted broadly to achieve equal employment opportunity." *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–36, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase "because of ... ***112** sex." However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in "impermissible consideration of ... sex ... in employment practices" when "sex ... was a motivating factor for any employment practice," irrespective of whether the employer was also motivated by "other factors." 42 U.S.C. § 2000e-2(m). Accordingly, the critical inquiry for a court assessing whether an employment practice is "because of ... sex" is whether sex was "a motivating factor." *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 23 (2d Cir. 2014).

Recognizing that Congress intended to make sex "irrelevant" to employment decisions, *Griggs*, 401 U.S. at 436, 91 S.Ct. 849, the Supreme Court has held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, *Manhart,* 435 U.S. at 711, 98 S.Ct. 1370, and non-conformity with gender norms, *Price Waterhouse*, 490 U.S. at 250–51, 109 S.Ct. 1775. As this Court has recognized, "any meaningful regime of antidiscrimination law must encompass such claims" because, if an employer is " '[f]ree to add non-sex factors, the rankest sort of discrimination' " could be worked against employees by using traits that are associated with sex as a proxy for sex. *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 n.9 (2d Cir. 2004) (quoting *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, *C.J.*, dissenting from denial of rehearing en banc)). Applying Title VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just "the principal evil[s] Congress was concerned with when it enacted" the statute in 1964, but also "reasonably comparable evils" that meet the statutory requirements. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

With this understanding in mind, the question before us is whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as "a subset of actions taken on the basis of sex." *Hively*, 853 F.3d at 343.[7]

B. Sexual Orientation Discrimination as a Subset of Sex Discrimination

We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination "because of ... sex" is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an ***113** employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex.

1. Sexual Orientation as a Function of Sex

a. "Because of ... sex"

We begin by considering the nature of sexual orientation discrimination. The term "sexual orientation" refers to "[a] person's predisposition or inclination toward sexual activity or behavior with other males or females" and is commonly categorized as "heterosexuality, homosexuality, or bisexuality." *See Sexual Orientation*, Black's Law Dictionary (10th ed. 2014). To take one example, "homosexuality" is "characterized by sexual desire for a person of the same sex." *Homosexual*, *id.; see also Heterosexual*, *id.* ("Of, relating to, or characterized by sexual desire for a person of the opposite sex."); *Bisexual*, *id.* ("Of, relating to, or characterized by sexual desire for both males and females."). To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted. *Hively*, 853 F.3d at 358 (Flaum, *J.*, concurring) ("One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' [sex] ... meaningless."). Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected. *See id.* ("[D]iscriminating against [an] employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex*.").[8]

Choosing not to acknowledge the sex-dependent nature of sexual orientation, certain *amici* contend that employers discriminating on the basis of sexual orientation can do so without reference to sex.[9] In support of this assertion, they point to *Price Waterhouse*, where the Supreme Court observed that one way to discern the motivation behind an employment decision is to consider whether, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be" the applicant or employee's sex. 490 U.S. at 250, 109 S.Ct. 1775. Relying on this language, these *amici* argue that a "truthful" response to an inquiry about why an employee was fired would be "I fired him because he is gay," not "I fired him because he is a man." But this semantic sleight of hand is not a defense; it is a distraction. The employer's failure to reference gender directly does not change the fact that a "gay" employee is simply a man who is attracted to men. ***114** For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex. More broadly, were this Court to credit *amici*'s argument, employers would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology. Title VII instructs courts to examine employers' motives, not merely their choice of words. *See* 42 U.S.C. § 2000e-2(m). As a result, firing an employee because he is "gay" is a form of sex discrimination.[10]

The argument has also been made that it is not "even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation[.]" *Hively*, 853 F.3d at 362 (Sykes, *J.*, dissenting). Even if that were so, the same could also be said of multiple forms of discrimination that are indisputably prohibited by Title VII, as the Supreme Court and lower courts have determined. Consider, for example, sexual harassment and hostile work environment claims, both of which were initially believed to fall outside the scope of Title VII's prohibition.

In 1974, a district court dismissed a female employee's claim for sexual harassment reasoning that "[t]he substance of [her] complaint [was] that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor." *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974). The district court concluded that this conduct, although "inexcusable," was "not encompassed by [Title VII]." *Id.* The D.C. Circuit reversed. Unlike the district court, it recognized that the plaintiff "became the target of her supervisor's sexual desires *because she was a woman*." *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (emphasis added). As a result the D.C. Circuit held that "gender cannot be eliminated from [plaintiff's formulation of her claim] and that formulation advances a prima facie case of sex discrimination within the purview of Title VII" because "it is enough that gender is a factor contributing to the discrimination." *Id.* Today, the Supreme Court and lower courts "uniformly" recognize sexual harassment claims as a violation of Title VII, *see, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), notwithstanding the fact that, as evidenced by the district court decision in *Barnes*, this was not necessarily obvious from the face of the statute.

The Supreme Court has also acknowledged that a "hostile work environment," although it "do[es] not appear in the statutory text," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), violates Title VII by affecting the "psychological aspects of the workplace environment," *Meritor*, 477 U.S. at 64, 106 S.Ct. 2399 (internal quotation marks omitted). As Judge Goldberg, one of the early proponents of hostile work environment claims, explained in a case involving national origin discrimination,

[Title VII's] language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of ***115** such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971). Stated differently, because Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used. *See Pullman–Standard v. Swint*, 456 U.S. 273, 276, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) ("Title VII is a broad remedial measure, designed 'to assure equality of employment opportunities.' " (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973))).

The Supreme Court gave voice to this principle of construction when it held that Title VII barred male-on-male sexual harassment, which "was assuredly not the principal evil Congress was concerned with when it enacted Title VII," *Oncale*, 523 U.S. at 79–80, 118 S.Ct. 998, and which few people in 1964 would likely have understood to be covered by the statutory text. But the Court was untroubled by these facts. "[S]tatutory prohibitions," it explained, "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* Applying this reasoning to the question at hand, the fact that Congress might not have contemplated that discrimination "because of ... sex" would encompass sexual orientation discrimination does not limit the reach of the statute.

The dissent disagrees with this conclusion. It does not dispute our definition of the word "sex," Lead Dissent at 145, nor does it argue that this word had a different meaning in 1964. Instead, it charges us with "misconceiv[ing] the fundamental public meaning of the language of" Title VII. *Id.* at 143 (emphasis omitted). According to the dissent, the drafters included "sex" in Title VII to "secure the rights of women to equal protection in employment," *id.* at 145, and had no intention of prohibiting sexual orientation discrimination, *id.* at 142–43. We take no position on the substance of the dissent's discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a "reasonably comparable evil," *Oncale*, 523 U.S. at 79, 118 S.Ct. 998, to sexual harassment and male-on-male harassment. Although legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on "the principal concerns of our legislators," *id.* at 79–80, 118 S.Ct. 998—the centerpiece of the dissent's statutory analysis. Rather, *Oncale* instructs that the text is the lodestar of statutory interpretation, emphasizing that we are governed "by the provisions of our laws." *Id.* The text before us uses broad language, prohibiting discrimination "because of ... sex," which Congress defined as making sex "a motivating factor." 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.[11]

***116 b. "But for" an Employee's Sex**

Our conclusion is reinforced by the Supreme Court's test for determining whether an employment practice constitutes sex discrimination. This approach, which we call the "comparative test," determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different "but for that person's sex." *Manhart*, 435 U.S. at 711, 98 S.Ct. 1370 (internal quotation marks omitted). To illustrate its application to sexual orientation, consider the facts of the recent Seventh Circuit case addressing a Title VII claim brought by Kimberly Hively, a lesbian professor who alleged that she was denied a promotion because of her sexual orientation. *Hively*, 853 F.3d at 341 (majority). Accepting that allegation as true at the motion-to-dismiss stage, the Seventh Circuit compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion). *Id.* at 345. Under this scenario, the Seventh Circuit concluded that, as alleged, Hively would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex. From this conclusion, it follows that sexual orientation discrimination is a subset of sex discrimination. *Id.*

The government,[12] drawing from the dissent in *Hively*, argues that this is an improper comparison. According to this argument, rather than "hold[ing] everything constant except the plaintiff's sex" the *Hively* majority's comparison changed "two variables—the plaintiff's sex and sexual orientation." 853 F.3d at 366 (Sykes, *J.*, dissenting). In other words, the Seventh Circuit compared a lesbian woman with a heterosexual man. As an initial matter, this observation helpfully illustrates that sexual orientation is a function of sex. In the comparison, changing Hively's sex changed her sexual orientation. Case in point.

But the real issue raised by the government's critique is the proper application of the comparative test. In the government's view, the appropriate comparison is not between a woman attracted to women and a man attracted to women; it's between a woman and a man, both of whom are attracted to people of the same sex. Determining which of these framings is correct requires understanding the purpose and operation of the comparative test. Although the Supreme Court has not elaborated on the role that the test plays in Title VII jurisprudence, based on how the Supreme Court has employed the test, we understand that its purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To determine whether a trait is such a proxy, the test compares a female and a male ***117** employee who both exhibit the trait at issue. In the comparison, the trait is the control, sex is the independent variable, and employee treatment is the dependent variable.

To understand how the test works in practice, consider *Manhart*. There, the Supreme Court evaluated the Los Angeles Department of Water's requirement that female employees make larger pension contributions than their male colleagues. 435 U.S. at 704–05, 98 S.Ct. 1370. This requirement was based on mortality data indicating that female employees outlived male employees by several years and the employer insisted that "the different contributions exacted from men and women were based on the factor of longevity rather than sex." *Id.* at 712, 98 S.Ct. 1370. Applying "the simple test of whether the evidence shows treatment of a person in a manner which *but for* that person's sex would be different," the Court compared a woman and a man, both of whose pension contributions were based on life expectancy, and asked whether they were required to make different contributions. *Id.* at 711, 98 S.Ct. 1370 (internal quotation marks omitted). Importantly, because life expectancy is a sex-dependent trait, changing the sex of the employee (the independent variable) necessarily affected the employee's life expectancy and thereby changed how they were impacted by the pension policy (the dependent variable). After identifying this correlation, the Court concluded that life expectancy was simply a proxy for sex and therefore the pension policy constituted discrimination "because of ... sex." *Id.*

We can also look to the Supreme Court's decision in *Price Waterhouse.* Although that case did not quote *Manhart*'s "but for" language, it involved a similar inquiry: in determining whether discrimination based on particular traits was rooted in sex stereotypes, the Supreme Court asked whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup "if she had been a man." 490 U.S. at 258, 109 S.Ct. 1775. Otherwise said, the Supreme Court compared a man and a woman who exhibited the plaintiff's traits and asked whether they would have experienced different employment outcomes. Notably, being aggressive and not wearing jewelry or makeup is consistent with gender stereotypes for men. Therefore, by changing the plaintiff's gender, the Supreme Court also changed the plaintiff's gender non-conformity.

The government's proposed approach to *Hively*, which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex, adopts the wrong framing. To understand why this is incorrect, consider the mismatch between the facts in the government's comparison and the allegation at issue: Hively did not allege that her employer discriminated against women with same-sex attraction but not men with same-sex attraction. If she had, that would be classic sex discrimination against a subset of women. *See* Lead Dissent at 152 n.20. Instead, Hively claimed that her employer discriminated on the basis of sexual orientation. To address that allegation, the proper question is whether sex is a "motivating factor" in sexual orientation discrimination, *see* 42 U.S.C. § 2000e-2(m), or, said more simply, whether sexual orientation is a function of sex.[13] But, contrary ***118** to the government's suggestion, this question cannot be answered by comparing two people with the same sexual orientation. That would be equivalent to comparing the gender non-conforming female plaintiff in *Price Waterhouse* to a gender non-conforming man; such a comparison would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-conformity in only one gender. Instead, just as *Price Waterhouse* compared a gender non-conforming woman to a gender conforming man, both of whom were aggressive and did not wear makeup or jewelry, the *Hively* court properly determined that sexual orientation is sex dependent by comparing a woman and a man with two different sexual orientations, both of whom were attracted to women.

The government further counters that the comparative test produces false positives in instances where it is permissible to impose different terms of employment on men and women because "the sexes are not similarly situated." Gov. Br. at 16–17 (quoting *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 469, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981)).[14] For example, the government posits that courts have rejected the comparative test when assessing employer policies regarding sex-segregated bathrooms and different grooming standards for men and women. Similarly, the lead dissent insists that our holding would preclude such policies if "[t]aken to its logical conclusion." Lead Dissent at 151. Both criticisms are misplaced.

A plaintiff alleging disparate treatment based on sex in violation of Title VII must show two things: (1) that he was "discriminate[d] against ... with respect to his compensation, terms, conditions, or privileges of employment," and (2) that the employer discriminated "because of ... sex." 42 U.S.C. § 2000e-2(a)(1). The comparative test addresses the second prong of that test; it reveals whether an employment practice is "because of ... sex" by asking whether the trait at issue (life expectancy, sexual orientation, etc.) is a function of sex. In contrast, courts that have addressed challenges to the sex-specific employment practices identified by the government have readily acknowledged that the policies are based on sex and instead focused their analysis on the first prong: whether the policies impose "disadvantageous terms or conditions of employment."[15] ***119** *Harris*, 510 U.S. at 25, 114 S.Ct. 367 (Ginsburg, *J.*, concurring); *see, e.g.*, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109–10 (9th Cir. 2006) (upholding grooming standards that do not "place[ ] a greater burden on one gender than the other"); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (concluding that "slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities"); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (same); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336–37 (D.C. Cir. 1973) (holding that hair-length regulations, like "the requirement that men and women use separate toilet facilities[,] ... do not pose distinct employment disadvantages for one sex").[16] Whether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from this Court's inquiry into whether sexual orientation discrimination is "because of ... sex," and has no bearing on the efficacy of the comparative test.

Having addressed the proper application of the comparative test, we conclude that the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently "but for" his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.[17]

2. Gender Stereotyping

Viewing the relationship between sexual orientation and sex through the lens of gender stereotyping provides yet another basis for concluding that sexual orientation discrimination is a subset of sex discrimination. Specifically, this framework demonstrates that sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.

Since 1978, the Supreme Court has recognized that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," because Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Manhart*, 435 U.S. at 707 & n.13, 98 S.Ct. 1370. This is true of stereotypes about both how the sexes are and how they should be. *Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775 ("[A]n employer who acts on the basis of a belief that a woman cannot ... or must not [possess certain traits] has acted ***120** on the basis of gender."); *see also* Zachary R. Herz, Note, Price's *Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 405–06 (2014) (distinguishing between ascriptive stereotypes that "treat[ ] a large group of people alike" and prescriptive stereotypes that speak to how members of a group should be).

In *Price Waterhouse*, the Supreme Court concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination. *See* 490 U.S. at 250–52, 109 S.Ct. 1775 (plurality); *see also id.* at 259, 109 S.Ct. 1775 (White, *J.*, concurring in the judgment); *id.* at 272–73, 109 S.Ct. 1775 (O'Connor, *J.*, concurring in the judgment).[18] Similarly, *Manhart* stands for the proposition that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," and held that female employees could not, by virtue of their status as women, be discriminated against based on the gender stereotype that women generally outlive men. 435 U.S. at

707–08, 711, 98 S.Ct. 1370. Under these principles, employees who experience adverse employment actions as a result of their employer's generalizations about members of their sex, *id.* at 708, 98 S.Ct. 1370, or "as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII," *Dawson*, 398 F.3d at 218.

Accepting that sex stereotyping violates Title VII, the "crucial question" is "[w]hat constitutes a gender-based stereotype." *Back*, 365 F.3d at 119–20. As demonstrated by *Price Waterhouse*, one way to answer this question is to ask whether the employer who evaluated the plaintiff in "sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man." 490 U.S. at 258, 109 S.Ct. 1775. Similarly, this Court has observed that the question of whether there has been improper reliance on sex stereotypes can sometimes be answered by considering whether the behavior or trait at issue would have been viewed more or less favorably if the employee were of a different sex. *See Back*, 365 F.3d at 120 n.10 (quoting *Doe ex rel. Doe v. City of Belleville,* 119 F.3d 563, 581–82 (7th Cir. 1997)).[19]

Applying *Price Waterhouse*'s reasoning to sexual orientation, we conclude that when, for example, "an employer ... acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be," but takes no such action against women who are attracted to men, ***121** the employer "has acted on the basis of gender." *Cf.* 490 U.S. at 250, 109 S.Ct. 1775.[20] This conclusion is consistent with *Hively*'s holding that same-sex orientation "represents the ultimate case of failure to conform" to gender stereotypes, 853 F.3d at 346 (majority), and aligns with numerous district courts' observation that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. ... The gender stereotype at work here is that 'real' men should date women, and not other men," *Centola v. Potter*, 183 F.Supp.2d 403, 410 (D. Mass. 2002); *see also, e.g., Boutillier v. Hartford Pub. Sch.*, 221 F.Supp.3d 255, 269 (D. Conn. 2016); *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1160 (C.D. Cal. 2015); *Terveer v. Billington*, 34 F.Supp.3d 100, 116 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1224 (D. Or. 2002).[21]

This conclusion is further reinforced by the unworkability of *Simonton* and *Dawson*'s holding that sexual orientation discrimination is not a product of sex stereotypes. Lower courts operating under this standard have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination. *See generally Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 705–09 (7th Cir. 2016) (panel op.) (collecting cases), *vacated by Hively*, 853 F.3d 339 (en banc). Under this approach "a woman might have a Title VII claim if she was harassed or fired for being perceived as too 'macho' but not if she was harassed or fired for being perceived as a lesbian." *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 524 n.8 (D. Conn. 2016). In parsing the evidence, courts have resorted to lexical bean counting, comparing the relative frequency of epithets such as "ass wipe," "fag," "gay," "queer," "real man," and "fem" to determine whether discrimination is based on sex or sexual orientation. *See, e.g.*, *Kay v. Indep. Blue Cross*, 142 Fed.Appx. 48, 51 (3d Cir. 2005). Claims of gender discrimination have been "especially difficult for gay plaintiffs to bring," *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011), because references to a plaintiff's sexual orientation are generally excluded from the evidence, *Boutillier*, 221 F.Supp.3d at 269, or permitted only when "the harassment consists of homophobic ***122** slurs directed at a *heterosexual*," *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F.Supp.3d 320, 332–33 (N.D.N.Y. 2016) (emphasis added). *But see Franchina*, 881 F.3d at 53 (holding that jury may consider evidence referencing plaintiff's sexual orientation for purposes of a sex discrimination claim). Unsurprisingly, many courts have found these distinctions unworkable, admitting that the doctrine is "illogical," *Philpott v. New York*, 252 F.Supp.3d 313, 316 (S.D.N.Y. 2017), and produces "untenable results," *Boutillier*, 221 F.Supp.3d at 270. In the face of this pervasive confusion, we are persuaded that "the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist save as a lingering and faulty judicial construct." *Videckis*, 150 F.Supp.3d at 1159 (quoting *Prowel*, 579 F.3d at 291). We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.

The government resists this conclusion, insisting that negative views of those attracted to members of the same sex may not be based on views about gender at all, but may be rooted in "moral beliefs about sexual, marital and familial relationships." Gov. Br. at 19. But this argument merely begs the question by assuming that moral beliefs about sexual orientation can be dissociated from beliefs about sex. Because sexual orientation is a function of sex, this is simply impossible. Beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex. For this reason, it makes no difference that the employer may not believe that its actions are based in sex. In *Manhart*, for example, the employer claimed its policy was based on longevity, not sex, but the Supreme Court concluded that, irrespective of the employer's belief, the longevity metric was predicated on assumptions about sex. 435 U.S. at 712–13, 98 S.Ct. 1370. The same can be said of sexual orientation discrimination.

To be clear, our conclusion that moral beliefs regarding sexual orientation are based on sex does not presuppose that those beliefs are necessarily animated by an invidious or evil motive. For purposes of Title VII, any belief that depends, even in part, on sex, is an impermissible basis for employment decisions.[22] This is true irrespective of whether the belief is grounded in fact, as in *Manhart*, *id.* at 704–05, 711, 98 S.Ct. 1370, or lacks "a malevolent motive," *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991). Indeed, in *Johnson Controls*, the Supreme Court concluded that an employer violated Title VII by excluding fertile women from jobs that involved exposure to high levels of lead, which can adversely affect the development of a fetus. 499 U.S. at 190, 200, 111 S.Ct. 1196. As the Court emphasized, "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination" under Title VII. *Id.* at 200, 111 S.Ct. 1196. Here, because sexual orientation is a function of sex, beliefs about sexual orientation, including moral ones, are, in some measure, "because of ... sex."

***123** The government responds that, even if discrimination based on sexual orientation reflects a sex stereotype, it is not barred by *Price Waterhouse* because it treats women no worse than men.[23] Gov. Br. at 19–20. We believe the government has it backwards. *Price Waterhouse*, read in conjunction with *Oncale*, stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms. *See Oncale*, 523 U.S. at 78, 118 S.Ct. 998 (holding that Title VII "protects men as well as women"); *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775 ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). It follows that the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right. To the contrary, this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women. By the same token, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.[24]

***124 3. Associational Discrimination**

The conclusion that sexual orientation discrimination is a subset of sex discrimination is further reinforced by viewing this issue through the lens of associational discrimination. Consistent with the nature of sexual orientation, in most contexts where an employer discriminates based on sexual orientation, the employer's decision is predicated on opposition to romantic association between particular sexes. For example, when an employer fires a gay man based on the belief that men should not be attracted to other men, the employer discriminates based on the employee's own sex. *See Baldwin*, 2015 WL 4397641, at *6.

This Court recognized associational discrimination as a violation of Title VII in *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008), a case involving allegations of racial discrimination. Holcomb, a white man, alleged that he was fired from his job as the assistant coach of a college basketball team because his employer disapproved of his marriage to a black woman. This Court concluded that Holcomb had stated a viable claim, holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 138. Although the Court considered the argument that the alleged discrimination was based on the race of Holcomb's wife rather than his own, it ultimately concluded that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139; *see also Whitney v. Greater N.Y. Corp. of Seventh–Day Adventists,* 401 F.Supp. 1363, 1366 (S.D.N.Y. 1975) ("[I]f [plaintiff] was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend.").

Applying similar reasoning, the Fifth, Sixth, and Eleventh Circuits have reached the same conclusion in racial discrimination cases. *See Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994–95 (6th Cir. 1999) (holding that plaintiff had alleged discrimination where the employer was "charged with reacting adversely to [plaintiff] because of [his] race in relation to the race of his daughter"); *Deffenbaugh–Williams v. Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) ("[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."), *vacated in part on other grounds by Williams v. Wal–Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."). Other circuits have indicated that associational discrimination extends beyond race to all of Title VII's protected classes. *See Hively*, 853 F.3d at 349 (majority) (holding that Title VII prohibits associational discrimination on the basis of race as well as color, national origin, religion, and sex); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009) (stating, in the context of a race discrimination case, that "Title VII protects individuals ***125** who, though not members of a *protected class*, are victims of discriminatory animus toward protected third persons with whom the individuals associate" (internal quotation marks omitted) (emphasis added)).[25] We agree and we now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.

This conclusion is consistent with the text of Title VII, which "on its face treats each of the enumerated categories exactly the same" such that "principles ... announce[d]" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin," and vice versa.[26] *Price Waterhouse*, 490 U.S. at 243 n.9, 109 S.Ct. 1775. It also accords with the Supreme Court's application of theories of discrimination developed in Title VII race discrimination cases to claims involving discrimination based on sex. *See Meritor*, 477 U.S. at 63–67, 106 S.Ct. 2399 (concluding that claims of hostile work environment, a theory of discrimination developed in the context of race, were equally applicable in the context of sex); *see also* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 349 (2017) (explaining that the 1972 amendments to Title VII "repeatedly equated the evils of sex discrimination with those of race discrimination").

As was observed in *Christiansen*, "[p]utting aside romantic associations," the notion that employees should not be discriminated against because of their association with persons of a particular sex "is not controversial." 852 F.3d at 204 (Katzmann, *C.J.*, concurring). If an employer disapproves of close friendships among persons of opposite sexes and fires a female employee because she has male friends, the employee has been discriminated against because of her own sex. "Once we accept this premise, it makes little sense to carve out same-sex [romantic] relationships as an association to which these protections do not apply." *Id.* Applying the reasoning of *Holcomb*, if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because "the fact that the employee is a man instead of a woman motivated the employer's discrimination against him." *Baldwin*, 2015 WL 4397641, at *6.

In this scenario, it is no defense that an employer requires both men and women to refrain from same-sex attraction or relationships. In *Holcomb*, for example, the white plaintiff was fired for his marriage to a black woman. *See* 521 F.3d at 138. If the facts of *Holcomb* had also involved a black employee fired for his marriage to a white woman, would we have said that because both the white employee ***126** and black employee were fired for their marriages to people of different races, there was no discrimination "because of ... race"? Of course not.[27] It is unthinkable that "tak[ing] action against an employee because of the employee's association with a person of another race," *id.* at 139, would be excused because two employees of different races were both victims of an anti-miscegenation workplace policy. The same is true of discrimination based on sexual orientation.[28]

Although this conclusion can rest on its own merits, it is reinforced by the reasoning of *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). In *Loving*, the Commonwealth of Virginia argued that anti-miscegenation statutes did not violate the Equal Protection Clause because such statutes applied equally to white and black citizens. *See id.* at 7–8, 87 S.Ct. 1817. The Supreme Court disagreed, holding that "equal application" could not save the statute because it was based "upon distinctions drawn according to race." *Id.* at 10–11, 87 S.Ct. 1817. Constitutional cases like *Loving* "can provide helpful guidance in [the] statutory context" of Title VII. *Ricci v. DeStefano*, 557 U.S. 557, 582, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009); *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 949 (2002) (arguing that, in the constitutional context, "the Supreme Court developed the law of sex discrimination by means of an analogy between sex and race discrimination"). Accordingly, we find that *Loving*'s insight—that policies that distinguish according to protected characteristics cannot be saved by equal application—extends to association based on sex.

Certain *amici* supporting the defendants disagree, arguing that applying *Holcomb* and *Loving* to same-sex relationships is not warranted because anti-miscegenation policies are motivated by racism, while sexual orientation discrimination is not rooted in sexism. Although these *amici* offer no empirical support for this contention, *amici* supporting Zarda cite research suggesting that sexual orientation discrimination has deep misogynistic roots. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994). But the Court need not resolve this dispute because the *amici* supporting defendants identify no cases indicating that the scope of Title VII's protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism. To the contrary, ***127** this approach is squarely foreclosed by the Supreme Court's precedents. In *Oncale*, the Court explicitly rejected the argument that Title VII did not protect male employees from sexual harassment by male co-workers, holding that "Title VII's prohibition on discrimination 'because of ... sex' protects men as well as women" and extends to instances where the "plaintiff and the defendant ... are of the same sex." 523 U.S. at 78–79, 118 S.Ct. 998. This male-on-male harassment is well-outside the bounds of what is traditionally conceptualized as sexism. Similarly, as we have discussed, in *Manhart* the Court invalidated a pension scheme that required female employees to contribute more than their male counterparts because women generally live longer than men. 435 U.S. at 711, 98 S.Ct. 1370. Again, the Court reached this conclusion notwithstanding the fact that some people might not describe this policy as sexist. By extension, even if sexual orientation discrimination does not evince conventional notions of sexism, this is not a legitimate basis for concluding that it does not constitute discrimination "because of ... sex."[29]

The fallback position for those opposing the associational framework is that associational discrimination can be based only on acts—such as Holcomb's act of getting married—whereas sexual orientation is a status. As an initial matter, the Supreme Court has rejected arguments that would treat acts as separate from status in the context of sexual orientation. In *Lawrence v. Texas*, the state argued that its "sodomy law [did] not discriminate against homosexual persons," but "only against homosexual conduct." 539 U.S. 558, 583, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, *J.*, concurring). Justice O'Connor refuted this argument, reasoning that laws that target "homosexual conduct" are "an invitation to subject homosexual persons to discrimination." *Id.* More recently, in a First Amendment case addressing whether a public university could require student organizations to be open to all students, a religious student organization claimed that it should be permitted to exclude anyone who engaged in "unrepentant homosexual conduct," because such individuals were being excluded "on the basis of a conjunction of [their] conduct and [their] belief that the conduct is not wrong," not because of their sexual orientation. *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 672, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) (internal quotation marks omitted). Drawing on *Lawrence* and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), a case brought under 42 U.S.C. § 1985(3), the Supreme Court rejected the invitation to treat discrimination based on acts as separate from discrimination based on status. *Christian Legal Soc.*, 561 U.S. at 689, 130 S.Ct. 2971; *see also Bray*, 506 U.S. at 270, 113 S.Ct. 753 (rejecting the act-status distinction by observing that "[a] tax on wearing yarmulkes is a tax on Jews"). Although *amici*'s argument inverts the previous defenses of policies targeting individuals attracted to persons of the same sex by arguing that Title VII's prohibition of associational discrimination protects only acts, not status, their proposed distinction is equally unavailing.

***128** More fundamentally, *amici*'s argument is an inaccurate characterization of associational discrimination. First, the source of the Title VII claim is not the employee's associational act but rather the employer's discrimination, which is motivated by "disapprov[al] of [a particular type of] association." *See Holcomb*, 521 F.3d at 139; *see also* 42 U.S.C. § 2000e-2(m) (asking whether the protected trait was "a motivating factor"). In addition, as it pertains to the employee, what is protected is not the employee's act but rather the employee's protected characteristic, which is a status. *Holcomb*, 521 F.3d at 139; *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 2522, 186 L.Ed.2d 503 (2013) (defining "status-based discrimination," which is "prohibited by Title VII," as "discrimination on the basis of race, color, religion, sex, or national origin"). Accordingly, associational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afoul of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action. *See* 42 U.S.C. § 2000e-2(m).[30]

In sum, we see no principled basis for recognizing a violation of Title VII for associational discrimination based on race but not on sex. Accordingly, we hold that sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination "because of ... sex." Therefore, it is no less repugnant to Title VII than anti-miscegenation policies.

C. Subsequent Legislative Developments

Although the conclusion that sexual orientation discrimination is a subset of sex discrimination follows naturally from existing Title VII doctrine, the *amici* supporting the defendants place substantial weight on subsequent legislative developments that they argue militate against interpreting "because of ... sex" to include sexual orientation discrimination.[31] Having carefully considered each of *amici*'s arguments, we find them unpersuasive.

First, the government points to the Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991), arguing that this amendment to Title VII ratified judicial decisions construing discrimination "because of ... sex" as excluding sexual orientation discrimination. Among other things, the 1991 amendment expressly "codif[ied] the concepts of 'business necessity' and 'job related' " as articulated in *Griggs*, 401 U.S. at 429–31, 91 S.Ct. 849, and rejected the Supreme Court's prior decision on that topic in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). *See* Civil Rights Act of ***129** 1991 §§ 2(2), 3(2), 105 Stat. at 1071. According to the government, this amendment also implicitly ratified the decisions of the four courts of appeals that had, as of 1991, held that Title VII does not bar discrimination based on sexual orientation.

In advancing this argument, the government attempts to analogize the 1991 amendment to the Supreme Court's recent discussion of an amendment to the Fair Housing Act ("FHA"). In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Court considered whether disparate-impact claims were cognizable under the FHA by looking to, *inter alia*, a 1988 amendment to the statute. ––– U.S. ––––, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015). The Court found it relevant that "all nine Courts of Appeals to have addressed the question" by 1988 "had concluded [that] the [FHA] encompassed disparate-impact claims." *Id.* at 2519. When concluding that Congress had implicitly ratified these holdings, the Court considered (1) the amendment's legislative history, which confirmed that "Congress was aware of this unanimous precedent," *id.*, and (2) the fact that the precedent was directly relevant to the amendment, which "included three exemptions from liability that assume the existence of disparate-impact claims," *id.* at 2520.

The statutory history of Title VII is markedly different. When we look at the 1991 amendment, we see no indication in the legislative history that Congress was aware of the circuit precedents identified by the government and, turning to the substance of the amendment, we have no reason to believe that the new provisions it enacted were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII. It is also noteworthy that, when the statute was amended in 1991, only three of the thirteen courts of appeals had considered whether Title VII prohibited sexual orientation discrimination.[32] *See Williamson*, 876 F.2d 69; *DeSantis v. PT&T Co.*, 608 F.2d 327 (9th Cir. 1979); *Blum*, 597 F.2d 936. Mindful of this important context, this is not an instance where we can conclude that Congress was aware of, much less relied upon, the handful of Title VII cases discussing sexual orientation. Indeed, the inference suggested by the government is particularly suspect given that the text of the 1991 amendment emphasized that it was "respond[ing] to Supreme Court decisions by *expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991 §§ 2(2), 3(2), 105 Stat. at 1071 (emphasis added). For these reasons, we do not consider the 1991 amendment to have ratified the interpretation of Title VII as excluding sexual orientation discrimination.

Next, certain *amici* argue that by not enacting legislation expressly prohibiting sexual orientation discrimination in the workplace Congress has implicitly ratified decisions holding that sexual orientation was not covered by Title VII. According to the government's *amicus* brief, almost every Congress since 1974 has considered ***130** such legislation but none of these bills became law.

This theory of ratification by silence is in direct tension with the Supreme Court's admonition that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," particularly when "it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (citations and internal quotation marks omitted). This is because "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation." *Patterson v. McLean Credit Union*, 491 (U.S. 164, 175 n.1, 109 S.Ct. 2363, 105 L.Ed.2d 132 1989) (internal quotation marks omitted). After all, "[t]here are many reasons Congress might not act on a decision ..., and most of them have nothing at all to do with Congress' desire to preserve the decision." *Michigan v. Bay Mills Indian Cmty.*, ––– U.S. ––––, 134 S.Ct. 2024, 2052, 188 L.Ed.2d 1071 (2014) (Thomas, *J*., dissenting). For example, Congress may be unaware of or indifferent to the status quo, or it may be unable "to agree upon how to alter the status quo." *Johnson v. Transp. Agency*, 480 U.S. 616, 672, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (Scalia, *J*., dissenting). These concerns ring true here. We do not know why Congress did not act and we are thus unable to choose among the various inferences that could be drawn from Congress's inaction on the bills identified by the government. *See LTV Corp.*, 496 U.S. at 659, 110 S.Ct. 2668 ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (internal quotation marks omitted)). Accordingly, we decline to assign congressional silence a meaning it will not bear.

Drawing on the dissent in *Hively*, the government also argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly prohibited sexual orientation discrimination in certain statutes but not Title VII. *See* 853 F.3d at 363–64 (Sykes, *J*., dissenting). While it is true that Congress has sometimes used the terms "sex" and "sexual orientation" separately, this observation is entitled to minimal weight in the context of Title VII.

The presumptions that terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms are used in "the same act." *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007). By contrast, when drafting separate statutes, Congress is far less likely to use terms consistently, *see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 936 (2013), and these presumptions are entitled to less force where, as here, the government points to terms used in different statutes passed by different Congresses in different decades. *See* Violence Against Women Reauthorization Act of 2013, Pub L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C), § 4704(a), 123 Stat. 2835, 2837, 2839 (2009); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998).

***131** Moreover, insofar as the government argues that mention of "sexual orientation" elsewhere in the U.S. Code is evidence that "because of ... sex" should not be interpreted to include "sexual orientation," our race discrimination jurisprudence demonstrates that this is not dispositive. We have held that Title VII's prohibition on race discrimination encompasses discrimination on the basis of ethnicity, *see Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016), notwithstanding the fact that other federal statutes now enumerate race and ethnicity separately, *see, e.g.*, 20 U.S.C. § 1092(f)(1)(F)(ii); 42 U.S.C. § 294e-1(b)(2). The same can be said of sex and sexual orientation because discrimination based on the former encompasses the latter.

In sum, nothing in the subsequent legislative history identified by the *amici* calls into question our conclusion that sexual orientation discrimination is a subset of sex discrimination and is thereby barred by Title VII.

III. Summary

Since 1964, the legal framework for evaluating Title VII claims has evolved substantially.[33] Under *Manhart*, traits that operate as a proxy for sex are an impermissible basis for disparate treatment of men and women. Under *Price Waterhouse*, discrimination on the basis of sex stereotypes is prohibited. Under *Holcomb*, building on *Loving*, it is unlawful to discriminate on the basis of an employee's association with persons of another race. Applying these precedents to sexual orientation discrimination, it is clear that there is "no justification in the statutory language ... for a categorical rule excluding" such claims from the reach of Title VII. *Oncale*, 523 U.S. at 80, 118 S.Ct. 998; *see also Baldwin*, 2015 WL 4397641, at *9 ("Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay, or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.").

Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. 42 U.S.C. § 2000e-2(m). As explained above, sexual orientation discrimination is a subset of sex discrimination because sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation ***132** discrimination is a form of sex discrimination.

Although sexual orientation discrimination is "assuredly not the principal evil that Congress was concerned with when it enacted Title VII," "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale*, 523 U.S. at 80, 118 S.Ct. 998. In the context of Title VII, the statutory prohibition extends to all discrimination "because of ... sex" and sexual orientation discrimination is an actionable subset of sex discrimination. We overturn our prior precedents to the contrary to the extent they conflict with this ruling. *See Simonton*, 232 F.3d at 35; *Dawson*, 398 F.3d at 218–20.

***

Zarda has alleged that, by "honestly referr[ing] to his sexual orientation," he failed to "conform to the straight male macho stereotype." J.A. 72. For this reason, he has alleged a claim of discrimination of the kind we now hold cognizable under Title VII. The district court held that there was sufficient evidence of sexual orientation discrimination to survive summary judgment on Zarda's state law claims. Even though Zarda lost his state sexual orientation discrimination claim at trial, that result does not preclude him from prevailing on his federal claim because his state law claim was tried under "a higher standard of causation than required by Title VII." *Zarda*, 855 F.3d at 81. Thus, we hold that Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation.

Conclusion

Based on the foregoing, we **VACATE** the district court's judgment on the Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

Dennis Jacobs, Circuit Judge, concurring:

I concur in Parts I and II.B.3 of the opinion of the Court (Associational Discrimination) and I therefore concur in the result. Mr. Zarda does have a sex discrimination claim under Title VII based on the allegation that he was fired because he was a man who had an intimate relationship with another man. I write separately because, of the several justifications advanced in that opinion, I am persuaded by one; and as to associational discrimination, the opinion of the Court says somewhat more than is necessary to justify it. Since a single justification is sufficient to support the result, I start with associational discrimination, and very briefly explain thereafter why the other grounds leave me unconvinced.

I

Supreme Court law and our own precedents on race discrimination militate in favor of the conclusion that sex discrimination based on one's choice of partner is an impermissible basis for discrimination under Title VII. This view is an extension of existing law, perhaps a cantilever, but not a leap.

First: this Circuit has already recognized associational discrimination as a Title VII violation. In Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008), we considered a claim of discrimination under Title VII by a white man who alleged that he was fired because of his marriage to a black woman. We held that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race ... The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, ***133** the employee suffers discrimination because of the employee's *own* race." Id. at 139 (emphasis in original).

Second: the analogy to same-sex relationships is valid because Title VII "on its face treats each of the enumerated categories exactly the same"; thus principles announced in regard to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin." Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion). And, presumably, vice versa.

Third: There is no reason I can see why associational discrimination based on sex would not encompass association between persons of the same sex. In Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a case in which a man alleged same-sex harassment, the Supreme Court stated that Title VII prohibits " 'discriminat[ion] ... because of ... sex' " and that Title VII "protects men as well as women." Id. at 79–80, 118 S.Ct. 998.

This line of cases, taken together, demonstrates that discrimination based on same-sex relationships is discrimination cognizable under Title VII notwithstanding that the sexual relationship is homosexual.

Zarda's complaint can be fairly read to allege discrimination based on his relationship with a person of the same sex. The allegation is analogous to the claim in Holcomb, in which a person of one race was discriminated against on the basis of race because he consorted with a person of a different race. In each instance, the basis for discrimination is disapproval and prejudice as to who is permitted to consort with whom, and the common feature is the sorting: one is the mixing of race and the other is the matching of sex.

This outcome is easy to analogize to Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). While *Loving* was an Equal Protection challenge to Virginia's miscegenation law, the law was held unconstitutional because it impermissibly drew distinctions according to race. Id. at 10–11, 87 S.Ct. 1817. In the context of a person consorting with a person of the same sex, the distinction is similarly drawn according to sex, and is therefore unlawful under Title VII.

Amicus Mortara argues that race discrimination aroused by couples of different race is premised on animus against one of the races (based on the idea of white supremacy), and that discrimination against homosexuals is obviously not driven by animus against men or against women. But it cannot be that the protections of Title VII depend on particular races; there are a lot more than two races, and Title VII likewise protects persons who are multiracial. Mr. Mortara may identify analytical differences; but to persons who experience the racial discrimination, it is all one.

Mr. Mortara also argues that discrimination based on homosexual acts and relationships is analytically distinct from discrimination against homosexuals, who have a proclivity on which they may or may not act. Academics may seek to know whether discrimination is illegal if based on same-sex attraction itself: they have jurisdiction over interesting questions, and we do not. But the distinction is not decisive. See Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) ("Our decisions have declined to distinguish between status and conduct in" the context of sexual orientation.). In any event, the distinction between act and attraction does not arise in this case because Mr. Zarda's termination ***134** was sparked by his avowal of a same-sex relationship.

A ruling based on Mr. Zarda's same-sex relationship resolves this appeal; good craft counsels that we go no further. Much of the rest of the Court's opinion amounts to woke dicta.

II

The opinion of the Court characterizes its definitional analysis as "the most natural reading of Title VII." Maj. Op. at 112. Not really. "Sex," which is used in series with "race" and "religion," is one of the words least likely to fluctuate in meaning. I do not think I am breaking new ground in saying that the word "sex" as a personal characteristic refers to the male and female of the species. Nor can there be doubt that, when Title VII was drafted in 1964, "sex" drew the distinction between men and women. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979).

In the opinion of the Court, the word "sex" undergoes modification and expansion. Thus the opinion reasons: "[l]ogically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." Maj. Op. at 113. It is undeniable that sexual orientation is a "function of sex" in the (unhelpful) sense that it cannot be defined or understood without reference to sex. But surely that is because it has to do with sex—as so many things do. *Everything* that cannot be understood without reference to sex does not amount to sex itself as a term in Title VII. So it seems to me that all of these arguments are circular as well as unnecessary.

III

The opinion of the Court relies in part on a comparator test, asking whether the employee would have been treated differently "but for" the employee's sex. But the comparator test is an evidentiary technique, not a tool for textual interpretation. "[T]he ultimate issue" for a court to decide in a Title VII case "is the reason for the individual plaintiff's treatment, not the relative treatment of different groups within the workplace." Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004). The opinion of the Court builds on the concept of homosexuality as a subset of sex, and this analysis thus merges in a fuzzy way with the definitional analysis. But when the comparator test is used for textual interpretation, it carries in train ramifications that are sweeping and unpredictable: think fitness tests for different characteristics of men and women, not to mention restrooms.

IV

The opinion of the Court relies on the line of cases that bars discrimination based on sexual stereotype: the manifestation of it or the failure to conform to it. There are at least three reasons I am unpersuaded.

Anti-discrimination law should be explicable in terms of evident fairness and justice, whereas the analysis employed in the opinion of the Court is certain to be baffling to the populace.

The Opinion posits that heterosexuality is just another sexual convention, bias, or stereotype—like pants and skirts, or hairdos. This is the most arresting notion in the opinion of the Court. Stereotypes are generalizations that are usually unfair or defective. Heterosexuality and homosexuality are both traits that are innate and true, not stereotypes of anything else.

***135** If this case did involve discrimination on the basis of sexual stereotype, it would have been remanded to the District Court on that basis, as was done in Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017) (per curiam). The reason it could not be remanded on that basis is that the record does not associate Mr. Zarda with any sexual stereotyping. The case arises from his verbal disclosure of his sexual orientation during his employment as a skydiving instructor, and that is virtually all we know about him. It should not be surprising that a person of any particular sexual orientation would earn a living jumping out of airplanes; but Mr. Zarda cannot fairly be described as evoking somebody's sexual stereotype of homosexual men. So this case does not present the (settled) issue of sexual stereotype, which I think is the very reason we had to go in banc in order to decide this case. As was made clear as recently as March 2017, "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." Id. at 201.

José A. Cabranes, Circuit Judge, concurring in the judgment:

I concur only in the judgment of the Court. It will take the courts years to sort out how each of the theories presented by the majority applies to other Title VII protected classes: "race, color, religion, ... [and] national origin." 42 U.S.C. § 2000e-2(a)(1).

This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of ... sex." *Id.* Zarda's sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex, and is prohibited by Title VII.

That should be the end of the analysis.[1]

Sack, Circuit Judge, concurring in the judgment, and in parts I (Jurisdiction), II.A (The Scope of Title VII), II:B.3 (Associational Discrimination), and II:C (Subsequent Legislative Developments) of the opinion for the Court.

We decide this appeal in the context of something of a revolution[1] in American law respecting gender and sex. It appears to reflect, *inter alia*, many Americans' evolving regard for and social acceptance of gay and lesbian persons. We are now called upon to address questions dealing directly with sex, sexual behavior, and sexual taboos, a discussion fraught with moral, religious, political, psychological, and other highly charged issues. For those reasons (among others), I think it is in the best interests of us all to tread carefully; to say no more than we must; to decide no more than is necessary to resolve this appeal. This is not for fear of offending, but for fear of the possible consequences of being mistaken in one unnecessary aspect or another of our decision.

In my view, the law of this Circuit governing what is referred to in the majority opinion as "associational discrimination"—discrimination against a person because of his or her association with another—is unsettled. What was embraced by this Court in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) (holding, by implication, that associational discrimination on the basis of sex is not cognizable under Title VII), ***136** seems to have both been overtaken by, and to be inconsistent with, our later panel decision in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008) (holding directly that associational discrimination on account of race is unlawful under Title VII).[2] Choosing between the two approaches, as I think we must, I agree with the majority that *Holcomb* is right and that *Simonton* is therefore wrong.[3] It is principally on that basis that I concur in the judgment of the Court.

My declination to join other parts of the majority opinion does not signal my disagreement with them. Rather, inasmuch as, in my view, this appeal can be decided on the simpler and less fraught theory of associational discrimination, I think it best to stop there without then considering other possible bases for our judgment.

Raymond J. Lohier, Jr., Circuit Judge, concurring:

I agree with the majority opinion that there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words "because of ... sex." The first term clearly subsumes the second, just as race subsumes ethnicity.[1] Oral Arg. Tr. at 53:5–6 (Government conceding that "ethnicity can be viewed as a subset of race"). From this central holding, the majority opinion explores the comparative approach, the stereotyping rationale, and the associational discrimination rationale to help determine "when a trait other than sex is ... a proxy for (or function of) sex." Maj. Op. at 116. But in my view, these rationales merely reflect nonexclusive "evidentiary technique[s]," Jacobs, J., Concurring Op. at 134, frameworks, or ways to determine whether sex is a motivating factor in a given case, rather than interpretive tools that apply necessarily across all Title VII cases. Zarda himself has described these three rationales as "evidentiary theories" or "routes." Oral Arg. Tr. at 4:17–18. On this understanding, I join the majority opinion as to Parts II.A and II.B.1.a, which reflect the textualist's approach, and join the remaining parts of the opinion only insofar as they can be said to apply to Zarda's particular case.

A word about the dissents. My dissenting colleagues focus on what they variously describe as the "ordinary, contemporary, common meaning" of the words "because of ... sex," Lynch, J., Dissenting Op. at 144 n.8; Livingston, J., Dissenting Op. at 167, or the "public meaning of [those] words adopted by Congress in light of the social problem it was addressing when it chose those words," Lynch, J., Dissenting Op. at 162. There are at least two problems with this position. First, as the majority opinion points out, cabining the ***137** words in this way makes little or no sense of *Oncale* or, for that matter, *Price Waterhouse*. See Maj. Op. at 113–14. Second, their hunt for the "contemporary" "public" meaning of the statute in this case seems to me little more than a roundabout search for legislative history. Judge Lynch's laudable call (either as a way to divine congressional intent or as an interpretive check on the plain text approach) to consider what the legislature would have decided if the issue had occurred to the legislators at the time of enactment is, unfortunately, no longer an interpretive option of first resort. Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation.

Gerard E. Lynch, Circuit Judge, with whom Judge Livingston joins as to Parts I, II, and III, dissenting:

Speaking solely as a citizen, I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII of the Civil Rights Act of 1964. I am confident that one day—and I hope that day comes soon—I will have that pleasure.

I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half century ago—until I actually woke up and realized that I must have been still asleep and dreaming. Because we all know that Congress did no such thing.

I

Of course, today's majority does not contend that Congress literally prohibited sexual orientation discrimination in 1964. It is worth remembering the historical context of that time to understand why any such contention would be indefensible.

The Civil Rights Act as a whole was primarily a product of the movement for equality for African–Americans. It grew out of the demands of that movement, and was opposed by segregationist white members of Congress who opposed racial equality. Although the bill, even before it included a prohibition against sex discrimination, went beyond race to prohibit discrimination based on religion and national origin, there is no question that it would not have been under consideration at all but for the national effort to reckon to some degree with America's heritage of race-based slavery and government-enforced segregation.

It is perhaps difficult for people not then alive to understand that before the Civil Rights Act of 1964 became law, an employer could post a sign saying "Help Wanted; No Negroes Need Apply" without violating any federal law—and many employers did. Even the original House bill, introduced with the support of President Kennedy's Administration in 1963, did not prohibit racial discrimination by private employers. Language prohibiting employment discrimination by private employers on the grounds of "race, color, religion or national origin" was added later by a House subcommittee. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Comm. L. Rev. 431, 434–35 (1966); Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. Miami Race & Soc. Just. L. Rev. 41, 62–63, 64 n.103 (2012).

Movement on the bill was slow. It was only after the March on Washington in the summer of 1963, the assassination of President Kennedy in November of that year, and President Johnson's strong support for a civil rights bill that prohibited racial discrimination in employment, that the legislation made progress in Congress. Todd. ***138** S. Purdum, *An Idea Whose Time Has Come* 111–13, 151 (2014). But the private employment discrimination provision, like other sections of the bill prohibiting racial discrimination in public accommodations and federally funded programs, was openly and bitterly opposed by a large contingent of southern members of Congress. *See* Louis Menand, *The Sex Amendment*, The New Yorker (July 21, 2014), http://www.newyorker.com/magazine/2014/07/21/sex-amendment. Its passage was by no means assured when the floor debates in the House began.

From the moment President Kennedy proposed the Civil Rights Act in 1963, women's rights groups, with the support of some members of Congress, had urged that sex discrimination be included as a target of the legislation. Purdum, *supra*, at 196. The movements in the United States for gender and racial equality have not always marched in tandem—although there was some overlap between abolitionists and supporters of women's suffrage, suffragists often relied on the racially offensive argument that it was outrageous that white women could not vote when black men could.[1] But by the 1960s, many feminist advocates consciously adopted arguments parallel to those of the civil rights movement, and there was growing recognition that the two causes were linked in fundamental ways.[2]

Women's rights groups had been arguing for laws prohibiting sex discrimination since at least World War II, and had been gaining recognition for the agenda of the women's rights movement in other arenas. In addition to supporting (at least rhetorically) civil rights for African–Americans, President Kennedy had taken tentative steps towards support of women's rights as well. In December 1961, he created the President's Commission on the Status of Women, chaired until her death by Eleanor Roosevelt. Exec. Order No. 10980, 26 Fed. Reg. 12,059 (Dec. 14, 1961). Among ***139** other goals, the Commission was charged with developing recommendations for "overcoming discriminations in ... employment on the basis of sex," and suggesting "services which will enable women to continue their role [ ]as wives and mothers while making a maximum contribution to the world around them." *Id.*

The Commission's report highlighted the increasing role of women in the workplace, noting (in an era when the primacy of women's role in child-rearing and home-making was taken for granted) that even women with children generally spent no more than a decade or so of their lives engaged in full-time child care, allowing a significant portion of women's lives to be dedicated to education and employment. *American Women*: *Report of The President's Commission on the Status of Women* 6–7 (1963). Accordingly, the Commission advocated a variety of steps to improve women's economic position. *Id.* at

6–7, 10. While those recommendations did not include federal legislation prohibiting employment discrimination on the basis of sex, they did include a commitment to equal opportunity in employment by federal contractors and proposed such equality as a goal for private employers—as well as proposing other innovations, such as paid maternity leave and universal high-quality public child care, that have yet to become the law of the land. *Id.* at 20, 30, 43.

Nevertheless, the notion that women should be treated equally at work remained controversial. By 1964, only two states, Hawaii and Wisconsin, prohibited sex discrimination in employment. Purdum, *supra*, at 196. Although decades had passed since the Supreme Court announced in *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908), that laws limiting the hours that women could work did not violate the Fourteenth Amendment, but rather were an appropriate accommodation for women's fragile constitutions and more pressing maternal obligations, *id.* at 420–21, 28 S.Ct. 324, state laws "protecting" women from the rigors of the workplace remained commonplace. Purdum, *supra*, at 196; *see also* *Hoyt v. Florida*, 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961) (upholding a law requiring women, specifically, to opt in to jury service, in part because "woman is still regarded as the center of home and family life").

Accordingly, when Representative Howard W. Smith of Virginia, a die-hard opponent of integration and federal legislation to enforce civil rights for African–Americans, proposed that "sex" be added to the prohibited grounds of discrimination in the Civil Rights Act, there was reason to suspect that his amendment was an intentional effort to render the Act so divisive and controversial that it would be impossible to pass. *See*, *e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (suggesting that the "sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act"); Comment, *Sex Discrimination in Employment*, 35 Fordham L. Rev. 503, 504 n.16 (1967). That might not have been the case, however. Like those early suffragettes who were ambivalent about, or hostile to, racial equality, Smith also had a prior history of support for (presumably white) women's equality. For example, he had been a longstanding supporter of a constitutional amendment guaranteeing equal rights to women. Purdum, *supra*, at 196; *see also* Gillian Thomas, *Because of Sex* 2 (2016).

Whatever Smith's subjective motivations for proposing it, the amendment was adamantly opposed by many northern liberals on the ground that it would undermine support for the Act as a whole. Purdum, *supra*, at 197; Menand, *supra*. Indeed, the ***140** *New York Times* ridiculed the amendment, suggesting that, among other alleged absurdities, it would require Radio City Music Hall to hire male Rockettes, and concluding that "it would have been better if Congress had just abolished sex itself." Editorial, *De–Sexing the Job Market*, N.Y. Times, August 21, 1965.

But despite its contested origins, the adoption of the amendment prohibiting sex discrimination was not an accident or a stunt. Once the amendment was on the floor, it was aggressively championed by a coalition comprising most of the (few) women members of the House. Purdum, *supra*, at 197. Its subsequent adoption was consistent with a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance.

Discrimination against gay women and men, by contrast, was not on the table for public debate. In those dark, pre-Stonewall days, same-sex sexual relations were criminalized in nearly all states. Only three years before the passage of Title VII, Illinois, under the influence of the American Law Institute's proposed Model Penal Code, had become the first state to repeal laws prohibiting private consensual adult relations between members of the same sex. Salvatore J. Licata, *The Homosexual Rights Movement in the United States: A Traditionally Overlooked Area of American History*, 6 J. Homosexuality 161, 171 (1981).

In addition to criminalization, gay men and women were stigmatized as suffering from mental illness. In 1964, both the American Psychiatric Association and the American Psychological Association regrettably classified homosexuality as a mental illness or disorder. As the Supreme Court recently explained, "[f]or much of the 20th century ... homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973." *Obergefell v. Hodges*, ––– U.S. ––––, 135 S.Ct. 2584, 2596, 192 L.Ed.2d 609 (2015), citing Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). It was not until two years later, in 1975, that the American Psychological Association followed suit and "adopted the same position [as the American Psychiatric Association], urging all mental health professionals to work to dispel the stigma of mental illness long associated with homosexual orientation." Brief of Am. Psychological Ass'n as *Amicus Curiae*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 2454, 147 L.Ed.2d 554 (2000), citing Am. Psychological Ass'n, *Minutes of the Annual Meeting of* *the Council of Representatives*, in 30 Am. Psychologist 620, 633 (1975). Because gay identity was viewed as a mental illness and was, in effect, defined by participation in a criminal act, the employment situation for openly gay Americans was bleak.

Consider the rules regarding employment by the federal government. Starting in the 1940s and continuing through the 1960s, thanks to a series of executive orders repealing long-standing discriminatory policies, federal employment opportunities for African–Americans began to open up significantly. *See, e.g.*, Exec. Order No. 9980, 13 Fed. Reg. 4,311 (July 26, 1948) (prohibiting racial discrimination in civilian agencies); Exec. Order No. 10308, 16 Fed. Reg. 12,303 (December 3, 1951) (creating the Committee on Government Compliance to enforce the prohibition against racial discrimination by firms contracting with the government); Exec. Order No. 11114, 28 Fed. Reg. 6,485 (June 22, 1963) (extending prohibition against discrimination to all ***141** federally-funded construction projects). In sharp contrast, in 1953 President Eisenhower signed an executive order *excluding* persons guilty of "sexual perversion" from government employment. Exec. Order No. 10450, 18 Fed. Reg. 2,489 (April 27, 1953); *see also* Licata, *supra*, at 167–68. During the same period, gay federal employees, or employees even suspected of being gay, were systematically hounded out of the service as "security risks" during Cold–War witchhunts. Licata, *supra*, at 167–68.

Civil rights and civil liberties organizations were largely silent.[3] Licata, *supra*, at 168. In an influential book about the political plight of gay people, Edward Sagarin, writing under the pseudonym Donald Webster Cory, sharply criticized the silence of the bar. Donald Webster Cory, *The Homosexual in America: A Subjective Approach* (1951). For instance, he described the response to the abusive tactics used against members of the military discharged for homosexual conduct as follows: "And who raises a voice in protest against such discrimination? No one. Where was the American Civil Liberties Union? Nowhere." *Id.* at 45. To the extent that civil rights organizations did begin to engage with gay rights during the early 1960s, they did so through the lens of sexual liberty, rather than equality, grouping the prohibition of laws against same-sex relations with prohibitions of birth control, abortion, and adultery.[4] Even by the mid-1960s, the ACLU was identified by *Newsweek* as the only group "apart from the homophile organizations" that opposed laws criminalizing homosexual acts. Leigh Ann Wheeler, *How Sex Became a Civil Liberty* 155 (2013).

Given the criminalization of same-sex relationships and arbitrary and abusive police harassment of gay and lesbian citizens, nascent gay rights organizations had more urgent concerns than private employment discrimination. As late as 1968, four years *after* the passage of Title VII, the North American Conference of Homophile Organizations proposed a "Homosexual Bill of Rights" that demanded five fundamental rights: that private consensual sex between ***142** adults not be a crime; that solicitation of sex acts not be prosecuted except on a complaint by someone other than an undercover officer; that sexual orientation not be a factor in granting security clearances, visas, or citizenship; that homosexuality not be a barrier to service in the military; and that sexual orientation not affect eligibility for employment *with federal, state, or local governments*. Licata, *supra*, at 177 (emphasis added). Those proposals, which pointedly did not include a ban on private sector employment discrimination against gays, evidently had little traction with many Americans at the time. The first state to prohibit employment discrimination on the basis of sexual orientation even in the public sector was Pennsylvania, by executive order of the governor, in 1975—more than a decade after the Civil Rights Act had become law. James W. Button et al., *The Politics of Gay Rights at the Local and State Level*, in *The Politics of Gay Rights* 269, 272 (Craig A. Rimmerman et al. eds., 2000). It was not until 1982 that Wisconsin became the first state to ban both public and private sector discrimination based on sexual orientation. *Id.* at 273; *see also* Linda A. Mooney et al., *Understanding Social Problems* 467 (6th ed. 2009). Massachusetts followed in 1989. Button et al., *supra*, at 273. Notably, as discussed more fully below, these states did so by explicit legislative action adding "sexual orientation" to pre-existing anti-discrimination laws that already prohibited discrimination based on sex; they did not purport to "recognize" that sexual orientation discrimination was merely an aspect of already-prohibited discrimination based on sex.

In light of that history, it is perhaps needless to say that there was no discussion of sexual orientation discrimination in the debates on Title VII of the Civil Rights Act. If some sexist legislators considered the inclusion of sex discrimination in the bill something of a joke, or perhaps a poison pill to make civil rights legislation even more controversial, evidently no one thought that adding sexual orientation to the list of forbidden categories was worth using even in that way. Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horribles. When Representative Emanuel Celler of New York, floor manager for the Civil Rights Bill in the House, rose to oppose Representative

Smith's proposed amendment, he expressed concern that it would lead to such supposed travesties as the elimination of "protective" employment laws regulating working conditions for women, drafting women for military service, and revisions of rape and alimony laws. *See* 110 Cong. Rec. 2,577 (1964). He did not reference the prohibition of sexual orientation discrimination.[5] The idea was nowhere on the horizon.

***143** II

I do not cite this sorry history of opposition to equality for African–Americans, women, and gay women and men, and of the biases prevailing a half-century ago, to argue that the private intentions and motivations of the members of Congress can trump the plain language or clear implications of a legislative enactment. (Still less, of course, do I endorse the views of those who opposed racial equality, ridiculed women's rights, and persecuted people for their sexual orientation.) Although Chief Judge Katzmann has observed elsewhere that judicial warnings about relying on legislative history as an interpretive aid have been overstated, *see* Robert A. Katzmann, *Judging Statutes* 35–39 (2014), I agree with him, and with my other colleagues in the majority, that the implications of legislation flatly prohibiting sex discrimination in employment, duly enacted by Congress and signed by the President, cannot be cabined by citing the private prejudices or blind spots of those members of Congress who voted for it.[6] The above history makes it obvious to me, however, that the majority misconceives the fundamental *public* meaning of the language of the Civil Rights Act. The problem sought to be remedied by adding "sex" to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market, and the chosen remedy was to prohibit discrimination that adversely affected members of one sex or the other. By prohibiting discrimination against people based on their sex, it did not, and does not, prohibit discrimination against people because of their sexual orientation.

A

To start, the history of the overlapping movements for equality for blacks, women, and gays, and the differing pace of their progress, as outlined in the previous section, tells us something important about what the language of Title VII must have meant to any reasonable member of Congress, and indeed to any literate American, when it was passed—what Judge Sykes has called the "original *public* meaning" of the statute. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362 (7th Cir. 2017) (*en banc*) (Sykes, *J*., dissenting) (emphasis added). That history tells us a great deal about why the legislators who constructed and voted for the Act used the specific language that they did.

The words used in legislation are used for a reason. Legislation is adopted in response to perceived social problems, and legislators adopt the language that they do to address a social evil or accomplish a desirable goal. The words of the statute take meaning from that purpose, and the principles it adopts must be read in light of the problem it was enacted to address. The words may indeed cut deeper than the legislators who voted for the statute fully understood or intended: as relevant here, a law aimed at producing gender equality in the workplace may require or prohibit employment ***144** practices that the legislators who voted for it did not yet understand as obstacles to gender equality. Nevertheless, it remains a law aimed at *gender* inequality, and not at other forms of discrimination that were understood at the time, and continue to be understood, as a different kind of prejudice, shared not only by some of those who opposed the rights of women and African–Americans, but also by some who believed in equal rights for women and people of color.

The history I have cited is not "legislative history" narrowly conceived. It cannot be disparaged as a matter of attempts by legislators or their aides to influence future judicial interpretation—in the direction of results they could not convince a majority to support in the overt language of a statute—by announcing to largely empty chambers, or inserting into obscure corners of committee reports, explanations of the intended or unintended legal implications of a bill. Nor am I seeking to infer the unexpressed wishes of all or a majority of the hundreds of legislators who voted for a bill without addressing a particular question of interpretation. Rather, I am concerned with what principles Congress committed the country to by enacting the words it chose.[7] I contend that these principles can be illuminated by an understanding of the central public meaning of the language used in the statute at the time of its enactment.[8]

If the specifically *legislative* history of the "sex amendment" is relatively sparse in light of its adoption as a floor amendment, *see* Maj. Op. at 128 n.31, the broader *political and social* history of the prohibition ***145** of sex discrimination in employment is plain for all to read. The history of the 20th century is, among other things, a history of increasing equality of men and women. Recent events remind us of how spotty that equality remains, and how inequality persists even with respect to the basic right of women to physical security and control of their own bodies. But the trend is clear, and it is particularly emphatic in the workplace.

That history makes it equally clear that the prohibition of discrimination "based on sex" was intended to secure the rights of women to equal protection in employment. Put simply, the addition of "sex" to a bill to prohibit employers from "discriminat[ing] against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, ... or national origin," 42 U.S.C. § 2000e-2(a)(1), was intended to eliminate workplace inequalities that held women back from advancing in the economy, just as the original bill aimed to protect African–Americans and other racial, national, and religious minorities from similar discrimination. The language of the Act itself would have been so understood not only by members of Congress, but by any politically engaged citizen deciding whether to urge his or her representatives to vote for it. As Judge Sykes noted in her dissent in the Seventh Circuit's encounter with the same issue we face today, citing a 1960s dictionary, "In common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*; it does not also refer to sexual orientation." *Hively*, 853 F.3d at 362–63 (Sykes, *J.*, dissenting) (emphasis in original).[9] On the verge of the adoption of historic legislation to address bigotry against African–Americans on the basis of race, women in effect stood up and said "us, too," and Congress agreed.

The majority cites judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making simply follows in this line. Maj. Op. at 114, 115. But the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people. It is true that what *counts* as discrimination against members of one sex may not have been fully fleshed out in the minds of supporters of the legislation, but it is easy enough to illustrate how the language of a provision enacted to accomplish the goal of equal treatment of the sexes compels results that may not have been specifically intended by its enacters.

To begin with, just as laws prohibiting racial discrimination, adopted principally to address some of the festering national wrongs done to African–Americans, protect members of *all* races, including then-majority ***146** white European–Americans, the prohibition of sex discrimination by its plain language protects men as well as women, whether or not anyone who voted on the bill specifically considered whether and under what circumstances men could be victims of gender-based discrimination. That is not an expansion of Title VII, but is a conclusion mandated by its text: Congress deliberately chose to protect women and minorities not by prohibiting discrimination against "African–Americans" or "Jews" or "women," but by neutrally prohibiting discrimination against any individual "based on race, ... religion, [or] sex." 42 U.S.C. § 2000e-2(a)(1). That choice of words is clearly intentional, and represents a commitment to a principle of equal treatment of races, religions, and sexes that is important, even if the primary intended beneficiaries of the legislation—those most in need of its protection—are members of the races, religions, and gender that have suffered the most from *in*equality in the past.

Other interpretations of the statute that may not have occurred to members of the overwhelmingly male Congress that adopted it seem equally straightforward. Perhaps it did not occur to some of those male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination, or that Title VII was inconsistent with a "Mad Men" culture in the office.[10] But although a few judges were slow to recognize this point, *see*, *e.g.*, *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), as soon as the issue began to arise in litigation, courts quickly recognized that for an employer to expect members of one sex to provide sexual favors as a condition of employment from which members of the other sex are exempt, or to view the only value of female employees as stemming from their sexualization, constitutes a fundamental type of discrimination in conditions of employment based on sex. *See, e.g.*, *Barnes v. Costle*, 561 F.2d at 989 (finding that retaliation by plaintiff's supervisor when she resisted his sexual advances "was plainly based on [plaintiff's] gender").[11]

The reason why any argument to the contrary would fail is not a matter of simplistic application of a formal standard, along the lines of "well, the employer wouldn't have asked the same of a man, so it's sex discrimination." Sexual exploitation has been a principal obstacle to the equal ***147** participation of women in the workplace, and whether or not individual legislators intended to prohibit it when they cast their votes for Representative Smith's amendment, both the literal language of that amendment *and* the elimination of the social evil at which it was aimed make clear that the statute must be read to prohibit it.[12]

The same goes for other forms of "hostile environment" discrimination. The history of resistance to racial integration illustrates why. Employers forced to take down their "whites only" signs could not be permitted to retreat to the position that "you can make me hire black workers, but you can't make me welcome them." Making black employees so *un*welcome that they would be deterred from seeking or retaining jobs previously reserved for whites *must be* treated as an instance of prohibited racial discrimination—and the same clearly goes for sex discrimination. The Supreme Court recognized that point, in exactly those terms:

> The phrase "terms, conditions or privileges of employment" in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. ... Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited.

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (internal quotation marks, brackets and emphasis omitted).

But such interpretations of employment "discrimination against any individual ... based on sex" do not say anything about whether discrimination based on *other* social categories is covered by the statute. Just as Congress adopted broader language than discrimination "against women," it adopted narrower language than "discrimination based on personal characteristics or classifications unrelated to job performance." Title VII does not adopt a broad principle of equal protection in the workplace; rather, its language singles out for prohibition discrimination based on particular categories and classifications that have been used to perpetuate injustice—but not all such categories and classifications. That is not a matter of abstract justice, but of political reality. Those groups that had succeeded by 1964 in persuading a majority of the members of Congress that unfair treatment of them ought to be prohibited were included; those who had not yet achieved that political objective were not.

Thus, if Representative Smith's amendment had been defeated, Title VII would still be a landmark prohibition of the kinds of race-, religion-, and national origin-based employment discrimination that had historically disadvantaged blacks, Jews, Catholics, or Mexican–Americans. But it would not have protected women, and a subsequent shift in popular support for such protection would not have changed that fact, without legislative action. Similarly, ***148** the statute did not protect those discriminated against, similarly unfairly, on the basis of age or disability; that required later legislation. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*; Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*

None of this, of course, is remotely to suggest that employment discrimination on the basis of sexual orientation is somehow not invidious and wrong. But not everything that is offensive or immoral or economically inefficient is illegal, and if the view that a practice is offensive or immoral or economically inefficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that practice will remain legal. In the context of private-sector employment, racial discrimination was just as indefensible before 1964 as it is today, but it was not illegal. Discrimination against women, as President Kennedy's commission understood, was just as unfair, and just as harmful to our economy, before Title VII prohibited it as it is now, but if Congress had not adopted Representative Smith's amendment, it would have remained legal. Employment discrimination against older workers, and against qualified individuals with disabilities, imposed unfair burdens on those categories of individuals in 1964, yet it remained legal after the Civil Rights Act of 1964 became law, because Congress did not at that time choose to prohibit such discrimination. Congress is permitted to choose what types of social problems to attack and by which means. The majority says that "we have stated that 'Title VII should be interpreted broadly to achieve equal employment opportunity,' " Maj. Op. at 111, quoting *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), but of course that dictum[13] appeared in the context of a discussion of racial discrimination. Congress, in fact, did not legislate in 1964 "broadly to achieve equal employment opportunity" for *all* Americans, but instead opted to prohibit only certain categories of unfair discrimination. It did not then prohibit, and alas has not since prohibited, discrimination based on sexual orientation.

B

The majority's linguistic argument does not change the fact that the prohibition of employment discrimination "because of ... sex" does not protect gays and lesbians. Simply put, discrimination based on sexual orientation is not the same thing as discrimination based on sex. As Judge Sykes explained,

> [t]o a fluent speaker of the English language—then and now—the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation." The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. ... The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination "because of sex" is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex.

***149** *Hively*, 853 F.3d at 363 (Sykes, *J.*, dissenting) (footnote omitted).

Of course, the majority does not really dispute this common-sense proposition. It does not say that "sex discrimination" in the ordinary meaning of the term is literally the same thing as "sexual orientation discrimination." Rather, the majority argues that discrimination based on sex encompasses discrimination against gay people because discrimination based on sex encompasses any distinction between the sexes that an employer might make for any reason.[14] The argument essentially reads "discriminate" to mean pretty much the same thing as "distinguish." And indeed, there are recognized English uses of "discriminate," particularly when followed with "between" or "from," that imply nothing invidious, but merely mean "to perceive, observe or note [a] difference," or "[t]o make or recognize a distinction." The Oxford English Dictionary Online, http://www.oed.com (search for "Discriminate," verb, definitions 2a and 2b). For example, a person with perfect pitch is capable of discriminating a C from a C-sharp. But in the language of civil rights, a different and stronger meaning applies, that references *invidious* distinctions: "To treat a person or group in an unjust or prejudicial manner, esp[ecially] on the grounds of race, gender, sexual orientation, etc.; frequently with *against*." *Id.* (definition 4).

And that is indeed the sense in which Title VII uses the word: the statute prohibits such practices as "fail[ing] or refus[ing] to hire or to discharge" persons on account of their race or sex or other protected characteristic, or "otherwise to discriminate *against* any individual" with respect to employment terms. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In other words, it is an oversimplification to treat the statute as prohibiting any distinction *between* men and women in the workplace, still less any distinction that so much as requires the employer to *know* an employee's sex in order to be applied, *cf.* Maj. Op. at 112–13; the law prohibits discriminating *against* members of one sex or the other in the workplace.

That point may have little bite in the context of racial discrimination. The different "races" are defined legally and socially, and not by actual biological or genetic differences—both Hitler's Nuremberg laws and American laws imposing slavery and segregation had to define, arbitrarily, how much ancestry of a particular type consigned persons to a disfavored category, since there is no scientific or genetic basis for distinguishing a "Jew" or a "member of the colored race" from anyone else. And since no biological factor can support any job qualification based on race, courts have taken the view that to distinguish *is*, for the most part, to discriminate against. But in the area of sex discrimination, where the groups to be treated equally do have potentially relevant biological differences, not every distinction between men and women in the workplace constitutes discrimination against one gender or the other.[15] The ***150** distinctions that were prohibited, however, in either case, are those that operate to the disadvantage of (principally) the disfavored race or sex. That is the social problem that the statute aimed to correct.

Opponents of Title VII, and later of the Equal Rights Amendment ("ERA"), were fond of conjuring what they thought of as unthinkable or absurd consequences of gender equality. Some of those proved not so unthinkable or absurd at all. Workplace "protective" legislation that applied only to women soon fell by the wayside, *see* 29 C.F.R. § 1604.2(b)(1) (stating that protective laws for women "conflict with and are superseded by [T]itle VII"), despite Representative Cellar's fears, without adverse consequences. But other distinctions based on sex remain, and their legality is either assumed, or at a minimum requires more thought than just "but that's a distinction based on sex, so it's illegal."

Distinctions based on personal privacy, for example, remain in place. When opponents of the ERA, like Senator Ervin, argued that under the ERA "there can be no exception for elements of publically [*sic*] imposed sexual segregation on the basis of privacy between men and women," 118 Cong. Rec. 9,564 (1972), that objection was derided by Senator Marlow Cook of Kentucky as the "potty" argument, *id.* at 9,531. Title VII too does not prohibit an employer from having separate men's and women's toilet facilities. Nor does it prohibit employer policies that differentiate between men and women in setting requirements regarding hair lengths. Thus, in *Longo v. Carlisle DeCoppet & Co.*, we held that a policy "requiring short hair on men and not on women" did not violate Title VII. 537 F.2d 685, 685 (2d Cir. 1976); *see also Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908–09 (2d Cir. 1996) (same).

Dress codes provide a more complicated example. It is certainly arguable that some forms of separate dress codes further stereotypes harmful to workplace equality for women; requiring female employees to wear "Hooters"-style outfits but male employees doing the same work to wear suit and tie would not stand scrutiny. But what of a pool facility that requires different styles of bathing suit for male and female lifeguards? Judge Cabranes's concurrence would seem to prohibit that practice, but I believe, and I expect Judge Cabranes would agree, that a pool that required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII, while one that prescribed trunks for men and a bathing suit covering the breasts for women would not.

More controversial distinctions, such as different fitness requirements for men and women applying for jobs involving physical strength, have also been upheld. In a recent case, the Fourth Circuit rejected the ***151** notion that Title VII prohibits gender-normed physical fitness benchmarks pursuant to which male FBI agent trainees must perform 30 push-ups, while female trainees need only do 14. *Bauer v. Lynch*, 812 F.3d 340, 342, 351 (4th Cir.), cert. denied, ––– U.S. ––––, 137 S.Ct. 372, 196 L.Ed.2d 290 (2016). In upholding this distinction, the court noted that of "the few decisions to confront the use of gender-normed physical fitness standards in the Title VII context, none has deemed such standards to be unlawful," *id.* at 348, because courts have recognized that some physiological differences between men and women "impact their relative abilities to demonstrate the same levels of physical fitness," *id.* at 351. Thus, the court in *Bauer* recognized that to distinguish between the sexes is not always to discriminate against one or the other. Indeed, a *failure* to impose distinct fitness requirements for men and women may be found to violate Title VII, if it has a disparate impact on one sex and the employer cannot justify the requirement as a business necessity. *See Lanning v. Se. Pa. Transp. Auth. (SEPTA),* 181 F.3d 478, 494 (3d Cir. 1999) (applying Civil Rights Act of 1991 and finding that time cutoff for 1.5 mile run for officers had a disparate impact, when women had a pass rate of only 6.7%, compared to a 55.6% pass rate for men, and remanding to district court to determine whether the score represents "the minimum qualifications necessary for successful performance of the job in question"). Taken to its logical conclusion, though, the majority's interpretation of Title VII would do away with this understanding of the Act.

These examples suffice to illustrate two points relevant to the supposedly simple interpretation of sex-based discrimination relied upon by the majority. First, it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited. Second, neither can it be the case that any discrimination that would be prohibited if race were the criterion is equally prohibited when gender is used.[16] Obviously, Title VII does not permit an employer to maintain racially segregated bathrooms, nor would it allow different-colored or different-designed bathing costumes for white and black lifeguards. Such distinctions would smack of racial subordination, and would impose degrading differences of treatment on the basis of race. Precisely the same distinctions between men and women would not.[17]

Nor does the example of "discrimination based on traits that are a function of sex, such as life expectancy," Maj. Op. at 112, help the majority's cause. Discrimination of that sort, as the majority notes, could permit gross discrimination against female employees "by using traits that are associated with sex as a proxy for sex." *Id*. at 112. That is certainly so as to "traits that are a function of sex," such as pregnancy or the capacity to become pregnant. But it is not so as to discrimination based on ***152** sexual orientation. Same-sex attraction is not "a function of sex" or "associated with sex" in the sense that life expectancy or childbearing capacity are.[18] A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or for women as such; a minority of both men and women are gay, and discriminating against them discriminates against *them*, as gay people, and does not differentially disadvantage employees or applicants of either sex.[19] That is not the case with other forms of "sex-plus" discrimination that single out for disfavored status traits that are, for example, common to women but rare in men.[20]

C

That "because of ... sex" did not, and still does not, cover sexual orientation, is further supported by the movement, in both Congress and state legislatures, to enact legislation protecting gay men and women against employment discrimination. This movement, which has now been successful in twenty-two states—including all three in our Circuit—and the District of Columbia, has proceeded by expanding the categories of prohibited discrimination in state anti-discrimination laws.[21] In none of those states did the prohibition of sexual orientation discrimination come by judicial interpretation of a pre-existing prohibition on gender-based discrimination to encompass discrimination on the basis of sexual orientation. Similarly, the Executive Branch has prohibited discrimination against gay men and lesbians in federal employment by adding "sexual orientation" to previously protected grounds. *See* Exec. Order No. 13087, 63 Fed. Reg 30,097 (May 28, 1998).[22] Finally, the same approach has ***153** been reflected in the repeated (but so far unsuccessful) introduction of bills in Congress to add "sexual orientation" to the list of prohibited grounds of employment discrimination in Title VII.[23]

The Department of Justice argues, relying on *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, ––– U.S. ––––, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015), that Congress ratified judicial interpretations of "sex" in Title VII as excluding sexual orientation when it amended the Civil Rights Act in 1991 and failed to overrule ***154** judicial decisions holding that the sex discrimination provision of Title VII did not cover sexual orientation discrimination. *See* Brief of United States as *Amicus Curiae* 8–14. In *Inclusive Communities*, the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act ("FHA"). 135 S.Ct. at 2525. In so holding, the Court found it relevant that Congress had amended the FHA after nine Courts of Appeals had held that the FHA allowed for disparate-impact claims, and did not alter the text of the Act in a way that would make it clear that disparate-impact claims were not contemplated by the FHA. *Id.* at 2519. Furthermore, the Court found it significant that the legislative history of the FHA amendment made it clear that Congress was aware of those Court of Appeals decisions. *Id.* at 2519–20. The majority dismisses this argument because at the time of the 1991 amendment to the Civil Rights Act, only three Courts of Appeals[24] had ruled that Title VII did not cover sexual orientation, and Congress did not make clear, in the legislative history of the 1991 amendment, that it was aware of this precedent. Maj. Op. at 127–28.

In light of the clear textual and historical meaning of the sex provision that I have discussed above, I do not find it necessary to rely heavily on the more technical argument that strives to interpret the meaning of statutes by congressional actions and omissions that might be taken as ratifying Court of Appeals decisions. But I do think it is worth noting that the Supreme Court also found it relevant, in *Inclusive Communities*, that Congress had *rejected* a proposed amendment "that would have eliminated disparate-impact liability for certain zoning decisions." 135 S.Ct. at 2520. Here, while only three Courts of Appeals may have ruled on the issue by 1991, over twenty-five amendments had been proposed to add sexual orientation to Title VII between 1964 and 1991. All had been rejected. In fact, two amendments were proposed in 1991, one in the House and one in the Senate, Civil Rights Amendments Act of 1991, S. 574, 102d Congress; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Congress, and neither of those amendments found its way into the omnibus bill that overruled other judicial interpretations of the Civil Rights Act. Moreover, in addition to the three Courts of Appeals that had ruled on the issue, the EEOC—the primary agency charged by Congress with interpreting and enforcing Title VII—had also held, by 1991, that sexual orientation discrimination fell "outside the purview of Title VII." *Dillon v. Frank*, EEOC Doc. No. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990).

Thus, to the extent that we can infer the awareness of Congress at all, the continual attempts to add sexual orientation to Title VII, as well as the EEOC's determination regarding the meaning of sex, should be considered, in addition to the three appellate court decisions, as evidence that Congress was unquestionably aware, in 1991, of a general consensus about the meaning of "because of ... sex," and of the fact that gay rights advocates were seeking to change the law by adding a new category of prohibited discrimination to the statute.

Although the Supreme Court has rightly cautioned against relying on legislative inaction as evidence of congressional intent, because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing ***155** legislation already incorporated the offered change," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (internal quotation marks omitted), surely the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something. *Supra* note 23. And it is pretty clear what it does *not* mean. It is hardly reasonable, in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination, to conclude that Congress rejected the proposed amendments because senators and representatives believed that Title VII "already incorporated the offered change." *Pension Benefit Guar. Corp.*, 496 U.S. at 650, 110 S.Ct. 2668. There may be many reasons why each proposal ultimately failed, but it cannot reasonably be claimed that the basic reason that Congress did not pass such an amendment year in and year out was anything other than that there was not yet the political will to do so.

This last point requires one further disclaimer. As with the social *pre*-history of Title VII, these later developments are not referenced in a dubious effort to infer the specific intentions of the members of Congress who voted for the Smith amendment in 1964, nor are they referenced to infer the specific intent of each Congress that was faced with proposed sexual orientation amendments. The point, rather, is that race, gender, and sexual orientation discrimination have been consistently perceived in the political world, and by the American population as a whole, as different practices presenting different social and political issues. At different times over the last few generations, the recognition of each as a problem to be remedied by legislation has been controversial, with the movements to define each form of discrimination as illegal developing at a different pace and for different reasons, and being opposed in each case by different coalitions for different reasons. To recognize this fact is to understand that discrimination against persons based on sex has had, in law and in politics, a meaning that is separate from that of discrimination based on sexual orientation.[25]

In short, Title VII's prohibition of employment discrimination against individuals ***156** on the basis of their sex is aimed at employment practices that differentially disadvantage men vis-à-vis women or women vis-à-vis men. That is what the language of the statute means to an ordinary "fluent speaker of the English language," *Hively*, 853 F.3d at 363 (Sykes, *J.*, dissenting), that is the social practice that Congress chose to legislate against, and in light of that understanding, certain laws and practices that distinguish between men and women have been found to violate Title VII, and certain others have not. Discrimination against persons whose sexual orientation is homosexual rather than heterosexual, however offensive such discrimination may be to me and to many others, is not discrimination that treats men and women differently. The simplistic argument that discrimination against gay men and women is sex discrimination because targeting persons sexually attracted to others of the same sex requires *noticing* the gender of the person in question is not a fair reading of the text of the statute, and has nothing to do with the type of unfairness in employment that Congress legislated against in adding "sex" to the list of prohibited categories of discrimination in Title VII.

III

The majority opinion goes on to identify two other arguments in support of its holding: (1) that sexual orientation discrimination is actually "gender stereotyping" that constitutes discrimination against individuals based on their sex, and (2) that such discrimination constitutes prohibited "associational discrimination" analogous to discriminating against employees who are married to members of a different race.

These arguments have the merit of attempting to link discrimination based on sexual orientation to the social problem of gender discrimination at which Title VII is aimed. But just as the "differential treatment" argument attempts to shoehorn sexual orientation discrimination into the statute's verbal template of discrimination based on sex, these arguments attempt a similar (also unsuccessful) maneuver with lines of case law. While certain Supreme Court cases identify clear-cut examples of sex or race discrimination that may have a superficial similarity to the practice at issue here, the majority mistakes that similarity for a substantive one.

A

Perhaps the most appealing of the majority's approaches is its effort to treat sexual orientation discrimination as an instance of sexual stereotyping. The argument proceeds from the premises that "sex stereotyping violates Title VII," Maj. Op. at 120, and that "same-sex orientation 'represents the ultimate case of failure to conform' to gender stereotypes," *id.* at 121, quoting *Hively*, 853 F.3d at 346, and concludes that an employer who discriminates against gay people is therefore "sex stereotyping" and thus violating Title VII. But like the other arguments adopted by the majority, this approach rests more on verbal facility than on social reality.

In unpacking the majority's syllogism, it is first necessary to address what we mean by "sex stereotyping" that "violates Title VII." Invidious stereotyping of members of racial, gender, national, or religious groups is at the heart of much employment discrimination. Most employers do not entertain, let alone admit to, older forms of racialist or other discriminatory ideologies that hold that members of certain groups are inherently or genetically inferior and undeserving of equal treatment. Much more common are assumptions, not always even conscious, that associate certain negative traits with particular groups. A perception that women, for example, are not ***157** suited to executive positions, or are less adept at the mathematical and practical skills demanded of engineers, can be a significant hindrance to women seeking such positions, even when a particular woman is demonstrably qualified, or indeed even where empirical data show that on average women perform as well as or better than men on the relevant tasks. Refusing to hire or promote someone because of that sort of gender (or racial, or ethnic, or religious) stereotyping is not a separate form of sex (or race, or ethnic, or religious) discrimination, but is precisely discrimination in hiring or promotion based on sex (or race, or ethnicity, or religion). It treats applicants or employees not as individuals but as members of a class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group as a whole. For the most part, then, the kind of stereotyping that leads to discriminatory employment decisions that violate Title VII is the assignment of traits that are negatively associated with job performance (dishonesty, laziness, greed, submissiveness) to members of a particular protected class.

Clearly, sexual orientation discrimination is not an example of that kind of sex stereotyping; an employer who disfavors a male job applicant whom he believes to be gay does not do so because the employer believes that most men are gay and therefore unsuitable. Rather, he does so because he believes that most *gay* people (whether male or female) have some quality that makes them undesirable for the position, and that because this applicant is gay, he must also possess that trait. Although that is certainly stereotyping, and invidiously so, it does not stereotype a group protected by Title VII, and is therefore not (yet) illegal.

But as the majority correctly points out, that is not the only way in which stereotyping can be an obstacle to protected classes of people in the workplace. The stereotyping discussed above involves beliefs about how members of a particular protected category *are*, but there are also stereotypes (or more simply, beliefs) about how members of that group *should be*. In the case of sex discrimination in particular, stereotypes about how women ought to look or behave can create a double bind. For example, a woman who is perceived through the lens of a certain "feminine" stereotype may be assumed to be insufficiently assertive for certain positions by contrast to men who, viewed through the lens of a "masculine" stereotype, are presumed more likely to excel in situations that demand assertiveness. At the same time, the employer may fault a woman who behaves as assertively as a male comparator for being *too* aggressive, thereby failing to comply with societal expectations of femininity.

That is the situation that a plurality of the Supreme Court identified in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), the key case the majority relies on for its "sex stereotyping" argument. As that opinion pointed out, "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id.* at 251, 109 S.Ct. 1775. The two horns of the dilemma described in *Price Waterhouse* have slightly different, yet equally problematic, sexist foundations: a female employee or applicant may be prejudiced by a negative assumption that women *aren't* or *can't be* sufficiently dominant for a position that requires leadership or strength or aggression, but when a woman unquestionably ***158** does show the putatively desired traits, she is held back because of the different but related notion that women *shouldn't be* aggressive or dominant. The latter is not an assumption about how *most* women *are*, it is a normative belief about how *all* women *should be*.

I fully accept the conclusion that that kind of discrimination is prohibited, and that it imposes different conditions of employment on men and on women. Not only does such discrimination require women to behave differently in the workplace than men, but it also actively deters women from engaging in kinds of behavior that are required for advancement to certain positions, and thus effectively bars them from such advancement. The key element here is that one sex is systematically disadvantaged in a particular workplace. In that circumstance, sexual stereotyping is sex discrimination.[26]

But as Judge Sykes points out in her *Hively* dissent, the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. 853 F.3d at 370. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex. Rather, it results from a distinct type of objection to anyone, of whatever gender, who is identified as homosexual. The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do—to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII.

B

The "associational discrimination" theory is no more persuasive. That theory rests on cases involving race discrimination.[27] Many courts have found that Title VII prohibits discrimination in cases in which, as in our case of *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), a white plaintiff alleged that he was fired because he was married to a person of a different race.

It would require absolute blindness to the history of racial discrimination in this country not to understand what is at stake in such cases, and why such allegations unmistakably state a claim of discrimination against an individual employee on the basis of race. Anti-miscegenation laws constituted a bulwark of the structure of institutional racism that is the paradigm of invidious discrimination in this country. African–Americans were condemned first to slavery, and then to second-class citizenship and virtual apartheid, on the basis of an ideology that regarded them as inferior. Such an ideology is incompatible with fraternization, ***159** let alone marriage and reproduction, between African–Americans and whites. A prohibition on "race-mixing" was thus grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites.

Thus, as the Supreme Court noted in striking down Virginia's law prohibiting marriage between a white person and a person of color, the Supreme Court of Virginia had upheld the statute because Virginia defined its "legitimate" purposes as " 'preserv[ing] the racial integrity of [the state's] citizens,' and [ ] prevent[ing] 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' " purposes the Court correctly identified and rejected as "obviously an endorsement of the doctrine of White Supremacy." *Loving v. Virginia*, 388 U.S. 1, 7, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), quoting *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, 756 (1955). The racist hostility to "race-mixing" extended well beyond a prohibition against interracial marriage. The beatings of "freedom riders" attempting to integrate interstate bus lines in the South in the early 1960s, inflicted on white as well as black participants in the protests, demonstrated that racial bigotry against African–Americans manifested itself in direct attacks not only on African–Americans, but also on whites who associated with African–Americans as equals. The entire system of "separate but equal" segregation in both state-owned and private facilities and places of public accommodation was designed, as Charles Black made plain in a classic deconstruction of the legal fiction of "separate but equal," to confine black people to "a position of inferiority." Charles Black, *The Lawfulness of the Segregation Decision*, 69 Yale L.J. 421, 424 (1960). Thus, the associational discrimination reflected in cases such as *Loving* and *Holcomb* was a product of bigotry against a single race by another. That discrimination is expressly prohibited in employment by Title VII.

Workplace equality for racial minorities is thus blatantly incompatible with a practice that ostracizes, demeans, or inflicts adverse conditions on white employees for marrying, dating, or otherwise associating with, people of color. The prohibition of that kind of discrimination is not simply a matter of noting that, in order to effectuate it, the employer must identify the races of the employee and the person(s) with whom he or she associates. Just as sexual harassment against female employees presents a serious obstacle to the full and equal participation of women in the workplace, discrimination against members of a favored race who so much as associate with persons of another race reflects a deep-seated bigotry against the disfavored race(s) that Title VII undertakes to banish from the workplace. The principle was well stated by the Sixth Circuit in a case cited by the majority, *Barrett v. Whirlpool Corporation*:

> Title VII protects individuals who, though not members of a protected class, are victims of discriminatory animus toward protected third persons with whom the individuals associate.

556 F.3d 502, 512 (6th Cir. 2009) (internal quotation marks and brackets omitted).[28]

***160** Discrimination on the basis of sexual orientation, however, is not discrimination of the sort at issue in *Holcomb* and *Barrett*. In those cases, the plaintiffs alleged that they were discriminated against because the employer was biased—that is, had a "discriminatory animus"—*against members of the race with whom the plaintiffs associated*. There is no allegation in this case, nor could there plausibly be, that the defendant discriminated against Zarda because it had something against *men*, and therefore discriminated not only against men, but also against anyone, male or female, who associated with them. I have no trouble assuming that the principle of *Holcomb* and *Barrett* applies beyond the category of race discrimination: an employer who fired or refused to promote an Anglo–American, Christian employee because she associated with Latinos or Jews would presumably run afoul of that principle just as much as one whose animus ran against black Americans. Such an employer would clearly be discriminating against the employee on the basis of her friends' ethnicity or religion—in the formulation from the *Barrett* opinion, that employer would be victimizing an employee out of "discriminatory animus toward protected third persons with whom the [employee] associate[d]." 556 F.3d at 512 (internal quotation marks and alterations omitted).[29]

It is more difficult to imagine realistic hypotheticals in which an employer discriminated against anyone who so much as associated with men or with women, though I suppose academic examples of such behavior could be conjured. But whatever such a case might look like, discrimination against gay people is not it. Discrimination against gay men, for example, plainly is not rooted in animus toward "protected third persons with whom [they] associate." *Id.*, 556 F.3d at 512. An employer who practices such discrimination is hostile to gay men, not to men in general; the animus runs not, as in the race and religion cases discussed above, against a "protected group" to which the employee's associates belong, but against an (alas) *unprotected* group to which they belong: other gay men.[30]

The majority tries to rebut this straightforward distinction in various ways. First, it notes—but declines to rely on—academic "research suggesting that sexual orientation discrimination has deep misogynistic roots." Maj. Op. at 126. It is certainly plausible to me that the "deep roots" of hostility to homosexuals are in some way related to the same sorts of beliefs about the proper roles of men and women in family life that underlie at least some employment discrimination against women. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 234 (1994) (noting that "[i]t should be clear from ordinary experience that the stigmatization of the homosexual has *something* to do with the homosexual's supposed deviance from traditional sex roles") (emphasis in original). It may also be that the "roots" of all forms of discrimination against people who are different in some way from a socially defined dominant group can be found in similar psychological ***161** processes of discomfort with change or difference, or with "authoritarian personality traits"[31]—or that there are other links among different forms of prejudice. And it can plausibly be argued that homosexual men have historically been derided because they were seen as abdicating their masculinity, and therefore the advantage they have over women. *See, e.g.*, Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, *in* The American Man 417, 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980).

But the majority is right not to go searching for such roots, whatever they might be, because legislation is not typically concerned, and Title VII manifestly is not concerned, with defining and eliminating the "deep roots" of biased attitudes. Congress legislates against concrete behavior that represents a perceived social problem. Title VII does not prohibit "misogyny" or "sexism," nor does it undertake to revise individuals' ideas (religious or secular) about how families are best structured. Rather, it prohibits overt acts: discrimination in hiring, promotion, and the terms and conditions of employment based on sex.[32] Similarly, states, like those in our Circuit, that have prohibited discrimination based on sexual orientation do not seek to eradicate disapproval of homosexual practices (whether rooted in religious belief or misogyny or some other theory, or caused by some conditioned or other visceral reaction). People may believe what they like, but they may not discriminate in employment against those whose characteristics or behaviors place them within the ambit of a protected category. Unlike those states, though, Congress has not enacted such a prohibition, and the fact that some of us believe that sexual orientation discrimination is unfair for much the same reasons that we disapprove of sex discrimination does not change that reality.

Second, the majority suggests that my analysis of associational discrimination is "squarely foreclosed by" cases like *Oncale*. Maj. Op. at 127. It is not. As noted above, I do not maintain that Title VII prohibits only those practices that its framers might have been principally concerned with, or only what was "traditionally," *id.*, seen as sex discrimination. To reiterate: sexual harassment plays a large role in hindering women's entry into, and advancement in, the workplace, and thus it is no surprise that courts have interpreted Title VII to prohibit it. And because Title VII protects both men and women from such practices, it does not matter whether the victim is male or female. Sexual harassment in the workplace quite literally imposes conditions of employment on one sex that are not imposed on the other, and it does not matter whether the employer who perpetrates such discriminatory disadvantage is male or female, or of the same or different sex than the employee. The victim of discrimination in such situations is selected by his or her sex, and the disadvantage is ***162** imposed on him or her by reason of his or her membership in the protected class. It is not a question of what is "traditionally conceptualized as sexism." Maj. Op. at 127. It is a question of the public meaning of the words adopted by Congress in light of the social problem it was addressing when it chose those words.

C

In the end, perhaps all of these arguments, on both sides, boil down to a disagreement about how discrimination on the basis of sexual orientation should be conceptualized. Whether based on linguistic arguments or associational theories or notions of stereotyping, the majority's arguments attempt to draw theoretical links between one kind of discrimination and another: to find ways to reconceptualize discrimination on the basis of sexual orientation as discrimination on the basis of sex. It is hard to believe that there would be much appetite for this kind of recharacterization if the law expressly prohibited sexual orientation discrimination, or that any opponent of sexual orientation discrimination would oppose the addition of sexual orientation to the list of protected characteristics in Title VII on the ground that to do so would be redundant or would express a misunderstanding of the nature of discrimination against men and women who are gay. I believe that the vast majority of people in our society—both those who are hostile to homosexuals and those who deplore such hostility—understand bias against or disapproval of those who are sexually attracted to persons of their own sex as a distinct type of prejudice, and not as merely a form of discrimination against either men or women on the basis of sex.

The majority asserts that discrimination against gay people is nothing more than a subspecies of discrimination against one or the other gender. Discrimination against gay men and lesbians is wrong, however, because it denies the dignity and equality of gay men and lesbians, and not because, in a purely formal sense, it can be said to treat men differently from women. It is understandable that those who seek to achieve legal protection for gay people victimized by discrimination search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice. Accordingly, much as I might wish it were otherwise, I must conclude that those arguments fail.

IV

The law with respect to the rights of gay people has advanced considerably since 1964. Much of that development has been by state legislation. As noted above, for example, twenty-two states now prohibit, by explicit legislative pronouncement, employment discrimination on the basis of sexual orientation. *See supra* note 21. But other advances have come by means of Supreme Court decisions interpreting the Constitution. Perhaps the most striking advance, from the vantage of the early 1960s, has been the legalization of same-sex marriage as a matter of constitutional law.[33]

***163** Nothing that I have said in this opinion should be interpreted as expressing any disagreement with the line of cases running from *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (invalidating criminal prohibitions of consensual sexual relations between members of the same sex), through *Obergefell v. Hodges*, ––– U.S. ––––, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (holding that persons of the same sex have a constitutional right to marry). But those cases provide no support for the plaintiff's position in this case, or for the method of interpretation utilized by the majority.

For one thing, it is noteworthy that none of the Supreme Court's landmark constitutional decisions upholding the rights of gay Americans depend on the argument that laws disadvantaging homosexuals constitute merely a species of the denial of equal protection of the laws on the basis of gender, or attempt to assimilate discrimination against gay people to the kinds of sex discrimination that were found to violate equal protection in cases like *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), in the 1970s.[34] Instead, the Court's gay rights cases were based on the guarantee of "liberty" embodied in the Fourteenth Amendment.

There is also a more fundamental difference. The Supreme Court's decisions in this area are based on the Constitution of the United States, rather than a specific statute, and the role of the courts in interpreting the Constitution is distinctively different from their role in interpreting acts of Congress. There are several reasons for this.

First, the entire point of the Constitution is to delimit the powers that have been granted by the people to their government. Our Constitution creates a republican form of government, in which the democratically elected representatives of the majority of the people are granted the power to set policy. But the powers of those representatives are constrained by a written text, which prevents a popular majority—both in the federal Congress and, since the Civil War Amendments, in state legislatures—from violating certain fundamental rights. As every law student reads in his or her first-year constitutional law class, "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). To the extent that the courts exercise a non-democratic or counter-majoritarian power, they do so in the name of those rights. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting *United States v. Carolene Products*, 304 U.S. 144, 153 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) to explain that "one aspect of the judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference"). Particular exercises of that power, including the gay rights decisions of this new millennium, may be controversial, ***164** and fierce disagreements exist over the legitimacy of various methods of constitutional interpretation. And it is *not* controversial that the power to assess the constitutionality of legislation must be exercised with restraint, and with a due deference to the judgments of elected officials who themselves have taken an oath to defend the Constitution. But it has long been generally accepted that the courts have a special role to play in defending the liberties enshrined in the Constitution against encroachment even by the people's elected representatives. *See City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (explaining that "Congress' discretion [to enact legislation] is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution").

Within the limits imposed by constitutional principles, however, the will of the majority, as expressed in legislation adopted by the people's representatives, governs. As the Supreme Court has instructed, the role of courts with respect to statutes is simply "to apply the statute as it is written—even if we think some other approach might accord with good policy." *Sandifer v. U.S. Steel Corp.*, ––– U.S. ––––, 134 S.Ct. 870, 878, 187 L.Ed.2d 729 (2014), quoting *Burrage v. United States*, ––– U.S. ––––, 134 S.Ct. 881, 892, 187 L.Ed.2d 715 (2014). Just last Term, a unanimous Supreme Court foreclosed judicial efforts to "update" statutes, declaring that, although "reasonable people can disagree" whether, following the passage of time, "Congress should reenter the field and alter the judgments it made in the past[,] ... the proper role of the judiciary in that process ... [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, ––– U.S. ––––, 137 S.Ct. 1718, 1725–26, 198 L.Ed.2d 177 (2017). In interpreting statutes, courts must not merely show deference or restraint; their obligation is to do their best to understand, in a socially and politically realistic way, what decisions the democratic branches of government have embodied in the language they voted for (and what they have not), and to interpret statutes accordingly in deciding cases.

Second, the rights conferred by the Constitution are written in broad language. As the great Chief Justice Marshall commented, our Constitution is "one of enumeration, and not of definition." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72, 6 L.Ed. 23 (1824). Examples are easily cited: The Constitution does not contain a list of specific punishments that are too cruel to be imposed; it prohibits, in general language, "cruel and unusual punishments." U.S. Const. amend. VIII. It does not enact a code of police procedure that explains exactly what kinds of searches the police may conduct, under what particular circumstances; it prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. It does not, as relevant here, identify particular types of discriminatory actions by state governments that it undertakes to forbid; it demands that those governments provide to all people within our borders "the equal protection of the laws." U.S. Const. amend. XIV.

Legislation, in contrast, can and often does set policy in minute detail. It does not necessarily concern itself with deep general principles. Rather, legislators are entitled to pick and choose which problems to address, and how far to go in addressing them. Within the limits of constitutional guarantees, Congress is given "wide latitude" to legislate, *City of Boerne*, 521 U.S. at 520, 117

S.Ct. 2157, but courts must struggle to define those limits by giving coherent meaning to broad constitutional principles. The majestic guarantee of equal ***165** protection in the Fourteenth Amendment is a very different kind of pronouncement than the prohibition, in Title VII, of specific kinds of discrimination, by a specified subset of employers, based on clearly defined categories. The language of the Constitution thus allows a broader scope for interpretation.

Third, and following in part from above, the Constitution requires some flexibility of interpretation, because it is intended to endure; it was deliberately designed to be difficult to amend.[35] It is difficult to amend because the framers believed that certain principles were foundational and, for practical purposes, all but eternal, and should not be subject to the political winds of the moment. A constitution is, to quote Chief Justice Marshall yet again, "framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it." *Cohens v. State of Virginia*, 19 U.S. (6 Wheat.) 264, 387, 5 L.Ed. 257 (1821). The choice of broad language reflects the framers' goal: they did not choose to prohibit "cruel and unusual punishments," rather than listing prohibited punishments, simply to save space, on the assumption that future courts could consult extra-constitutional sources to identify what particular penalties they had in mind; they did so in order to enshrine a general principle, leaving its instantiation and elaboration to future interpreters.

Those enduring principles would not, could not, endure if they were incapable of adaptation—at times via judicial interpretation—to new social circumstances, as well as new understandings of old problems. That idea is not new. In 1910, the Supreme Court wrote, in the context of the Eighth Amendment, that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 54 L.Ed. 793 (1910). More recently, in *Obergefell*, the Court noted that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 135 S.Ct. at 2603.

Legislation, on the other hand, is not intended to last forever. It must be consistent with constitutional principles, and ideally it will be inspired by a principled concept of ordered liberty. But it nevertheless remains the domain of practical political compromise. Congress and the state legislatures are in frequent session, and are capable—notwithstanding criticisms of "gridlock" and praise of "checks and balances"—of acting to repeal, extend, or modify prior enactments. In interpreting the Constitution, courts speak to the ages; in interpreting legislation, federal courts speak to—and essentially for—Congress, which can always correct our mistakes, or revise legislation in light of changing political and social realities.

Finally, the Constitution, as noted above, is designed, with very limited exceptions,[36] to govern the government. The ***166** commands of equal protection and respect for liberties that can only be denied by due process of law tell us how a government must behave when it regulates the people who created it. Legislation, however, generally governs the people themselves, in their relation with each other.

The question of how the government, acting at the behest of a possibly temporary political majority, is permitted to treat the people it governs, is a different question, and is answered by reference to different principles, than the question of what obligations should be imposed on private citizens. The former question must ultimately be answered by courts under the principles adopted in the Constitution. The latter is entrusted primarily to the legislative process. Courts interpreting statutes are not in the business of imposing on private actors new rules that have not been embodied in legislative decision. It is for that reason that segregation in public facilities was struck down by constitutional command, long before segregation of private facilities was prohibited by federal legislation adopted by Congress. Whether or not the Fifth and Fourteenth Amendments have something to say about whether *the state and federal governments* may discriminate in employment against gay Americans—a question that is not before us, and about which I express no view—it is the prerogative of Congress or a state legislature to decide whether private employers may do so.

In its *amicus* submission, the EEOC quite reasonably asks whether it is just that a gay employee can be married on Sunday, and fired on Monday—discriminated against at his or her job for exercising a right that is protected by the Constitution. Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* 22.[37] I would answer that it is not just. But at the same time, I recognize that the law does not prohibit every injustice. The Constitution protects the liberty of gay people to marry against deprivation by their government, but it does not promise freedom from discrimination by their fellow citizens. That is hardly a novel proposition: absent Title VII, the same injustice could have been inflicted on the *Loving*s themselves. The Constitution protected them against *governmental* discrimination, but (except for specific vestiges of slavery prohibited by the Thirteenth Amendment) only an act of Congress can prohibit one individual from discriminating against another in housing, public accommodations, and employment. It is well to remember that whether to prohibit race and sex discrimination was a controversial political question in 1964. Imposing an obligation on private employers to treat women and minorities fairly required political organizing and a political fight.

At the end of the day, to paraphrase Chief Justice Marshall, in interpreting statutes we must never forget that it is *not* a Constitution we are expounding. *Cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819). When interpreting an act of Congress, we need to respect the choices made by Congress about which social problems to address, and how to address them. In 1964, Congress—belatedly—prohibited employment discrimination based on race, sex, religion, ethnicity, and national origin. Many states have similarly recognized the injustice of discrimination on the basis of sexual orientation. ***167** In doing so, they have called such discrimination by its right name, and taken a firm and explicit stand against it. I hope that one day soon Congress will join them, and adopt that principle on a national basis. But it has not done so yet.

For these reasons, I respectfully, and regretfully, dissent.[38]

Debra Ann Livingston, Circuit Judge, dissenting:

I dissent for substantially the reasons set forth in Sections I, II, and III of Judge Lynch's opinion, and I join in those sections. I share in the commitment that all individuals in the workplace be treated fairly, and that individuals not be subject to workplace discrimination on the basis of their sexual orientation, just as on the basis of their "race, color, religion, sex, [and] national origin." I cannot conclude, however, as the majority does, that sexual orientation discrimination is a "subset" of sex discrimination, Maj. Op. at 112–13, 114 n.10, 119, 119–20, et passim, and is therefore included among the prohibited grounds of workplace discrimination listed in Title VII.[1]

The majority's efforts founder on the simple question of how a reasonable reader, competent in the language and its use, would have understood Title VII's text when it was written—on the question of its public meaning at the time of enactment. The majority acknowledges the argument "that it is not 'even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation.' " *Id.* at 114 (citation omitted). It does not contest the point, however, but seeks merely to justify its departure from ordinary, contemporary meaning by claiming that "[e]ven if that [is] so," its approach no more departs from the ordinary meaning of words in their contemporary context than supposedly occurred when sexual harassment and hostile work environment claims were first recognized by courts. *Id.* at 114–15. But as Judge Lynch has cogently explained, that is simply not the case. Dissenting Op. at 144–47. The majority does not discover a "plain" yet hidden meaning in Title VII, sufficiently obscure as to wholly elude every appellate court, including this one, until the Seventh Circuit's decision in *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc), last year. Instead, it *sub silentio* abandons our usual approach to statutory interpretation. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, ––– U.S. ––––, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014) (noting the " 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning' " (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979))); *Bilski v. Kappos*, 561 U.S. 593, 603, 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010) (quoting *Perrin* and applying the same canon of statutory interpretation); *Diamond v. Diehr*, 450 U.S. 175, 182, 101 S.Ct. 1048, 67 L.Ed.2d 155 (1981) (same).

Because Sections I, II, and III of Judge Lynch's dissent are sufficient to answer the statutory question that this case presents, ***168** I do not go further to address the subject of constitutional interpretation, and do not join in Section IV. I agree with Judge Lynch, however, that constitutional and statutory interpretation should not be confused: that while courts sometimes may be called upon to play a special role in defending constitutional liberties against encroachment by *government*, in statutory interpretation, courts "are not in the business of imposing on private actors new rules that have not been embodied in legislative decision." Dissenting Op. at 166. To do so chips away at the democratic and rule-of-law principles on which our system of governance is founded—the very principles we rely on to secure the legitimacy and the efficacy of our laws, including antidiscrimination legislation.[2]

The Supreme Court said unanimously, just last Term, that the proper role of the judiciary in statutory interpretation is "to apply, not amend, the work of the People's representatives," even when reasonable people might believe that "Congress should reenter the field and alter the judgments it made in the past." *Henson v. Santander Consumer USA Inc.*, ––– U.S. ––––, 137 S.Ct. 1718, 1725–26, 198 L.Ed.2d 177 (2017). "[I]t is for Congress, not the courts, to write the law," *Stanard v. Olesen*, 74 S.Ct. 768, 771, 98 L.Ed. 1151 (1954), and where "Congress' ... decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them[,]" *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 427, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985) (citing *Victory Carriers, Inc v. Law*, 404 U.S. 202, 216, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971)).

This hornbook separation-of-powers principle and the reasons behind it need not be elaborated here, for both should be well known to every law student. *See The Federalist No. 47*, at 251–52 (James Madison) (Carey & McClellan eds., 2001) (quoting Montesquieu to the effect that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator"); *see also I.N.S. v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (noting that "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted"). Together, they explain why judges interpreting statutes do their best to discern the ordinary, contemporary, common meaning of the statute's language. This is the law that was enacted through the democratic process, and the law we are to apply.

This approach does not always yield results that satisfy the judge charged with the task of statutory interpretation. It has not done so today. But I cannot faithfully join in the majority's opinion. I agree with Judge Lynch that when Title VII was written and, indeed, today, "bias against or disapproval of those who are sexually attracted to persons of their own sex" was and is viewed "as a distinct type of prejudice," and not as a subcategory of "discrimination against either men or women on the basis of sex." Dissenting Op. at 162. Accordingly, and agreeing with him that in interpreting an act of Congress, we must "respect the choices made by Congress about which social problems to address, ***169** and how to address them," *id.* at 166, I respectfully dissent.

Reena Raggi, Circuit Judge, dissenting:

A majority of the court today extends Title VII's prohibition of employment discrimination "because of ... sex," 42 U.S.C. § 2000e-2(a)(1), to discrimination based on sexual orientation. I respectfully dissent substantially for the reasons stated by Judge Lynch in Parts I, II, and III of his dissenting opinion and by Judge Livingston in her dissenting opinion.

All Citations

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Footnotes

* Judge Sack and Judge Lynch, who are senior judges, are eligible to participate in this en banc pursuant to 28 U.S.C. § 46(c)(1) and 28 U.S.C. § 294(c).

1 Zarda died in a BASE jumping accident after the district court awarded partial summary judgment but prior to trial on the remaining claims. The executors of his estate have been substituted as plaintiffs. Zarda and the executors of his estate are referred to collectively as "Zarda" throughout this opinion.

2 This opinion assumes *arguendo* that "sex" in Title VII "means biologically male or female," *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, *J.*, dissenting), and uses the terms "sex" and "gender" interchangeably, as do the Supreme Court and other circuits cited herein.

3 The First Circuit has since qualified *Higgins*, holding that a plaintiff may "bring[ ] sex-plus claims under Title VII where, in addition to the sex-based charge, the 'plus' factor is the plaintiff's status as a gay or lesbian individual." *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018).

4 This Court has squarely held that failure to present a Title VII claim to the EEOC before filing suit in federal court "is not a jurisdictional prerequisite, but only a precondition to bringing a Title VII action that can be waived by the parties or the court." *Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir. 2000) (alterations and internal quotation marks omitted).

5 The full quotation is, "I am not making this charge on the grounds that I was discriminated on the grounds of my sexual orientation. Rather, I am making this charge because, in addition to being discriminated against because of my sexual orientation, I was also discriminated against because of my gender." S.A. 3. Although inartful and perhaps even confusing, the best interpretation of this statement, read in the context of the entire charge, is that Zarda alleged that the sexual orientation discrimination he experienced was a subset of gender discrimination. Even if otherwise, the governing rule is that "[c]laims not raised in an EEOC complaint ... may be brought in federal court if they are reasonably related to the claim filed with the agency." *Williams v. N.Y.C. Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (internal quotation marks omitted). A claim is considered reasonably related if the alleged conduct "would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." *Id.* (internal quotation marks omitted). Because Zarda's charge gave the Commission "adequate notice to investigate discrimination on both bases," it is irrelevant whether Zarda's EEOC complaint unequivocally alleged sexual orientation discrimination. *Id.* (internal quotation marks omitted).

6 Defendants' additional argument, which is that the executors of Zarda's estate lack standing to pursue this action, is premised on the representation that the sexual orientation claim under Title VII was not raised before the district court so the estate may not now raise that claim on the deceased plaintiff's behalf. Because we find that the sexual orientation claim was properly raised, we need not address this argument.

7 Importantly, Title VII protection does not hinge on whether sexual orientation discrimination is "synonymous with sex discrimination." *Hively*, 853 F.3d at 363 (Sykes, *J.*, dissenting). While synonyms are coextensive, sex discrimination obviously encompasses more than sexual orientation discrimination, including sexual harassment and other recognized subsets of sex discrimination.

8 The lead dissent rejects this "linguistic argument," Lynch, *J.*, Dissenting Op. at 148 (hereinafter "Lead Dissent"), and advocates that Title VII's prohibition must be understood in the context of the prejudices and popular movements animating national politics at the time the statute was enacted, particularly concerns about the sexual exploitation of women, *id.* at 142–48. But the dissent's account does not and cannot rebut the fact that sexual orientation is a sex-dependent trait.

9 Notably, the government concedes that "as a logical matter ... [y]ou could view sexual orientation as a subset of sex," however the government also insists that it could be "view[ed] ... as a distinct category." Oral Arg. Tr. at 53:17–20.

10 Lest there be any doubt, this Court's holding that sexual orientation discrimination is a subset of sex discrimination encompasses discrimination based on a person's attraction to people of the opposite sex, same sex, or both.

11 This holding is easily operationalized. A standard jury instruction in a Title VII case alleging sex discrimination informs the jury that a plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant intentionally discriminated against the plaintiff because of sex, meaning that the plaintiff's sex was a motivating factor in the defendant's decision to take the alleged adverse employment action against the plaintiff. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). In a case alleging sexual orientation discrimination under Title VII, an instruction should add that "because of sex" includes actions taken because of sexual orientation.

12 Both the Department of Justice and the EEOC have filed *amicus* briefs in this case, the former in support of defendants and the latter in support of Zarda. Because EEOC attorneys represent only the Commission, 42 U.S.C. § 2000e-4(b)(2), while the Department of Justice has litigating authority on behalf of the United States, 28 U.S.C. § 517, this opinion refers to the Department of Justice as "the government."

13 The lead dissent trivializes the role of sex as a motivating factor by suggesting that an employer who discriminates on the basis of sexual orientation is merely "noticing" an employee's gender. Lead Dissent at 156. This argument, which implies that an employee's sexual orientation is the primary motivating factor while his or her sex is merely collateral, cannot be squared with the Supreme Court's case law. For example, in *Manhart*, the employer's argument that it was motivated by employee's life expectancy could not save its policy because, irrespective of the employer's intention or what it claimed to notice, life expectancy was a function of sex. 435 U.S. at 712–13, 98 S.Ct. 1370.

14 Ironically, the quoted language from *Michael M.* references instances where men and women are differently situated *because of the discrimination* borne by women—the fact that they are assigned parental responsibility at the moment an infant is born, are generally paid less than men, and are excluded from positions that are necessary for subsequent promotions. 450 U.S. at 469, 101 S.Ct. 1200 (collecting cases reflecting "the special problems of women" (internal quotation marks omitted)). The *Michael M.* Court acknowledged that, when the sexes are not similarly situated because of discrimination, statutes may impose different standards in the interest of leveling the playing field. *Id.* However, Title VII commands equal treatment of sexes and neither the text of the statute nor *Michael M.* creates an exception permitting employers to engage in disparate treatment of men and women simply because they exhibit biological differences.

15 As alleged, Zarda's termination was plainly an adverse employment action that is covered by Title VII. *See* 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer ... to discharge ... any individual because of such individual's ... sex ....").

16 Arguably this approach is consistent with the Supreme Court's analysis in *Oncale*, which, after acknowledging that male-on-male harassment can be "because of ... sex," qualified that not all remarks with "sexual content or connotations" rise to the level of discrimination. 523 U.S. at 79–80, 118 S.Ct. 998.

17 The lead dissent argues that this conclusion is out of sync with precedents prohibiting sexual harassment and hostile work environments because, while those cases addressed particular employment "practice[s]," today's decision extends protection to "an entirely different category of people." Lead Dissent at 22. But "persons discriminated against based on sexual orientation" is no more a new category than "persons discriminated against based on gender stereotypes." In both instances, a man or woman is discriminated against based on a trait that is a function of sex and their claims fall squarely within the ambit of a well-recognized category: "persons discriminated against based on sex."

18 One *amicus* and the lead dissent interpret dicta in *Price Waterhouse* as establishing that sex stereotyping is discriminatory only when it pertains to traits that are required for the employee's job. *See* 490 U.S. at 251, 109 S.Ct. 1775 (observing that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not"). We think this narrow reading is an inaccurate statement of *Price Waterhouse*, which did not indicate that stereotyping is impermissible *only* when the stereotyped trait is required for the plaintiff's job, and it is directly contradicted by *Manhart*'s holding that discriminating against women based on their longer life expectancy, which was certainly not an employment requirement, violated Title VII. 435 U.S. at 710–11, 98 S.Ct. 1370.

19 In this respect, discerning whether a stereotype is based on sex is closely aligned with the comparative test articulated in *Manhart*, which can illustrate both (1) whether a trait is a function of sex and (2) whether assumptions about that trait reflect a gender stereotype.

20 Some *amici* insist that stereotypes are mere evidence of discrimination and that stereotyping does not, by itself, constitute sex discrimination. Beyond establishing an adverse employment action, a Title VII plaintiff must always adduce evidence that an employer discriminated "because of" a protected trait and the Court agrees that sex stereotyping is legally relevant as "evidence that gender played a part" in a particular employment decision. *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775 (emphasis omitted). But, *Price Waterhouse*'s reference to the evidentiary value of stereotyping in no way undercuts it conclusion that an employer may not "evaluate employees by assuming or insisting that they match[ ] the stereotype associated with their group." *Id.* And, just as the Supreme Court concluded that "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," *id.* at 250, 109 S.Ct. 1775, this Court concludes that an employer who acts on the basis of a belief that an employee cannot or should not have a particular sexual orientation has acted on the basis of sex.

21 The Sixth Circuit has expressed the same observation, albeit in a decision declining to apply *Price Waterhouse* to sexual orientation discrimination. *See* *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.").

22 We express no view on whether some exception, either under a different provision of Title VII or under the Religious Freedom Restoration Act, might immunize from liability discriminatory conduct rooted in religious beliefs.

23 The lead dissent offers a variation on this argument, reasoning that prescriptive views about sexual orientation rest not on "a belief about what men or women ought to be or do," but "a belief about what *all* people ought to be or do," Lead Dissent at 158, which is to say, a belief that all people should be attracted to the opposite sex. *See also* *Hively*, 853 F.3d at 370 (Sykes, *J.*, dissenting) ("To put the matter plainly, heterosexuality is not a female stereotype; it is not a male stereotype; it is not a sex-specific stereotype at all."). It invokes the same idea when it contends that sexual orientation discrimination is not a function of sex because it "does not differentially disadvantage employees or applicants of either sex." Lead Dissent at 152. We think the dissent goes astray by getting off on the wrong foot. The dissent views the "key element" as whether "one sex is systematically disadvantaged in a particular workplace." *Id.* at 158. But Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* ... sex." *See* 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see also* *Manhart*, 435 U.S. at 708, 98 S.Ct. 1370 ("The statute's focus on the individual is unambiguous."). Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex. And this means that a man and a woman are both entitled to protection from the same type of discrimination, provided that in each instance the discrimination is "because of such individual's ... sex." As we have endeavored to explain, sexual orientation discrimination is because of sex.

24 The *Hively* dissent also argued that sexual orientation discrimination is not a form of sex discrimination because it does not discriminate comprehensively *within* a sex. In particular, the dissent suggested that in cases where a fired lesbian employee was replaced by a heterosexual woman a jury would not be able to understand that sexual orientation discrimination is a subset of sex discrimination. *See* 853 F.3d at 373. We think that jurors are capable of understanding that an employer might discriminate against some members of a sex but not others. To wit, the intuitive principle that "Title VII does not permit the victim of [discrimination] to be told that he [or she] has not been wronged because other persons of his or her race or sex were hired" is well established in the law. *Connecticut v. Teal*, 457 U.S. 440, 455, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). By way of illustration, had the plaintiff in *Price Waterhouse* been denied a promotion while a gender-conforming woman was made a partner, this would have strengthened rather than weakened the plaintiff's case that she was discriminated against for failing to conform to sex stereotypes. We see no more difficulty with the concept that an employer cannot discriminate on the basis of sexual orientation than with the concept that one cannot discriminate based on an employee's gender non-conformity.

25 In addition, numerous district courts throughout the country have recognized that employers violate Title VII when they discriminate against employees on the basis of association with people of another national origin or sex, not only with people of another race. *See, e.g.*, *Montes v. Cicero Pub. Sch. Dist. No. 99*, 141 F.Supp.3d 885, 900 (N.D. Ill. 2015) (national origin); *Morales v. NYS Dep't of Labor*, 865 F.Supp.2d 220, 242–43 (N.D.N.Y. 2012), *aff'd*, 530 Fed.Appx. 13 (2d Cir. 2013) (summary order) (race and national origin); *Kauffman v. Maxim Healthcare Servs., Inc.*, No. 04-CV-2869, 2006 WL 1983196, at *4 (E.D.N.Y. July 13, 2006) (sex and race); *Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT*, 618 F.Supp. 1458, 1460 (D. Colo. 1985) (race and national origin).

26 The only exception, not relevant here, is for a "bona fide occupational qualification," which permits some differential treatment based on religion, sex, or national origin, but not based on race. 42 U.S.C. § 2000e-2(e).

27 Indeed, if this were the case, the white employee *and* the black employee would have cognizable Title VII claims. *Cf. Hively*, 853 F.3d at 359 n.2 (Flaum, *J.*, concurring) (noting that "even if an employer allegedly discriminates against all homosexual employees," the "employer's discrimination across sexes does not demonstrate that sex is irrelevant, but rather that *each individual* has a plausible sex-based discrimination claim" (emphasis added)).

28 The lead dissent seeks to distinguish *Holcomb* by arguing that the employer in *Holcomb* was prejudiced against black people, whereas here the employer is "hostile to gay men, not men in general." Lead Dissent at 160. But, this distorts the comparison by misattributing the prejudice at issue in *Holcomb*. The basis of the Title VII claim in *Holcomb* was not the race of the plaintiff's wife; rather, the plaintiff, who was white, "suffer[ed] discrimination because of his *own* race" as a result of the employer's "disapprov[al] of interracial association." 521 F.3d at 139. Accordingly, the prejudice was not against all black people (or all white people) but against people marrying persons of a different race. That maps squarely onto this case where the prejudice is not against all men, but people being attracted to persons of the same sex.

29 To the extent that *amici* are arguing that racism and sexism are necessary elements of a Title VII claim because these beliefs are invidious or malicious, we think their contentions are misguided. Malice, which the Supreme Court has described as an "evil motive," is not required by Title VII, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 530, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999); to the contrary, it is merely a basis on which an aggrieved employee may seek punitive damages, *see* 42 U.S.C. § 1981a(b)(1).

30 Because associational discrimination is premised on the employer's motivation and an employee's status, an associational discrimination claim does not require an act that consummates an association. For example, consider a scenario in which Holcomb had not been married to a black woman but merely expressed an interest in dating black women. If the employer terminated Holcomb merely on the basis of his desire to date black women, this would still be an instance "where an employee is subjected to adverse action because an employer disapproves of interracial association," and "the employee suffers discrimination because of the employee's *own* race." *Holcomb*, 521 F.3d at 139. The same is true in the context of sexual orientation.

31 Because "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives," we have "little legislative history to guide us in interpreting" it. *Meritor*, 477 U.S. at 63–64, 106 S.Ct. 2399.

32 The fourth case cited by the government involved allegations of discrimination against a transgender individual, a distinct question not at issue here. *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–87 (7th Cir. 1984). In addition, of the three cases actually on point, two predate *Price Waterhouse*, which was decided in May 1989, while the third was issued one month after *Price Waterhouse* but made no mention of it. Given that these cases did not have the opportunity to apply a relevant Supreme Court precedent, even if Congress was aware of them, there was reason for Congress to regard the weight of these cases with skepticism.

33 We also note that there has been a sea change in the constitutional framework governing same-sex marriage. *See generally Obergefell v. Hodges*, ––– U.S. ––––, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). In the wake of this transformation, the intersection of the modern constitutional framework and decades-old precedents regarding sexual orientation discrimination under Title VII created a "paradoxical legal landscape" in

which a man could exercise his constitutional right to marry his same-sex partner on Saturday and "then be fired on Monday for just that act." *Hively*, 830 F.3d at 714 (majority). This decision frees this circuit's jurisprudence regarding sexual orientation from that paradox.

1 *Cf.* 1 *Callimachus* fr. 465, at 353 (Rudolfus Pfeiffer ed., 1949) (3d century B.C.) (μέγα βιβλίον . . . μ[έ]γ[α] κακ[όν]).

1 Welcomed by some, denounced by others, to be sure.

2 I find it hard to interpret the law to prohibit associational race discrimination but not associational sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) ("[T]he statute on its face treats each of the enumerated categories exactly the same."). If it weren't for *Simonton*, therefore, I would think *Holcomb* stands for the proposition that "where an employee is subjected to adverse action because an employer disapproves of [a same-sex] association, the employee suffers discrimination because of the employee's *own* [sex]." *Holcomb*, 521 F.3d at 139 (emphasis in original).

3 *Holcomb* modified this Circuit's understanding of Title VII, and represents an "intervening development in the law" that justifies reconsideration of our prior precedent. *See Crown Coat Front Co. v. United States*, 363 F.2d 407, 414 (2d Cir. 1966) (Friendly, J., concurring) (quoting *Miss. River Fuel Corp. v. United States*, 314 F.2d 953, 958 (Ct. Cl. 1963) (Davis, J., concurring)) (explaining that stare decisis applies even when the Circuit sits en banc, but that overturning precedent is nevertheless justified when the law has changed), *rev'd*, 386 U.S. 503, 87 S.Ct. 1177, 18 L.Ed.2d 256 (1967).

1 In that sense, I agree with Judge Cabranes that the inquiry could end there.

1 For example, Susan B. Anthony herself stated, in a dialogue with Frederick Douglass:

> The old anti-slavery school say [*sic*] women must stand back and wait until the negroes shall be recognized. But we say, if you will not give the whole loaf of suffrage to the entire people, give it to the most intelligent first. If intelligence, justice, and morality are to have precedence in the Government, let the question of woman be brought up first and that of the negro last.

Transcript of Annual Meeting of American Equal Rights Association (1869), reprinted in *History of Woman Suffrage: 1861–1876*, 383 (Elizabeth Cady Stanton et al. eds.) (1882). During the debate over the addition of "sex" to Title VII, it was similarly argued that if sex was not added to the prohibited categories of discrimination, white women would have fewer protections than black men. As Representative Martha Griffiths, an early supporter of the amendment, warned during congressional hearings, "A vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister." Gillian Thomas*, Because of Sex* 2 (2016). And both the civil rights and the women's movements have persistently overlooked the intersectional existence of black women and other women of color. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stanford L. Rev. 1241, 1242–43 & n.3 (1991).

2 Pauli Murray and Mary O. Eastwood, lawyers and women's rights activists, exemplified that recognition, writing:

> [I]n matters of discrimination, the problems of women are not as unique as has been generally assumed. That manifestations of racial prejudice have been more brutal than the more subtle manifestations of prejudice by reason of sex in no way diminishes the force of the equally obvious fact that the rights of women and the rights of Negroes are only different phases of the fundamental and indivisible issue of human rights.

Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 235 (1965) (footnote omitted).

3 In fact, many civil rights and women's rights organizations were reluctant to support gay rights. *See, e.g.*, Bhaskar A. Shukla, *Feminism: From Mary Wollstonecraft to Betty Friedan* 111 (2007) (describing how Betty Friedan had opposed "equating feminism with lesbianism," and is said to have coined the anti-lesbian phrase "Lavender Menace" during a 1969 National Organization for Women meeting). Similarly, some civil rights leaders were uncomfortable with according public prominence to Bayard Rustin, a gay black man, despite his formidable organizing skills. Rustin was a leading strategist of the civil rights movement, and was the chief organizer of the 1963 March on Washington. John D'Emilio, *Lost Prophet: The Life and Times of Bayard Rustin* 2–3 (2003). Although Rustin spent most of his life fighting for civil rights for African–Americans, "[p]rejudice of another sort, still not named as such in mid century America, had curtailed his opportunities and limited his effectiveness." *Id.* at 326–27 (2003).

4 For example, at the ACLU's Biennial Conference in 1964, in a speech tellingly titled "Civil Liberties and the War on Crime," activist lawyer Harriet Pilpel advocated a constitutionally protected right to privacy as a necessary corrective to the civil liberties abuses perpetuated by laws "relating to birth control, abortion, compulsory sterilization, prostitution, miscegenation, homosexuality, fornication and adultery." Allison Day, *Guiding* Griswold: *Reevaluating National Organizations' Role in the Connecticut Birth Control Cases*, 22 Cardozo J. L. & Gender 191, 216–18 & n.204 (2016); *see also* Samuel Walker, *In Defense of*

American Liberties: A History of the ACLU 312 (1990) (crediting Pilpel's speech as the first substantive introduction of gay rights to the ACLU's agenda). Pilpel's argument was not based on equal protection, and made no claim that the criminalization of same-sex relations constituted a form of sex discrimination or gender bias.

5 By contrast, by the early 1970s, when Congress finally got around to proposing the Equal Rights Amendment ("ERA") for ratification, gay issues were at least on the radar screen, albeit only as a talking point of opponents that was quickly disavowed by the ERA's supporters. Senator Sam Ervin, who opposed the ERA, purported to be concerned that its broad language might invalidate laws that "make homosexuality a crime or ... [require states to recognize] the right of a man to marry another man or the right of a woman to marry a woman." 118 Cong. Rec. 9,315 (1972). Senator Birch Bayh, the chief sponsor of the ERA, hastened to deny that the Amendment would have any such effect, reassuring the Senate that the ERA would require only that "if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman." *Id*. at 9,331.

6 In the years immediately following the enactment of Title VII, however, even certain prominent officials charged with enforcing it seemed to take the opposite approach, interpreting the statute, insofar as it prohibited sex discrimination, in the light of the presumed prejudices of those who adopted it. Franklin Roosevelt, Jr., the first chair of the Equal Employment Opportunity Commission, believed that the ban on sex discrimination was an inadvertent add-on, and as a result need not be enforced as strictly as the prohibition on racial discrimination. When asked, at his first press conference as head of the EEOC, "What about sex?" Roosevelt responded, "Don't get me started. I'm all for it." Thomas, *supra*, at 4. One of the agency's first executive directors, Herman Edelsberg, was no better, dismissing the provision as a "fluke" that was "conceived out of wedlock." *Id.*

7 Despite my explicit clarity about this point, both the majority, *see* Maj. Op. at 115 (characterizing "reliance on the principal concern of our legislators" as "the centerpiece of the dissent's statutory analysis") (internal quotation marks omitted), and Judge Lohier's concurrence, *see* Lohier, *J.* Concurring Op. at 137 (characterizing this opinion as a "call ... to consider what the legislature would have decided if the issue had occurred to the legislators at the time of enactment"), fail to grasp it. As the text above makes plain, I do not contend that Title VII is limited by what members of Congress who voted for it privately believed or intended to prohibit, or might have hoped it would or would not do. The question here is what "discriminate against any individual ... because of such individual's ... sex," 42 U.S.C. § 2000e-2(a)(1), as contrasted to "discriminate against any individual ... because of such individual's ... sexual orientation," meant (and continues to mean) to ordinary speakers of English. Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the "plain meaning" of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on such an approach. (No less a textualist than Justice Scalia recognized the point: "Adhering to the *fair meaning* of the text ... does not limit one to the hyperliteral meaning of each word in the text." Antonin Scalia and Bryan A. Garner, *Reading Law* 356 (2012) (emphasis in original).) That is because the political and social context of the words is critical to understanding what it is that the political branches of our government wrote into law. (Justice Scalia again: Because most common English words "have a number of dictionary definitions," a court should ordinarily "assume the *contextually appropriate* ordinary meaning." *Id*. at 70 (emphasis added).)

8 As the Supreme Court has repeatedly instructed, "[i]t is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' " *Sandifer v. U.S. Steel Corp*., ––– U.S. ––––, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014), quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). It is worth noting, moreover, that, because legislation is a fundamentally *political* process, the *political* context of legislation, and the way in which language is (or is *not*) used in the public debate over proposed legislation, can be useful in understanding that meaning.

9 The majority agrees, at least "*arguendo*." Maj. Op. at 107 n.2. Issues about how to define who falls into which gender, or whether the division of humanity into two sexes or genders is oversimplified as applied to persons who identify as transgender or gender fluid or bigendered are not before us today, and neither the majority nor the plaintiffs nor their *amici* contend that gay and lesbian individuals constitute a third or fourth sex. *Cf. Hively*, 853 F.3d at 355 (Posner, *J.*, concurring) ("It's true that even today if asked what is the sex of plaintiff Hively one would answer that she is female or that she is a woman, not that she is a lesbian. Lesbianism denotes a form of sexual or romantic attraction; it is not a physical sex identifier like masculinity or femininity.").

10 As we have recently been reminded, too many powerful men continue to engage in such practices. *See*, *e.g.*, J.M.F., *What is Sexual Harassment and How Prevalent Is It?*, The Economist (Nov. 24, 2017), https://www.economist.com/blogs/economist-explains/2017/11/economist-explains-17 (writing that "[i]n recent months myriad women have detailed the sexual harassment and assault they have experienced in ... Hollywood, Silicon Valley, politics, the media, the armed forces, [and] academia").

11 Indeed, the overt objectification of female employees was highlighted in debates immediately following the enactment of Title VII. One industry notorious for sexualizing women was the airline industry, which hired only young, attractive women to serve as flight attendants. Stephanie Coontz, *A Strange Stirring: The Feminine Mystique and American Women at the Dawn of the 1960s* 9–10

(2011). Flight attendants were forced to retire upon marriage, or, if they did not marry, once they reached their early thirties because, as one airline official commented, "the average woman's appearance has markedly deteriorated at this age." *Id.* at 10. In 1965, responding to public (male) commentary lamenting the idea that Title VII might mean an end to the practice of hiring only female flight attendants, Representative Martha Griffiths remarked, "If you are trying to run a whorehouse in the sky, get a license." Menand, *supra*.

12 The text of the sex provision, as well as the principle of equal treatment of both sexes makes it as obvious that the less-frequently encountered situation of sexual harassment of male employees, whether by men or by women, must also be included in Title VII's prohibitions. *See* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) (noting that under Title VII, "[m]ale as well as female employees are protected against discrimination"); *see also* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding that "nothing in Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant ... are of the same sex").

13 The quoted statement from *Huntington* is actually a parenthetical squib glossing a citation to *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–36, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and summarizing the import of a lengthy discussion in that seminal Supreme Court decision; *Huntington* itself concerned the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, codified at 42 U.S.C. §§ 3601–3631. *Huntington*, 844 F.2d at 928.

14 Indeed, Judge Cabranes's concurring opinion suggests that that interpretation is so obvious and straightforward that nothing more need be said on the subject, and that we can dispense with the various arguments from precedent and principle that the majority opinion makes in support of its holding. Cabranes, *J.*, Concurring Op. at 135. But that interpretation, in fact, is anything but obvious.

15 The majority's reliance on a footnote in *Price Waterhouse* does nothing to change this fact. Maj. Op. at 123–24. The majority quotes the portion of the footnote stating that Title VII "on its face treats each of the enumerated categories exactly the same," and that the "principles ... announce[d]" by the *Price Waterhouse* Court with regard to gender "apply with equal force to discrimination based on race, religion, or national origin," to support its conclusion that the associational discrimination cases that have arisen in the context of race should also apply to associational discrimination in terms of gender. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). While I explain my disagreement with this argument below, it is worth noting here why this footnote does not change the above analysis. The Court in *Price Waterhouse* did not state that every decision with regard to one enumerated group in Title VII must be applied blindly to every other group. Rather, it emphasized that the "principles" embedded in Title VII should apply with equal force to each enumerated category. *Id.* It is those principles that have allowed courts to interpret the various prohibitions in Title VII "against the background of ... the historical context from which the Act arose," *United Steelworkers of Am., AFL–CIO–CLC v. Weber*, 443 U.S. 193, 201, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), in upholding distinctions between sexes that would unquestionably be rejected if made between races. And it is the principle of equal opportunity animating Title VII that I have attempted to distill in this opinion.

16 That of course does not mean that "discriminate against" has any different meaning as applied to "because of ... race" than it does as applied to "because of ... sex." What it means is that similar, or even identical, practices may have a different social meaning and a different economic effect when they distinguish male from female employees than when they distinguish white from black employees.

17 Despite the Times's concerns, the Rockettes remain all female more than 50 years after Title VII became law, and the owners of franchises in the Women's National Basketball Association are likely not very worried about losing a lawsuit by men who were not allowed to try out for employment with their teams. Needless to say, dance troupes or professional sports leagues that employed only whites or blacks would be quite a different matter.

18 To spell the point out: life expectancy, *see* Maj. Op. at 116–17, citing *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), may be quite literally a mathematical "function of sex," to the extent that with knowledge of a person's sex, one can calculate his or her life expectancy, which will differ from that of a member of the opposite sex. Whatever the majority means by its assertion that "sexual orientation is a function of sex," Maj. Op. at 119, it plainly does not mean anything like that.

19 Although empirical data are hard to come by, there appears to be nothing to suggest that rates of homosexuality differ significantly between men and women. *See, e.g.*, Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, Gallup (Jan. 11, 2017), http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx.

20 Of course, discrimination against a subcategory of members of one sex is also prohibited by Title VII. An employer that hires gay men but refuses to hire lesbians, or vice versa, would thus be in violation of the statute.

21 *See* Cal. Gov't Code § 12940 (California); Colo. Rev. Stat. § 24-34-402 (Colorado); Conn. Gen. Stat. § 46a-60 (Connecticut); Del. Code Ann. tit. 19, § 711 (Delaware); D.C. Code § 2-1402.11 (District of Columbia); Haw. Rev. Stat. § 378-2 (Hawaii); 775 Ill. Comp. Stat. 5/2-101, 102 (Illinois); Iowa Code § 216.6; Me. Rev. Stat. tit. 5, § 4571 (Maine); Md. Code Ann., State Gov't § 20-606 (Maryland); Mass. Gen. Laws ch. 151B, § 4 (Massachusetts); Minn. Stat. § 363A.08 (Minnesota); Nev. Rev. Stat. § 613.330 (Nevada); N.H. Rev. Stat. Ann. § 354-A:7 (New Hampshire); N.J. Stat. Ann. § 10:5-4 (New Jersey); N.M. Stat. Ann. § 28-1-7 (New Mexico); N.Y. Exec. Law § 296 (New York); Or. Rev. Stat. § 659A.003 (Oregon); R.I. Gen. Laws § 28-5-7 (Rhode Island); Vt. Stat. Ann. tit. 21, § 495 (Vermont); Wash. Rev. Code § 49.60.180 (Washington); Wis. Stat. § 111.321 (Wisconsin).

22 Discrimination in federal employment on the basis of sex (as well as race, color, religion, and national origin) has been prohibited by executive order since 1969. *See* Exec. Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 8, 1969). In 1998, the Clinton Administration did not argue that the prohibition of sex discrimination in that Order already banned, or henceforth would be deemed to ban, sexual orientation discrimination; rather, like the states that have prohibited such discrimination by all employers, it straightforwardly added sexual orientation to the prohibited categories. *See* Exec. Order No. 13087.

23 *See* Civil Rights Amendments Act, H.R. 166, 94th Cong. (1975); A Bill to Prohibit Discrimination on the Basis of ... Sexual Preference, H.R. 2667, 94th Cong. (1975); Civil Rights Amendments, H.R. 5452, 94th Cong. (1975); Civil Rights Amendments, H.R. 13019, 94th Cong. (1976); Civil Rights Amendments, H.R. 451, 95th Cong. (1977); Civil Rights Amendments Act, H.R. 7775, 95th Cong. (1977); Civil Rights Amendments, H.R. 2998, 95th Cong. (1977); Civil Rights Amendments Act of 1977, H.R. 4794, 95th Cong. (1977); Civil Rights Amendments Act of 1977, H.R. 5239, 95th Cong. (1977); Civil Rights Amendments Act of 1977, H.R. 8269, 95th Cong. (1977); Civil Rights Amendments Act of 1979, H.R. 2074, 96th Cong. (1979); A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 2081, 96th Cong. (1979); Civil Rights Amendments Act of 1981, H.R. 1454, 97th Cong.; Civil Rights Amendments Act of 1981, H.R. 3371, 97th Cong.; A Bill to Prohibit Discrimination on the Basis of Sexual Orientation, S. 1708, 97th Cong. (1981); A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 430, 98th Cong. (1983); Civil Rights Amendments Act of 1983, H.R. 427, 98th Cong.; Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong.; Civil Rights Amendments Act of 1985, S. 1432, 99th Cong.; Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong.; Civil Rights Amendments Act of 1987, S. 464, 100th Cong.; Civil Rights Amendments Act of 1987, H.R. 709, 100th Cong.; Civil Rights Protection Act of 1988, S. 2109, 100th Cong.; Civil Rights Amendments Act of 1989, S. 47, 101st Cong.; Civil Rights Amendments Act of 1989, H.R. 655, 101st Cong.; Civil Rights Amendments Act of 1991, S. 574, 102d Cong.; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong.; Civil Rights Amendments Act of 1993, H.R. 423, 103d Cong.; Employment Nondiscrimination Act of 1994, S. 2238, 103d Cong.; Civil Rights Act of 1993, H.R. 431, 103d Cong.; Employment Non–Discrimination Act of 1994, H.R. 1430, 103d Cong.; Civil Rights Amendments Act of 1995, H.R. 382, 104th Cong.; Employment Non–Discrimination Act of 1995, S. 932, 104th Cong.; Employment Non–Discrimination Act of 1995, H.R. 1863, 104th Cong.; Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong.; Employment Non–Discrimination Act of 1997, S. 869, 105th Cong.; Employment Non–Discrimination Act of 1997, H.R. 1858, 105th Cong.; Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong.; Employment Non–Discrimination Act of 1999, S. 1276, 106th Cong.; Employment Non–Discrimination Act of 1999, H.R. 2355, 106th Cong.; Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong.; Employment Non–Discrimination Act of 2001, H.R. 2692, 107th Cong.; Employment Non–Discrimination Act of 2002, S. 1284, 107th Cong.; Equal Rights and Equal Dignity for Americans Act of 2003, S. 16, 108th Cong.; Employment Non–Discrimination Act of 2003, H.R. 3285, 108th Cong.; Employment Non–Discrimination Act of 2003, S. 1705, 108th Cong.; Civil Rights Amendments Act of 2005, H.R. 88, 109th Cong.; Employment Non–Discrimination Act of 2007, H.R. 2015, 110th Cong.; Employment Non–Discrimination Act of 2007, H.R. 3685, 110th Cong.; Employment Non–Discrimination Act of 2009, H.R. 3017, 111th Cong.; Employment Non–Discrimination Act of 2009, H.R. 2981, 111th Cong.; Employment Non–Discrimination Act of 2009, S. 1584, 111th Cong.; Employment Non–Discrimination Act, H.R. 1397, 112th Cong. (2011); Employment Non–Discrimination Act of 2011, S. 811, 112th Cong.; Employment Non–Discrimination Act of 2013, H.R. 1755, 113th Cong.; Employment Non–Discrimination Act of 2013, S. 815, 113th Cong.; Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015).

24 *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *DeSantis v. Pac. Telephone and Telegraph Co., Inc.*, 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

25 This is by no stretch of the imagination an outlier position, past or present. As the majority recognizes, until just last year, when the Seventh Circuit decided *Hively,* 853 F.3d at 340, this interpretation of the sex provision prevailed, unanimously, in federal courts of appeals nationwide. Maj. Op. at 107–08 (citing the "consensus among our sister circuits" that "because of ... sex" did not cover sexual orientation, and listing eight Court of Appeals decisions so holding). Specifically, eleven Circuit Courts, including ours, had considered the question, and all had concluded that, by its terms, Title VII does not prohibit sexual orientation discrimination. *See* *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 708 (7th Cir. 2000); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis*, 608 F.2d at 329–30; *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017). As

noted above, the EEOC had also concluded that sexual orientation fell "outside the purview of Title VII." *Dillon*, 1990 WL 1111074, at *3. It was not until 2015 that the EEOC ruled, for the first time, that Title VII should be interpreted to cover sexual orientation, *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015), and its position is opposed by the Department of Justice, which also has responsibility for enforcing statutes prohibiting sex discrimination. *See* Brief of the United States as *Amicus Curiae* 1.

26 The same type of discrimination could affect men in a job environment in which stereotypically "feminine" traits such as empathy are required. On the authority of *Price Waterhouse*, Title VII would prohibit an employer from discriminating against male social workers in hiring or promotion *either* based on a stereotypical assumption that men are in general insufficiently caring *or* because of a prejudice against men who do display such putatively feminine qualities.

27 Other than the Seventh Circuit's decision in *Hively*, 853 F.3d at 347–49, no federal appellate court has applied this theory outside of the context of racial discrimination cases.

28 The majority quotes this passage from *Barrett*, italicizing "protected class," in an effort to suggest that the Sixth Circuit, like the Seventh, has applied this principle to sex discrimination. Maj. Op. at 124. It has not. *Barrett* was a race discrimination case. To the extent that the formulation used could be read to extend beyond race, it is dictum. As will be made clear momentarily, it is not dictum to which I object, but it is one that, properly understood, has no application to the present case.

29 Furthermore, the principle that prohibitions against discrimination equally protect members of the socially dominant group in situations in which they are victims of discrimination would apply the same rule to a Jewish or black employer who discriminated against Jewish or black employees who married or associated with Christians or whites.

30 The majority twits "[c]ertain *amici*" for failing to offer "empirical support" for a comparable assertion. Maj. Op. at 126. I doubt that a fair-minded reader needs any for the proposition I have stated.

31 Sociologists have theorized that individuals with authoritarian personalities are most likely to be prejudiced against marginalized groups because they are rigid thinkers who obey authority, see the world as black and white, and enforce strict adherence to social hierarchies. Theodor W. Adorno et al., *The Authoritarian Personality* 228 (1st ed. 1950).

32 This is not to deny that such legislation may be supported in part by the hope that once individuals from different backgrounds have occasion to interact with one another, they will see beyond stereotypes and preconceived notions about how an entire class of people "is," and the ignorance and bigotry that initially motivated discrimination will be lessened. But any such purpose cannot warrant extending the categories of discrimination that Congress has outlawed to any other category that shares similar "roots" to prohibited practices.

33 Both the majority, *see* Maj. Op. at 131 n.33, and Judge Sack, *see* Concurring Op. of Sack, *J.*, at 135, cite these dramatic, and to me welcome, changes in the law. But these changes, both legislative and constitutional, stem from changes in social attitudes toward gay people, not from any change in, or improved understanding of, the meaning of "sex discrimination."

34 That is particularly noteworthy given that one of the pioneering academic assertions of a right to same-sex marriage argued that the prohibition of discrimination based on sex in the Equal Rights Amendment (then before the states for ratification) would invalidate laws prohibiting same-sex marriage. Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573, 583–88 (1973).

35 Scholars have noted that an exceedingly small fraction of the population could conceivably block ratification of a constitutional amendment, despite overwhelming majority support for such an amendment. *See, e.g.*, Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1060 (1988).

36 A significant exception is the Thirteenth Amendment, which "[b]y its own unaided force ... abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835 (1883); *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437–44, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (explaining that the Amendment reaches, and authorizes Congress to reach in implementing legislation, private conduct).

37 The majority notes the same "paradox." Maj. Op. at 131 n.33.

38 For the record, I note that I fully agree with the majority's discussion of our jurisdiction, Maj. Op. at 109–11.

1 In relevant part, Title VII renders it an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

origin.” 42 U.S.C. § 2000e-2(a)(1).

2 Notably, all three states in this Circuit have prohibited workplace discrimination on the basis of sexual orientation, as have nineteen other states and the District of Columbia, all through legislation, and not judicial reinterpretation of existing prohibitions on sex discrimination. Under New York law, Zarda was thus able to present his claim that he was subject to workplace discrimination on the basis of his sexual orientation to a jury. The jury decided in favor of his former employer, Altitude Express.

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United States District Court, E.D. Pennsylvania.

Anthony S. ZIELONKA,
v.
TEMPLE UNIVERSITY.

No. CIV. A. 99-5693.
|
Oct. 12, 2001.

MEMORANDUM

WALDMAN, J.

I. *Introduction*

***1** Plaintiff alleges that he was wrongfully denied tenure as a faculty member at Temple University because of his association with an African American professor for whom plaintiff voted in an academic election for department chair. Plaintiff asserts a Title VII claim against Temple, as well as supplemental state law claims for breach of contract and violation of the Pennsylvania Human Relations Act ("PHRA"). Presently before the court is defendant's Motion for Summary Judgment.

II. *Legal Standard*

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Arnold Pontiac-GMC, Inc. v. General Motors Corp.,* 786 F.2d 564, 568 (3d Cir.1986). Only facts that may affect the outcome of a case are "material." *See Anderson,* 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. *See id.* at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. *See J.F. Feeser, Inc. v. Serv-A-Portion, Inc.,* 909 F.2d 1524, 1531 (3d Cir.1990) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)), *cert. denied,* 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, such as those found in the pleadings, but rather must present evidence from which a jury could reasonably find in his favor. *See Anderson,* 477 U.S. at 248; *Ridgewood Bd. of Educ. v. N.E. for M.E.,* 172 F.3d 238, 252 (3d Cir.1999); *Williams v. Borough of West Chester,* 891 F.2d 458, 460 (3d Cir.1989); *Woods v. Bentsen,* 889 F.Supp. 179, 184 (E.D.Pa.1995).

III. *Facts*

From the evidence of record, as uncontroverted or otherwise viewed in a light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff was an assistant professor of French in Temple's Department of French and Italian from the 1989-1990 academic year until June 30, 1997. He was engaged pursuant to an employment contract which was renewed each academic year. As a faculty member, plaintiff was also subject to a collective bargaining agreement. The collective bargaining representative was the Temple Association of University Professionals ("TAUP"). He became eligible for review for tenure and promotion to associate professor in the 1994-95 academic year.

In the fall of 1989, Dr. Wilbert Roget, the only African American then in the Department of French and Italian, indicated his interest in running for Chair of the Department. In December 1989, Dr. Roget was approached by a colleague, Dr. James Mall, who suggested that there was a position available at Howard University he might wish to pursue rather than run for Chair and another Colleague, Dr. Marquita Noris, gave Dr. Roget the position announcement.

***2** Dr. Roget was a candidate in the April 1990 election for Chair of the Department. His opponent was Dr. Charlotte Kleis. Plaintiff met with each candidate and concluded that Dr. Roget had "a clearer vision of what he would do as Chair." Plaintiff, Dr. Eric Sellin, Dr. Kathy Collins, Dr. Justin Vitello and Dr. Ruth Thomas voted in favor of Dr. Roget.[1] Dr. Noris and Dr. Mall voted for Dr. Kleis. Dr. Roget and Dr. Kleis each voted for themselves. Upon the recommendation of the faculty, then Dean Lois S. Cronholm appointed Dr. Roget as Chair of the Department for a three year term from July 1, 1990 through June 30, 1993.

When Dr. Kleis learned that Dr. Roget proposed to replace him as Graduate Advisor with plaintiff, Dr. Kleis suggested to plaintiff that his vote had been "bought." Plaintiff understood Dr. Kleis to mean that plaintiff voted for Dr. Roget in exchange for this assignment.

As his term as Department Chair neared expiration, Dr. Roget decided to run for another term. On February 10, 1993, Drs. Kleis, Mall, Noris and Thomas wrote a letter to Dr. Roget in which they expressed their opposition to his candidacy and advised that Dr. Mall planned to be a candidate. They expressed criticism of "the way in which the department is managed." They accused Dr. Roget of fostering "political divisions in the department," pitting "you and the junior faculty on one side" against "the tenured faculty" on the other. They also noted the unfairness of requiring junior colleagues to choose between Dr. Roget and four professors who comprised a majority of the departmental personnel committee. Dr. Roget showed the letter to plaintiff.

Dr. Roget's opponent in the second election was indeed Dr. Mall. According to plaintiff, he was told by Dr. Manon Ress, who had joined the Department since the prior election, that she was told at a social gathering in early 1993 by "either Dr. Mall or his wife" that her chances for tenure would depend upon how she voted in the upcoming election for Chair. This itself is incompetent hearsay evidence. The court will assume for purposes of the pending motion, however, that this could be presented in competent form by Dr. Ress based on a letter to President Liacouris she authored on May 5, 1996 in which she states she was told, albeit by someone not identified in the letter, that her prospect for tenure would be affected by her vote for Chair.[2]

The second election was held in the spring of 1993. Plaintiff, Dr. Vitello, Dr. Christopher Concolino and Dr. Ress voted for Dr. Roget. Dr. Noris, Dr. Kleis and Dr. Thomas, who had voted for Dr. Roget in the prior election, voted for Dr. Mall. Dr. Roget and Dr. Mall each voted for themselves.

Both elections were conducted by secret ballot. Some persons, however, had expressed their intentions and it could be discerned how others voted, in plaintiff's words, "by process of elimination."[3]

***3** Given the apparent division in the Department and because Dr. Roget's reign as Chair was tumultuous, Dean Carolyn Adams decided not re-appoint Dr. Roget to the position. Dean Adams felt that it would be best to appoint someone new from outside of the Department. Dr. Kleis became interim Chair until Dean Adams appointed Betty Richards of the Department of German and Slavic to serve as acting Chair.

Although Dr. Roget did not lodge a complaint, there were protests about Dean Adam's decision. She then requested that the Office of Affirmative Action investigate the circumstances surrounding the decision not to reappoint Dr. Roget as Chair. The investigation was conducted by Dr. William Yates, the Assistant Vice President for Affirmative Action and an African American. He interviewed twenty-three individuals, including all members of the Department. Dr. Yates concluded in his report of May 16, 1994 that racism was not a factor in the decision not to reappoint Dr. Roget but that it was probably a factor in Dr. Roget's inability to perform as Chair.

After the Yates report, a faculty Committee of Inquiry was convened to investigate the suggestion of racism. The Committee consisted of Dr. Deirdre David of the English Department, Dr. Gregory Lorant of the Biology Department, Dr. Joseph Margolis of the Philosophy Department, Dr. Ronald Taylor of Psychology, Dr. Kariamu Weish-Asante of the African-American Studies Department and Dr. Howard Winant of the Sociology Department. The Committee considered Dr. Yate's report, gathered additional testimony and issued a report on December 12, 1994.

The Committee found that Dr. Roget engaged in "an unusually autocratic method of chairing" and "in alienating practices."[4] The Committee concluded that "there is no evidence to sustain charges that Dr. Roget was hampered in his performance by racism," but also that "it is impossible to say race played no part in the history of conflict between Dr. Roget and his colleagues" as "race plays an inevitable part in the way individuals respond to one another." The Committee opined that the Department was, however, plagued by "rancor, resentment and old grudges" and recommended that the

Dean conduct a search for "an outside chair."

Dean Adams released an excerpted version of the Yates report which contained no names or comments attributed to any interviewee.[5] It is unclear from the record presented whether any portion of the Committee of Inquiry report was released prior to the final denial of tenure to plaintiff. It is clear, however, that no statement in the report is attributed to him and that his name is mentioned only as one of various persons who were interviewed.

Following a national search for someone to chair the French and Italian Department, Dr. Marge Devinney was selected effective in the Fall of 1995. Dr. Devinney was a professor of German and in the Fall of 1995, the Department of French and Italian and the Department of German and Slavic were merged.

The departmental personnel committee which reviewed plaintiff's 1994-95 application for tenure included individuals who were displeased with Dr. Roget and voted against recommending tenure for plaintiff. Drs. Mall, Noris and Thomas recommended against tenure while Dr. Roget and Dr. Tim Corrigan favored tenure.

***4** In this multi-level review process, the interim Chair of the Department and the Dean of Temple's College of Arts and Sciences then recommended against tenure and promotion for plaintiff. The College of Arts and Sciences Tenure Committee then recommended that plaintiff receive tenure. Given the split vote, three negative recommendations and one positive recommendation, a subcommittee of the Council of Deans made an independent review and ultimately voted four to two against recommending tenure. The Council of Deans then voted ten to two against tenure.

In response to this recommendation, plaintiff complained to then President Peter Liacouras in a letter in May 1995 that the review process was unfair and that there were "serious problems and conflicts within the Department that had adversely affected [his] review." Rather than forwarding the negative tenure recommendation to the Board of Trustees, President Liacouras discussed plaintiff's situation with Dr. Yates and asked that he investigate the matter. Dr. Yates concluded that plaintiff's support of Dr. Roget "could have been a factor" in the negative recommendation by the Department Personnel Committee regarding plaintiff's tenure. President Liacouras then decided that no further action should be taken on plaintiff's review and that it would be best to defer action on plaintiff's application for tenure until the next year.

Provost James England telephoned plaintiff to inform him the President had decided to "send the review back to the department for a new review, a de novo review." Dr. England also told plaintiff that the President would review the process upon completion to ensure it had been conducted fairly.

In a letter dated June 15, 1995, signed by the Provost and countersigned by plaintiff, the parties agreed upon a delay in plaintiff's tenure and promotion consideration until the 1995-96 academic year and, in the event of a negative decision, to employment for a final academic year in 1996-97. Plaintiff agreed to waive and release any claim to tenure based on the extension of his employment during the 1994-95 and 1996-97 academic years. The letter provided that "[t]his agreement is subject to the written concurrence of the Temple Association of University Professionals" and contained a signature line at the bottom for "Arthur Hochner, President TAUP."

The second review again focused on the pertinent areas of scholarship, teaching and service. New evaluations of plaintiff's publications were utilized. Evaluations from the prior review which included negative comments were not resubmitted. New peer reviews of teaching and new student course evaluations were utilized. The participants in the process presented new Recommendation Sheets with new commentary and analysis. The College of Arts and Sciences Tenure Committee expressly noted in its evaluation that in response to plaintiff's concern and "political divisions in his department," it was scrupulous in its effort to be fair.

Drs. Kleis, Thomas, Noris and Mall participated in plaintiff's second review for tenure and promotion. They voted not to recommend tenure. There was also a new professor from outside the University, Dr. Devinney, who had assumed the position of Department Chair. She recommended against tenure. Indeed, the results at every level of the review process were negative. Plaintiff's teaching was found to be satisfactory and his research better than satisfactory. This was deemed to be insufficient in terms of the desired level of distinction, although six outside reviewers selected to assess plaintiff's publications found them praiseworthy. The Board of Trustees voted to deny tenure to plaintiff and by letter of June 27, 1996, President Liacouris informed plaintiff that he had been denied tenure.

***5** Plaintiff filed a twenty page complaint with the Faculty Senate Personnel Committee, an independent body with authority to review complaints about the tenure and promotion process, in which he challenged the fairness of the second review process. The Committee concluded in a report of December 4, 1996 that the process had been fair and that no further action was warranted. Plaintiff then detailed his complaints regarding the fairness of the process to President Liabouris. He responded in a letter of April 1, 1997 that he had carefully considered all of plaintiff's expressed objections and concurred with the conclusion of the Faculty Senate Personnel Committee. TAUP declined plaintiff's request to file a grievance.

Plaintiff's employment with Temple was terminated at the end of the 1996-97 academic year. Plaintiff began new employment with Assumption College in Massachusetts in August 1998. He received credit toward tenure for his eight years at Temple.

IV. *Discussion*

A. *Associational Discrimination*

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race." 42 U.S.C. § 2000e-2(a) (emphasis added).

Federal courts have recognized Title VII claims for associational discrimination. *See,* e.g., *Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 892 (11th Cir.1986); *Reiter v. Central Consol. Sch. Dist.,* 618 F.Supp. 1458, 1460 (D.Colo.1985); *Gresham v. Waffle House, Inc.,* 586 F.Supp. 1442, 1445 (N.D.Ga.1984); *Holiday v. Belle's Rest.,* 409 F.Supp. 904, 908 (W.D.Pa.1976). Such claims, however, are predicated upon discrimination against a plaintiff because of his race.

In arguing that "it would be entirely illogical to require Dr. Zielonka to prove that discrimination was based on his own race," plaintiff misperceives the basis of an associational discrimination claim. The plaintiff's own race must have been as much a motivating factor in the defendant's adverse action as the race of the individual with whom he associated. *See Drake v. Minnesota Mining & Mfg. Co.,* 134 F.3d 878, 884 (7th Cir.1998) (key inquiry in associational race discrimination claim "should be whether the employee has been discriminated against and whether that discrimination was 'because of' the employee's race"); *La Rocca v. Precision Motorcars, Inc.,* 45 F.Supp.2d 762, 773 (D.Neb.1999) (plaintiff must show that "but for [his] race not being black he would not have been discriminated against because of his association" or that any discrimination he suffered "was a result of his race being different from" that of person he associated with); *Reiter,* 618 F.Supp. at 1460 ("underlying rationale" for associational discrimination claim "is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with"); *Gresham,* 586 F.Supp. at 1445 (but for being white, plaintiff would not have been discriminated against on the basis of her marriage to a black man); *Holiday,* 409 F.Supp. at 908 (essence of plaintiff's claim is that "because she was white as opposed to any other race she was the victim of employment discrimination"). In associational discrimination cases, it is the interracial nature of a relationship itself that motivates discrimination.

Plaintiff quotes a line from *Johnson v. University of Cincinnati,* 215 F.3d 561 (6th Cir.2000) that "[p]laintiff need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status requirement" to suggest that the race of a plaintiff in an associational discrimination case is irrelevant. In support of the foregoing assertion, however, the Court in *Johnson* cites to a case from which it quotes parenthetically that "[w]here a plaintiff claims discrimination [in a Title VII action] based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race." *Id.* at 575.[6] It is correct that a plaintiff of any race may maintain a claim for associational discrimination, but the discrimination must be based on the difference in his race and that of those he associates with.[7]

***6** Plaintiff did not have the type of relationship with Dr. Roget that alone may reasonably support an assumption that plaintiff's race motivated the action he complains of. The cases in which courts have recognized a cause of action under Title VII have typically involved more substantial relationships. *See Parr,* 791 F.2d at 892 (interracial marriage); *Chacon v. Ochs,* 780 F.Supp. 680, 682 (C.D.Ca.1991) (interracial marriage); *Gresham,* 586 F.Supp. at 1445 (interracial marriage); *Holiday,* 409 F.Supp. at 908 (interracial marriage); *Clark v. Louisa County School Board,* 472 F.Supp. 321 (E.D.Va.1979) (interracial marriage). *See also Robinett v. First Nat'l Bank of Wichita,* 1989 WL 21158, *1-2 (D.Kan. Feb. 1, 1989) ("good friendship" of white plaintiff with black co-worker "insufficient to establish the type of relationship" necessary to support cause of action).

Plaintiff has not presented any competent evidence that he actively attempted to vindicate Dr. Roget's rights or protested against discrimination directed toward him.[8] It appears that plaintiff's relationship with Dr. Roget was that of friendly acquaintance and supportive voter in an academic election.

In any event, there is no showing or assertion that plaintiff was discriminated against because of his race. There is no showing or contention that but for his race, plaintiff would have been recommended for or received tenure. Accepting that some professors opposed Dr. Roget's reelection because he is African American, there is no showing that their resentment of plaintiff for voting for Dr. Roget was because plaintiff is of a different race than Dr. Roget. To the contrary, there is every indication that these professors would have been displeased with the support of anyone for Dr. Roget for Department Chair, regardless of their race, nationality, age or gender.

B. *Indirect Discrimination*

***7** Perhaps perceiving the problems with his associational claim, in his response brief plaintiff seems to recast his claim as one for indirect discrimination. Relying on *Anjelino v. New York Times,* 200 F.3d 73 (3d Cir.1999), plaintiff argues that he is a "person aggrieved" by discrimination against Dr. Roget. As this court has recently held in a housing discrimination case, a white plaintiff may sue for an injury proximately caused by an act of discrimination against the African American target of that act. *See Lane v. Cole,* 88 F.Supp.2d 402, 406 (E.D.Pa.2000).

The question in *Anjelino* was one of standing at the pleading stage. The Court held that male plaintiffs had standing to sue for their loss of employment and seniority on a priority list resulting from defendants' gender discrimination against female co-workers. *See Anjelino,* 200 F.3d at 92. The male plaintiffs alleged that because hiring for work shifts would stop just before the names of women on the priority list were reached, males listed below those names would also not be hired. If true, this would mean that but for defendants' discrimination against females, male plaintiffs would have received more employment opportunities and seniority.

The alleged discriminatory conduct against Dr. Roget is the denial of the position of Department Chair allegedly because of race.[9] This did not result in plaintiff's loss of tenure and promotion. Rather, according to plaintiff, that resulted from retaliation by professors angry about his voting decision. Even if Dr. Roget had been reappointed as Chair, it appears from plaintiff's evidence that he would have been similarly treated by those professors. If plaintiff had been removed before the vote to prevent him from voting for Dr. Roget, he may have a claim. If plaintiff's promotion was contingent on Dr. Roget's reappointment as Chair, he may have a claim. This, however, is not a case where someone shot through plaintiff to hit Dr. Roget. The shot for which plaintiff seeks redress was aimed at him.

C. *Retaliation*

Although not pled in his complaint, plaintiff contends that he has made out a claim for retaliation.[10] In an on the record exchange at the close of plaintiff's deposition, his counsel acknowledged that no claim for retaliation had been pled but opined that defendant should have been aware of the prospect of such a claim from what was pled. Plaintiff, however, never amended his complaint to assert a retaliation claim or sought leave to do so through this date. Defendant justifiably emphasizes this basic deficiency in addressing summary judgment but nevertheless discusses the putative claim to show that it cannot be sustained on the competent evidence of record.

Title VII prohibits an employer from discriminating against an employee because he has opposed any employment practice unlawful under that subchapter or made a charge, testified, assisted or participated in an investigation, proceeding or hearing under Title VII. *See* 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, a plaintiff must show that he engaged in protected activity, that he was subsequently or contemporaneously subject to an adverse employment action and that there was a causal link between the protected activity and the adverse action. *See Woodson v. Scott Paper Co.,* 109 F.3d 913, 920 (3d Cir.1997); *Barber v. CSX Distribution Servs.,* 68 F.3d 694, 701 (3d Cir.1995); *Jalil v. Avdel Corp.,* 873 F.2d 701, 708 (3d Cir.1989), *cert. denied,* 493 U.S. 1023, 110 S.Ct. 725, 107 L.Ed.2d 745 (1990).

Protected activity includes informal protests to a superior about discriminatory employment actions. *See Abramson v. William Patterson Coll.,* 260 F.3d 265, 288 (3d Cir.2001); *EEOC v. L.B. Foster Co.,* 123 F.3d 746, 754 (3d Cir.1997); *Sumner v. United States Postal Service,* 899 F.2d 203, 209 (2d Cir.1990) Protected activity encompasses complaints about discriminatory treatment directed at another employee. *See Aman v. Cort Furniture Rental Corp.,* 85 F.3d 1074, 1085 (3d Cir.1996).

Grievances about matters not made unlawful by Title VII, however, are not protected activity. *See Walden v. GeorgiaPacific Corp.,* 126 F.3d 506, 513 n. 4 (3d Cir.1997), *cert. denied,* 523 U.S. 1074, 118 S.Ct. 1516, 140 L.Ed.2d 669 (1998).

***8** Plaintiff argues that he "provided evidence of racism as a witness in Dr. Yates' internal investigation" and cites to two exhibits. These exhibits, however, simply do not support this contention. Plaintiff was one of twenty-three persons interviewed during the internal investigation conducted by Dr. Yates. There is no competent evidence of record, including the testimony of Dr. Yates, that plaintiff specifically complained to Dr. Yates or anyone in authority at Temple at the pertinent time about racial discrimination. Further, plaintiff has produced no competent evidence that anything he said in his interview with Dr. Yates played any role in his denial of tenure. The report summarizing the results of the investigation did not identify any specific respondent.

If plaintiff is suggesting that his mere participation in the internal investigation was protected activity, it was not. Activity protected under the participation clause of Title VII does not include participation in internal investigations. *See E.E.O.C. v. Total Systems Services, Inc.,* 221 F.3d 1171, 1174 (11th Cir.2000); *Tuthill v. Consolidated Rail Corp.,* 1997 WL 560603, *4 (E.D.Pa. Aug. 26, 1997); *Russell v. Strick Corp.,* 1997 WL 381584, *4 (E.D.Pa. July 9, 1997). *See also Morris v. Boston Edison Co.,* 942 F.Supp. 65, 71 (D.Mass.1996).[11] There also is no competent evidence of any causal link between plaintiff's participation in the internal investigation and the decision to deny him tenure.

Plaintiff's support for Dr. Roget in the academic elections is also not protected activity. Plaintiff testified that he supported Dr. Roget because he thought he was the best candidate and not in an effort to oppose perceived racial discrimination. There is no evidence that in connection with his vote plaintiff protested any discrimination against Dr. Roget.

D. *PHRA Claim*

The same standards and analysis are generally applicable to Title VII and PHRA claims. *See Gomez v. Allegheny Health Serv. Inc.,* 71 F.3d 1079, 1083-84 (3d Cir.1995), *cert. denied,* 518 U.S. 1005, 116 S.Ct. 2524, 135 L.Ed.2d 1049 (1996); *Griffiths v. CIGNA Corp.,* 988 F.2d 457, 469 n. 10 (3d Cir.), *cert. denied,* 510 U.S. 865, 114 S.Ct. 186, 126 L.Ed.2d 145 (1993). While there are no reported opinions involving associational discrimination claims under PHRA, the statute has the same because of "such" individual's race language as Title VII and the court believes such a claim would be addressed by the state courts in a manner consistent with Title VII jurisprudence. *See* 43 P.S. § 955(a). Moreover, the parties have agreed that the parallel Title VII and PHRA claims should be governed by the same standards and resolved in tandem.[12]

E. *Breach of Contract*

***9** The letter agreement of June 15, 1995 was expressly "subject to the written concurrence of [TAUP]." The signature line for TAUP President Arthur Hochner is blank and there is no evidence or suggestion of written concurrence in any form by anyone authorized to act for TAUP. In the absence of such expressly required condition, there was no effective written agreement. *See InfoComp, Inc. v. Electra Products, Inc.,* 109 F.3d 902, 905-06 (3d Cir.1997); *Franklin Interiors v. Wall of Fame Management Co.,* 510 Pa. 597, 511 A.2d 761, 763 (Pa.1986). *See also Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Board,* 559 Pa. 56, 739 A.2d 133, 137 (Pa.1999) (noting contract would not exist in absence of signature parties intended to require).

Plaintiff is thus free to argue than an oral contract existed based on the various representations and subsequent performance of the parties. *See InfoComp,* 109 F.3d at 907; *Franklin Interiors,* 511 A.2d at 762. The terms of the ineffective written agreement may still be evidence of the parties' intent. *See InfoComp.,* 109 F.3d at 907.

Defendant maintains that the existence and terms of an oral agreement must be proven by clear and precise evidence. Defendant relies on *Feret v. First Union Corp.,* 1999 WL 80374 (E.D.Pa. Jan. 25, 1999) in which the court did so state. *See id.* at *15. The Court in *Feret* cites to other district court cases which in turn cite back successively to the others and ultimately to *Browne v. Maxfield,* 663 F.Supp. 1193, 1197 (E.D.Pa.1987). *See,* e.g., *Martin v. Safeguard Scientifics, Inc.,* 17 F.Supp.2d 357, 368 (E.D.Pa.1998); *Gorwara v. AEL Inc.,* 784 F.Supp. 239, 242 (E.D.Pa.1992). None of these cases, however, cite to any opinion of a Pennsylvania court holding that a heightened standard applies to proof of oral contracts generally. Although defendant's contention regarding the burden of proof is unchallenged by plaintiff, the court believes that an employment related oral contract may be established by a preponderance of the evidence. *See* Robert *Billet Promotions, Inc. v. IMI*

Cornelius, Inc., 1998 WL 721081, *13 (E.D.Pa. Oct. 14, 1998) (holding oral contract must be proved by preponderance of evidence and rejecting contention clear and convincing evidence is required); *Steelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc.,* 862 F.Supp. 1361, 1365 n. 6 (E.D.Pa.1994), *aff'd in part and vacated in part on other grounds,* 63 F.3d 1267 (3d Cir.1995), *cert. denied,* 516 U.S. 1172, 116 S.Ct. 1264, 134 L.Ed.2d 212 (1996); *Pinizzotto v. Parsons Brinkerhoff Quade & Douglas,* 697 F.Supp. 886, 888 (E.D.Pa.1988) (rejecting higher standard of proof and upholding finding of oral contract from preponderance of evidence).

Moreover, plaintiff's testimony of his conversation with the Provost, if credited, followed by the letter of June 15, 1995 and the conduct of the parties would be sufficient to prove by clear and precise evidence an oral agreement including a promise of a de novo tenure review in a process reviewed for fairness by the President.[13] In assessing whether plaintiff has presented competent evidence sufficient to sustain his claim of breach of this agreement, the court applies a preponderance of the evidence standard.

***10** Plaintiff does not appear seriously to question that he received a "new" or "de novo review." In any event, it is clear from the record that he did. De novo means anew, without deference to any prior determination. Plaintiff's application for tenure was addressed anew without consideration of the earlier conclusions. Dr. Devinney confirmed that she took "most seriously that this is a review de novo." Plaintiff was permitted to present further and current matters pertaining to the pertinent areas of scholarship, teaching and service. New evaluations of plaintiff's publications were utilized. Evaluations from the prior review which included negative comments were not resubmitted. New peer reviews of teaching and new student course evaluations were utilized. The participants in the process presented new Recommendation Sheets with new commentary and analysis.[14]

The essence of plaintiff's allegation of unfairness is that the Department Personnel Committee, which included Drs. Kleis, Mall, Noris and Thomas, should have been excluded and that its participation tainted the process. Assuming that Drs. Kleis, Mall, Noris and Thomas were antagonistic toward plaintiff, the competent evidence of record simply does not support plaintiff's supposition of taint. Others in the process were aware of plaintiff's expressed concern about these four colleagues and of the rancorous history of the Department. The College of Arts and Sciences Tenure Committee expressly noted in its evaluation that in response to plaintiff's concern and "political divisions in his department," it was scrupulous in its effort to be fair. The independent Faculty Senate Personnel Committee reviewed and rejected plaintiff's claim that the second review process was unfair.

Moreover, there is no competent evidence that President Liacouris did not keep the promise to review the process upon completion to ensure it had been fair. In his letter of April 1, 1997 to plaintiff, President Liacouris states that he carefully considered plaintiff's complaint regarding the fairness of the process and concurred in the conclusion of the Faculty Senate Personnel Committee. Temple did not agree to ensure a tenure review process accepted as fair by plaintiff.

V. *Conclusion*

There is no competent evidence of record that plaintiff was denied tenure because of his race or the interracial nature of any relationship or association. One cannot reasonably find from the competent evidence of record that plaintiff was an indirect unintended victim of racial discrimination against Dr. Roget or that plaintiff's denial of tenure was proximately caused by the failure of Dr. Roget to obtain reappointment as Chair. There is no competent evidence of record that plaintiff engaged in protected activity under Title VII, let alone that he was denied tenure for doing so. Plaintiff has failed to sustain his Title VII and PHRA claims.

One cannot reasonably find from the competent evidence of record that plaintiff was denied a new or de novo tenure review. One cannot reasonably find from the competent evidence of record that President Liacouris failed to review the process after completion for fairness. What evidence on the point which has been presented shows is that President Liacouris, and others, carefully considered plaintiff's detailed critique of the review process and concluded it had been fair. Temple did not agree to a process deemed fair by plaintiff. Plaintiff has failed to sustain his claim for breach of contract.

***11** Temple is entitled to summary judgment. Its motion will be granted. An appropriate order will be entered.

ORDER

AND NOW, this day of October, 2001, upon consideration of defendant's Motion for Summary Judgment and plaintiff's response thereto, consistent with the accompanying memorandum, IT IS HEREBY ORDERED that said Motion is GRANTED and accordingly JUDGMENT is ENTERED in the above action for defendant Temple University.

All Citations

Not Reported in F.Supp.2d, 2001 WL 1231746

Footnotes

1 Dr. Thomas was on a committee of three professors which had "enthusiastically" recommended that Dr. Roget be hired as an associate professor seven years earlier.

2 Dr. Ress, however, has not confirmed plaintiff's suggestion that she left Temple because she felt she would be denied tenure. She states in her letter that she "resigned for personal reasons." She also attributed the animosity surrounding the election for Chair not to racism but to "the political situation in the Department."

3 Plaintiff has not averred that he had announced his voting intention to others.

4 Dr. Sellin testified that he considered himself one of Dr. Roget's "best friends" when he became Chair but that he was a "poor chair" and "demonstrated poor managerial skills, particularly with regard to the ability to relate to tenured faculty members of the Department."

5 Dr. Yates testified that "I think if I remember correctly, Dr. Zielonka said that he had some concerns about his tenure process because of his support of Dr. Roget." Dr. Yates understood from plaintiff that "there was animus in the department" because he had supported Dr. Roget for Chair but it was "not necessarily based on race." Plaintiff "didn't elaborate" on the matter further during his interview.

6 Insofar as the Court in *Johnson* suggests that in an associational discrimination case the race of the minority individual is "imputed" to the plaintiff, the court cannot agree. The essence of the claim is that but for the interracial nature of his association, the plaintiff would not have been discriminated against. In *Johnson,* an African American plaintiff alleged that he was terminated from his employment for advocating enforcement of procedures to prevent discrimination in employment and pay against minorities and women. He had not framed his claim as one of associational discrimination, but rather claimed "protected status" under Title VII "as a person who advocates on behalf of women and minorities" and alleged he was terminated for such advocacy. *See Johnson v. University of Cincinnati,* 1997 U.S. Dist. LEXIS 23768, *26-27 (S.D.Ohio Dec. 18, 1997). While citing to several associational discrimination cases, the appellate court seems to have accepted and acted on this theory. *See Johnson,* 215 F.3d at 577 (plaintiff's "advocacy of hiring practices that do not discriminate" is "protected conduct under Title VII" for which he may not be "discriminated or retaliated against").

7 Plaintiff has not proffered and the courts have not articulated elements of a prima facie case specifically for claims of associational discrimination. Plaintiff correctly states that the traditional *McDonnell Douglas* formulation is not intended to be rigid or ritualistic, but rather a method for evaluating evidence which must be adapted to particular claims and circumstances. *See Waldron v. SL Industries, Inc.,* 56 F.3d 491, 494 n. 3 (3d Cir.1995); *Massarsky v. General Motors Corp.,* 706 F.2d 111, 118 n. 13 (3d Cir.1983). Plaintiff, however, then proceeds to assert only that a "prima facie case would require a showing that Dr. Roget was a member of a protected class" and that plaintiff was injured "from unlawful discrimination against Dr. Roget." This is not correct. It is not necessary to show that the person with whom a plaintiff associates is a member of a protected class per se, but only of a race different than that of the plaintiff. Although it may be instructive and is the major thrust of plaintiff's presentation, it is unnecessary for a plaintiff to show any discrimination against the person with whom he is associated. The essence of the claim is discrimination against a plaintiff "because his race was different from the race of the people he associated with." *Reiter,* 618 F.Supp. at 1460. Any formulation of a prima facie case of associational discrimination logically would have to include at least a modicum of evidence of a causal link between the adverse action complained of and the interracial nature of the relationship or association in question. *See,* e.g., *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 306 (3d Cir.1999) (prima facie case of disability discrimination includes showing of "adverse employment action as a result of discrimination" prohibited by ADA); *Waldron,* 56 F.3d at 494 (prima facie Title VII case includes evidence of termination in circumstances supporting inference of discrimination made unlawful by Title VII); *Nelson v. Upsala College,* 51 F.3d 383, 386 (3d Cir.1995) (prima facie case of retaliation includes evidence of causal link between engagement in protected activity and adverse employment action).

8 Plaintiff was a witness in the internal investigation, however, there is no competent evidence that plaintiff conveyed to those investigating that Dr. Roget was discriminated against because of race. Moreover, there is no evidence that other members of the

Department or any decisionmakers were aware of what plaintiff told interviewers during the investigation.

9 The only evidence of race based animus against Dr. Roget is the suggestion of a colleague that he consider a position at Howard University rather than run for Chair and, if admissible, the opinion of Dr. Yates that Dr. Roget's race was probably a factor in his inability to perform well as Chair. The remark about Howard is ambiguous. Howard is a traditionally black university. It also appears that Howard had in fact recently posted a position in Dr. Roget's field and it is far from clear that the same suggestion would not have been made with regard to such a current posting of any university. The totality of evidence otherwise strongly suggests that, in the words of the Committee of Inquiry, plaintiff's department was plagued by "rancor, resentment and old grudges" resulting from petty political concerns and not racism. In any event, the court assumes for purposes of addressing the instant motion that one could find on the present record that Dr. Roget was a victim of racial discrimination.

10 Plaintiff first suggested the possibility of a retaliation claim in his response to defendant's motion to dismiss. The court then noted that it was not clear beyond doubt from the face of the pleadings that plaintiff would be unable to produce evidence which could entitle him to relief on this theory. At the dismissal stage, the test is whether a plaintiff has pled facts which may entitle him to any relief. Once discovery proceeds and by the summary judgment stage, a defendant is entitled to know precisely what claims and theories a plaintiff is pursuing.

11 Temple's internal investigation was not related to any EEOC charge, investigation or proceeding. Dr. Roget never filed a formal complaint with the EEOC. He does indicate that he informally conferred with an EEOC counselor. This, however, was in 1995. The Yates report was completed on May 16, 1994 and the Committee of Inquiry report was completed on December 12, 1994.

12 In his brief plaintiff states "Dr. Zielonka agrees with Temple that the analysis required for adjudicating his claims under the PHRA is identical to a Title VII inquiry."

13 Defendant has not argued a lack of consideration, and the court will assume for purposes of adjudicating the instant motion that there was consideration although it is not altogether clear what benefit was conferred upon Temple or what detriment resulted to plaintiff. Temple received another year of plaintiff's services at the going rate of pay, but this does not appear to have been intended for its benefit. Plaintiff agreed not to claim automatic entitlement to tenure based on the extended years of employment granted to him. This appears to be Temple unilaterally offering to grant plaintiff a benefit on condition he not seek to use it against the University. Plaintiff arguably gave up an opportunity to pursue a grievance over the denial of tenure, but there is no indication TAUP would have agreed to file a grievance. The court will also assume that a promise of fairness is sufficiently definite and specific to be enforced, although what is fair is often subjective. *See Engstrom v. John Nuveen & Co.,* 668 F.Supp. 953, 962 (E.D.Pa.1987) (promise of "excellent treatment" insufficiently definite or specific to be enforced).

14 An ultimate decision itself to grant or deny academic tenure is inherently "judgmental and subject." *Fields v. Clark University,* 966 F.2d 49, 54 (1st Cir.1992). It is often a decision to "prune the ranks-sometimes ruthlessly" of those with "satisfactory performance" in favor of those of "superior achievement." *Kuhn v. Ball State University,* 78 F.3d 330, 331 (7th Cir.1996).

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