



U.S. Equal Employment Opportunity Commission

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## Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination

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### Overview

The Commission adopted its current Strategic Enforcement Plan (SEP) in December of 2012. The SEP includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as a top Commission enforcement priority.

Consistent with this priority, the Commission's General Counsel formed an LGBT working group that provides advice and input to the Agency's litigators on developing litigation-related vehicles. This work group also coordinates internal initiatives and policies, trains internal staff, and conducts outreach with external stakeholders.

In addition, Agency litigators have filed lawsuits and amicus curiae briefs in various courts addressing a multitude of LGBT discrimination-related issues. These include:

### Litigation

#### *Pending Cases*

- ***EEOC v. Bojangles Restaurants, Inc.***, (E.D. N.C., Civ. No. 5:16-cv-00654-BO, filed July 6, 2016). The EEOC sued Bojangles Restaurants, Inc., a North Carolina corporation operating a chain of fast food restaurants, alleging that it discriminated against charging party, Jonathan Wolfe, a transgender woman, by subjecting her to a hostile work environment because of her gender identity in violation of Title VII. Specifically, the EEOC alleges that Wolfe was repeatedly subjected to offensive comments about her gender identity and appearance, in particular belittling comments by managers demanding that Wolfe engage in behavior and grooming practices that are stereotypically male. The EEOC is seeking injunctive relief to prohibit Bojangles Restaurants from engaging in unlawful sex discrimination in the future, as well as backpay, compensatory damages, and punitive damages for Wolfe.
- ***EEOC v. Scott Medical Health Center, P.C.***, (W.D. Pa., Civ. No. 2:16-cv-00225-CB, filed March 1, 2016). The EEOC sued Scott Medical Health Center, P.C., a provider of pain management and weight loss services, alleging that it discriminated against charging party Dale Baxley on the basis of sex in violation of Title VII when it subjected him to harassment because of his sexual orientation and/or because he did not conform to the employer's gender-based expectations, preferences, or stereotypes. The Commission further alleges that the defendant failed to take action to stop the harassment after Baxley complained, resulting in his constructive discharge. According to the EEOC's lawsuit, Baxley's immediate supervisor knew that Baxley was gay and frequently assailed him with highly offensive anti-gay epithets, and other vulgar epithets based on sex stereotypes. When Baxley complained about the harassment to the medical director, the medical director took no corrective action. After two to three more weeks of continued harassment, Baxley resigned to avoid being subjected to the highly offensive conduct. The EEOC is seeking injunctive relief to prohibit Scott Medical Health Center, P.C. from engaging in unlawful sex discrimination in the future, as well as backpay, compensatory damages, and punitive damages for Baxley.
- ***EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*** (E.D. Mich., Civ. No. 2:14-cv-13710-SFC-DRG, filed Sept. 25, 2014). The EEOC sued Detroit-based R.G. & G.R. Harris Funeral Homes Inc., alleging that it discriminated based on sex by firing a funeral director/embalmer because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations,

preferences, or stereotypes in violation of Title VII. The Commission alleges that Amiee Stephens had been employed by Harris as a funeral Director/Embalmer since October 2007 and had always adequately performed the duties of that position. In 2013, she gave Harris a letter explaining she was undergoing a gender transition from male to female, and would soon start to present (e.g., dress) in appropriate business attire at work, consistent with her gender identity as a woman. Two weeks later, Harris's owner fired Stephens, telling her that what she was "proposing to do" was unacceptable. Defendant filed a motion to dismiss the complaint on November 19, 2014. The EEOC opposed the motion on December 10, 2014. On April 23, 2015, the court denied defendant's motion to dismiss. The court acknowledged that "even though transgendered/transsexual status is currently not a protected class under Title VII, Title VII nevertheless 'protects transsexuals from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.'" *Id.* at 8. The court concluded that the EEOC had sufficiently pled a sex-stereotyping gender-discrimination claim under Title VII because the Commission alleged that Stephen's failure to conform to sex stereotypes was the driving force behind the funeral home's decision to fire Stephens. *Id.* at 14.

- ***Broussard v. First Loan Tower LLC*** (E.D. La., Civ. No. 2:15-cv-01161-CJB-SS) (court granted EEOC's Motion to intervene on September 17, 2015). Plaintiff Tristan Broussard filed this Title VII suit against his former employer, First Loan Tower LLC, alleging he was fired on the basis of gender identity in violation of Title VII. Broussard was a manager-trainee for defendant. While completing employment paperwork, he was required to produce his driver's license as a valid form of identification. A manager questioned why the license listed his sex as "F" and Broussard explained he is a transgender man. Several days later, First Tower's Vice President informed Broussard that he must dress and act as a female in the workplace because it was confusing to customers. As a condition of employment, First Tower required him to sign a statement agreeing to act and be treated as a female rather than as a male while working for First Tower Loan. Broussard refused, and First Tower fired him.

Broussard's complaint alleges that First Tower Loan's decided to terminate him because he is transgender and because of his inability to conform to First Tower Loan's stereotypical expectations of gender. He further alleges that defendant's requirements that he should agree to be treated as female, including dress and conduct, violates Title VII's prohibition on employment discrimination because of sex. Broussard first filed charges with the EEOC. The Commission investigated the discrimination charged and issued a notice of right to sue. In September 2015, the court granted the EEOC's motion to intervene. The Commission's lawsuit seeks injunctive relief to prohibit First Tower Loan from engaging in unlawful sex discrimination in the future, as well as lost wages, compensatory and punitive damage for Broussard.

On December 10, 2015, the court issued an order staying the EEOC's suit pending private arbitration between Broussard and the defendant. On January 7, 2016, the Commission filed a motion to reconsider that order staying the EEOC's claims. This motion is pending before the court.

## *Resolved Cases*

- ***EEOC v. Pallet Companies d/b/a IFCO Sys. North Am., Inc.*** (hereinafter "IFCO"), (D. Md., Civ. No. 1:16-cv-00595-CCB, filed Mar. 1, 2016, settled June 28, 2016). The EEOC sued IFCO, a provider of reusable plastic containers, alleging that it discriminated against charging party, Yolanda Boone on the basis of sex by terminating her for complaining about harassment. The EEOC alleged that Boone, a lesbian woman, was harassed because of her sexual orientation and/or her non-conformity with the employer's gender-based expectations, preferences, or stereotypes in violation of Title VII. The EEOC further alleged that Boone's supervisor harassed her by repeatedly making comments, sometimes accompanied by sexually suggestive gestures, about her sexual orientation and nonconformity with stereotypical female gender norms. A few days after Boone complained to management and contacted IFCO's employee complaint hotline, IFCO retaliated against her by terminating her employment. As part of the settlement agreement, IFCO agreed to pay \$202,200 in damages (\$182,200 for Boone and \$20,000 to the Human Rights Campaign Foundation). The two year consent decree also enjoins IFCO from engaging in sex discrimination or retaliation in the future and requires IFCO to retain an expert on sexual orientation, gender identity, and transgender training to assist in developing a training program for IFCO's staff on LGBT workplace issues, among other injunctive relief.
- ***EEOC v. Deluxe Financial Services Corp.***, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled January 20, 2016). The EEOC sued Deluxe Financial Services Corporation, a check-printing and financial services corporation, alleging that after charging party, Britney Austin, began to present at work as a woman and informed her supervisors that she was transgender, Deluxe refused to let her use the women's restroom in violation of Title VII. The Commission further alleged that supervisors and coworkers subjected her to a hostile work environment, including hurtful epithets and intentionally using the wrong gender pronouns to refer to her. As part of a settlement agreement, Deluxe agreed to pay \$115,000 in damages. Furthermore, a three-year consent decree provides that Deluxe will not make exclusions in their healthcare benefits plan for

medically necessary care based on transgender status, will revise employment policies including a commitment to preventing unlawful sex discrimination, and will provide employee training explaining that unlawful sex discrimination includes discrimination based on sex-stereotypes, gender-identity, and transgender status.

- **EEOC v. Lakeland Eye Clinic, P.A.** (M.D. Fla., Civ. No. 8:14-cv-2421-T35 AEP, filed Sept. 25, 2014, settled April 9, 2015). The EEOC sued Lakeland Eye Clinic, an organization of health care professionals, alleging that it discriminated based on sex by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes in violation of Title VII. According to the EEOC's lawsuit, the defendant's employee had performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her. In April 2015, Defendant agreed to settle the case by entering into a two year consent decree which includes injunctive relief and \$150,000 in monetary damages.

## Appellate Cases

- **EEOC v. Boh Bros. Constr. Co. LLC** (5th Cir. 11-30770). The Commission won a jury verdict in the amount of \$451,000 in this Title VII enforcement action with evidence showing that Chuck Wolfe, the supervisor of an all-male construction crew, harassed Kerry Woods, one of his subordinates, and created a hostile work environment. The district court subsequently reduced the verdict to \$301,000 because of statutory limits and also provided injunctive relief to prevent future discrimination. A panel of the Fifth Circuit reversed the jury verdict, and the EEOC sought rehearing en banc. In September 2013, a 10-6 majority of the Court of Appeals upheld the jury verdict except for the punitive damages award.

The Appellate Court held that a plaintiff alleging same-sex harassment can show that the harassment occurred because of sex by showing that it was motivated by the harasser's subjective perception that the victim failed to conform to gender stereotypes. The Court agreed with the Commission that this rule follows from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). The Court ruled that the focus is on the "harasser's subjective perception of the victim" and even an employer's "wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim" since "[w]e do not require a plaintiff to prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective truth." The Court then ruled that the Commission had offered sufficient evidence to sustain the jury's verdict that Wolfe harassed Woods because of sex (here, because Wolfe viewed Woods as "not manly enough"), and that Wolfe's harassment of Woods was sufficiently severe or pervasive to create a hostile environment. See 732 F.3d 444 (5th Cir. 2013) (en banc).

## Amicus Briefs

### Transgender Status & Gender-Identity

- **Dawson v. H & H Electric, Inc.** (E.D. Ark. No. 4:14cv00583 SWW) (amicus brief filed June 26, 2015). Plaintiff filed this Title VII suit against her employer, alleging discrimination on the basis of her transgender status. At the time she was hired, plaintiff used her birth name and presented as a male. After a gender dysphoria diagnosis, plaintiff began transitioning from male to female and legally changed her name. Plaintiff repeatedly asked to use her legal name at work and was denied. Following a series of discriminatory behavior from H & H's vice president, he ultimately fired plaintiff stating, "you do great work, but you are too much of a distraction." H & H moved for summary judgment, arguing that transgender status is not a cognizable claim under Title VII.

In an amicus curiae brief, the EEOC argued *Price Waterhouse* makes clear that transgender discrimination is cognizable as discrimination because of sex under Title VII. The Commission noted that numerous federal district courts have concluded that transgender discrimination is cognizable under Title VII. Additionally, the Commission argued that the defendant's reliance on the rationale in *Sommers* and *Ulane* is misplaced because the Supreme Court rejected the rationale in those cases. The Commission further argued that the Supreme Court in *Oncale* explicitly rejected the idea that Title VII only proscribes types of discrimination specifically contemplated by Congress. Furthermore, Congressional inaction does not exclude the plaintiff's claim under Title VII. Accordingly, the plain language of Title VII prohibits discrimination based on transgender status, and the court should hold that transgender discrimination is cognizable as sex discrimination under Title VII.

On September 15, 2015, the District Court denied H & H's motion for summary judgment. The court found that plaintiff pled facts sufficient to state a sufficient claim that H & H discriminated against her because of her sex in violation of Title VII. Notably, the court did not specifically address the Commission's argument. Instead, it based the analysis on gender non-conforming behavior, rather than status as a transgender individual. The court concluded that plaintiff provided ample evidence from which a reasonable juror could find that she was terminated because of her sex. The plaintiff carried her burden to show that H & H's proffered reason was pretext for sex discrimination.

- ***Eure v. Sage Corp.***, (5th Cir. No. 14-51311) (amicus brief filed April 22, 2015). Plaintiff, a transgender individual, alleged that defendant violated Title VII by discriminating against him because of his sex/gender. Plaintiff stated that the defendant reduced his work hours because he is transgender. Further, plaintiff alleged that defendant cut his supervisor's pay as retaliation for hiring him. Plaintiff and his supervisor resigned as a result of defendant's conduct. Plaintiff appealed the district court's grant of summary judgment in favor of defendant. In granting summary judgment, the district court asserted that plaintiff presented evidence specifically on status as a transgender person, and not in terms related to conformance with gender stereotypes. The district court held that failure to present evidence showing that the discrimination was motivated by plaintiff's failure to act as a stereotypical woman fails to establish a cognizable gender stereotyping claim and cannot succeed in showing that the discrimination was "because of sex" under Title VII.

In an amicus brief, the EEOC argued that the 5<sup>th</sup> Circuit should reverse the grant of summary judgment because the district court incorrectly interpreted the scope of Title VII's protections against discrimination "because of...sex." The Commission explained that a transgender plaintiff may state a claim for discrimination because of sex, if the defendant's action was motivated by the plaintiff's nonconformance with a sex stereotype or norm. The Commission further argued that a plaintiff asserting transgender discrimination need not provide specific evidence of gender stereotyping because "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual." Additionally, the EEOC argued that the evidence presents a genuine dispute of fact, from which a reasonable jury could infer that defendant discriminated against the plaintiff because of his sex.

On August 26, 2015, the EEOC requested the circuit court to allow it to participate in oral arguments on behalf of the plaintiff. On September 17, 2015, the plaintiff withdrew his appeal.

- ***Jamal v. Saks & Co.*** (S.D. Tex. No. 4:14-cv-02782) (amicus brief submitted with motion for leave to file Jan. 22, 2015). Plaintiff, a transgender individual, alleged that defendant violated Title VII by harassing and discharging her because of her sex/gender. Plaintiff alleged that managers and co-workers referred to her using male pronouns, despite her requests to use female pronouns. Further, plaintiff alleged that management told her to change her appearance to a more masculine one, not to wear makeup or feminine clothing, and to separate her home life from her work life. She filed an EEOC charge and was fired ten days later. Defendant filed a motion to dismiss arguing that Title VII does not protect "transsexuals." Defendant further argued that plaintiff failed to comply with the administrative prerequisites to suit because her EEOC charge described her as a male yet her complaint used the pronoun "her." Finally, defendant argued that plaintiff could not state a claim for retaliation because she had no reasonable belief that the conduct she complained of violated Title VII.

In its proposed amicus brief, the EEOC argued that the district court should deny defendant's motion to dismiss and hold that discrimination against an individual because she is transgender violates Title VII. As it did in its amicus brief in *Lewis* (above), the EEOC explained that courts recognize that Title VII's prohibition on sex discrimination encompasses discrimination based on the failure to conform to gender expectations. Thus, discrimination against a transgender individual for non-conformance with gender norms is sex discrimination. Further, the EEOC contended, specific evidence of gender stereotyping is not necessary because consideration of gender stereotypes is inherently part of what drives transgender discrimination. Additionally, the EEOC argued, the district court should hold that plaintiff's EEOC charge satisfied the administrative prerequisite to a suit alleging transgender discrimination, as the discrimination alleged in the charge is the same discrimination as that alleged in the complaint. Finally, the EEOC urged the district court to hold that plaintiff's act of filing a charge with the EEOC and opposing conduct that a reasonable person would believe is unlawful is protected activity for purposes of a retaliation claim. The EEOC explained that Title VII's "participation clause" protects an individual from retaliation for filing a charge, without limitation (e.g., a showing that plaintiff's charge was filed "in good faith"). Plaintiff's "opposition clause" claim also should proceed because she could have a good faith, reasonable belief that transgender-based discrimination violates Title VII.

On January 26, 2015, Saks withdrew its motion to dismiss plaintiff's claim. On March 4, 2015, the parties filed a stipulation agreeing to dismiss the action with prejudice.

- **Lewis v. Highpoint Reg'l Health Sys.** (E.D.N.C. No. 5:13-cv-838-BO) (amicus brief filed Oct. 30, 2014). Plaintiff, a transgender female, alleges that defendant violated Title VII by failing to hire her in 2013 because of her sex/gender. Plaintiff alleges that during the interview process, she was interviewed by a group of peer nurses who ridiculed her regarding her sex. Defendant informed plaintiff that it was looking for someone with more experience. Although plaintiff had the qualifications for the position, she was not hired; rather, she alleges that an individual with less experience was hired for the position. Defendant filed a motion to dismiss arguing that Title VII does not prohibit "sexual orientation" discrimination.

In an amicus brief, the EEOC argued the district court should deny defendant's motion to dismiss and hold that failing to hire an individual because she is transgender violates Title VII. The EEOC explained that sexual orientation is a different concept altogether than transgender status or gender identity. The EEOC further explained that courts have recognized that Title VII's prohibition on sex discrimination encompasses discrimination based on the failure to conform to gender expectations. Thus, discrimination against a transgender individual for non-conformance with gender norms is sex discrimination. Further, the EEOC argued, specific evidence of gender stereotyping is not necessary because consideration of gender stereotypes is inherently part of what drives transgender discrimination.

On October 30, the district court granted the EEOC's motion for leave to file its amicus brief. The court noted that "[i]t is clear that this Court's ruling will implicate the interpretation and effective enforcement of Title VII, and therefore the EEOC has an interest in this matter. Further, as plaintiff is *pro se*, and the EEOC is the expert agency on the matter of Title VII, the EEOC's amicus brief will be of aid to the Court in its decisional process."

On January 15, 2015, the district court denied defendant's motion to dismiss (as well as plaintiff's motion for summary judgment). The court noted that "[n]owhere in her complaint does plaintiff allege discrimination on the basis of sexual orientation." Further, the court concluded, "neither the Supreme Court nor the Fourth Circuit's Title VII jurisprudence has addressed transgender[] status, which, as amicus EEOC points out, is different than sexual orientation." The Court declined to resolve whether "plaintiff's complaint fits within a gender-stereotyping framework" since "the issue was not raised in defendant's motion to dismiss . . . ." See 2015 WL 221615 (E.D.N.C. Jan. 15, 2015).

- **Chavez v. Credit Nation Auto Sales, LLC** (N.D. Ga. No. 1:13-cv-0312) (amicus brief filed June 5, 2014). Plaintiff worked as a mechanic for Credit Nation, a company that sells and repairs cars. In 2009, she informed her employer that she intended to transition from male to female. Some months later, she was terminated after a supervisor photographed her sleeping in a car during working hours. She then filed suit under Title VII, alleging that she was fired because of her gender. In moving for summary judgment, defendant argued that the plaintiff did not exhaust her administrative remedies because she failed to file a timely charge. The Commission filed an amicus curiae brief in the district court, limited to this issue. The Commission argued that the charge-filing limitations period should be tolled because before finally accepting the plaintiff's charge, EEOC had twice refused on the ground that "transgendered persons cannot file claims for sex discrimination under Title VII."

In ruling on the summary judgment motion, the district court rejected defendant's exhaustion argument. Without mentioning EEOC's brief, the court noted that the "limitations period under Title VII may be equitably tolled if the EEOC misleads a complainant regarding the nature of his or her rights." In the court's view that is what happened here. The court stated that "Title VII prohibits employers from discriminating against employees for failing to act and appear according to expectations defined by gender." (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989); *Glenn v. Brumby*, 683 F.3d 1312, 1316 (11th Cir. 2011)). The court reasoned that because the "very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior, . . . [d]iscrimination against a transgender individual because of the gender nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." (citing *Brumby*, 683 F.3d at 1317) (adding that the "majority of federal courts" agree). Accordingly, the court concluded, "the EEOC misled [p]laintiff when it told [her] that she could not bring a claim for gender discrimination under Title VII," and, so, limitations on the claim "is required to be equitably tolled." The court went on to grant defendant's motion, however, finding no issue of fact as to whether the proffered reason for her termination - sleeping on the job - was pretextual. See 2014 WL 4585452 (N.D. Ga. Sept. 12, 2014).

On January 14th, 2016, the Eleventh Circuit issued a decision affirming the district court's ruling in favor of summary judgment for defendant on the issue of pretext, but reversed on the issues of (1) defendant's discriminatory intent, and (2) whether or not gender bias was a motivating factor in the termination decision, finding that plaintiff did present triable issues of fact. See *Chavez v. Credit Nation Auto Sales, LLC*, 2016 WL 158820 (11th Cir. Jan. 14, 2016).

The 11<sup>th</sup> Circuit held that plaintiff did not create a jury issue as to pretext because (a) she admitted to sleeping in her car on the clock, and (b) the defendant had previously fired a different employee for this same conduct. However, as to the termination, the court ruled that plaintiff presented sufficient evidence to demonstrate that gender bias was a motivating factor, including the skeptical attitude of her supervisor regarding her transition, instructions about how she was to dress at work and to and from work, her employer's concern about her gender expression as being disruptive, a bypassed disciplinary process that was supposed to precede any termination action, etc. See *Chavez*, 2016 WL 158820 at \*6-9. The court stated that this issue should have survived summary judgment because it is enough that the plaintiff shows that "discriminatory animus existed and was at least 'a motivating factor.'" See *id.* at \*8.

- ***Pacheco v. Freedom Buick GMC Truck, Inc.*** (W.D. Tex. Civ. No. 7:10-cv-00116) (amicus brief submitted as attachment with motion for leave to file Oct. 17, 2011; district court denied motion for leave to file Nov. 1, 2011). Plaintiff Alex Pacheco filed suit alleging that defendant Freedom Buick GMC Truck, Inc. discharged her because she is transgender and failed to conform to male gender stereotypes, and that this is discrimination because of sex in violation of Title VII. Freedom moved for summary judgment. The Commission sought to file an amicus curiae brief in which the Commission took the position that, as a matter of law, disparate treatment of an employee because she is transgender is discrimination because of sex. The amicus brief argued that this is so for at least two reasons: (1) under the reasoning of the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), discrimination against a transgender individual because he or she does not conform to gender norms or stereotypes is discrimination "because of . . . sex" under Title VII; and (2) following the reasoning in *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), discrimination because an individual intends to change, is changing, or has changed his or her sex, is likewise prohibited by Title VII. The amicus brief also took the position that there were genuine issues of material fact that should preclude summary judgment on Pacheco's claim.

The Commission filed a motion for leave to file this amicus brief in the district court, and attached a copy of the brief to this motion. Freedom opposed the EEOC's motion for leave to file. The district court entered an order denying Freedom's motion for summary judgment. Later, the district court entered a separate order denying the EEOC's motion for leave to file its amicus brief. However, the district court did not strike the EEOC's motion for leave to file (or the proposed amicus brief, which was attached to the EEOC's motion) from the public docket sheet for the case.

## Sexual Orientation

- ***Christiansen v. Omnicom Group, Inc.*** (2nd Cir. No. 16-748) (amicus brief filed June 28, 2016). Plaintiff-Appellant Matthew Christiansen brought a Title VII lawsuit against Omnicom, alleging that his employer subjected him to a sexually hostile work environment by harassing him because he was gay and perceived as unmanly. The District Court for the Southern District of New York dismissed Christiansen's complaint for failure to state a claim. The court stated that it was "constrained" by binding circuit precedent, specifically *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005). However, the court noted that the "broader legal landscape" has changed greatly since *Simonton*. Moreover, the court stated that drawing a line between discrimination based on sexual orientation and that based on sexual stereotyping was difficult. Yet, given that *Simonton* is still good law, the court was obligated to adhere to precedent.

Plaintiff appealed the decision to the Second Circuit. The EEOC filed an *amicus curie* brief in support of Christiansen, arguing that sexual orientation discrimination is cognizable as sex discrimination under Title VII. The EEOC outlined three theories under which Christiansen's claim can proceed. First, Title VII's prohibition on discrimination based on sex stereotypes extends to discrimination based on sexual orientation. Second, Title VII's prohibition on discrimination based on interracial associations extends to discrimination based on same-sex associations. Third, Title VII's prohibition on sex discrimination extends to discrimination based on sexual orientation.



Additionally, the EEOC argued that the Second Circuit should reconsider *Simonton* for two reasons: the legal underpinnings for the decision have shifted, and the rule that Title VII does not prohibit discrimination based on sexual orientation is outdated.

- ***Evans v. Georgia Regional Hospital***(11th Cir. No. 15-15234) (amicus brief filed January 11, 2016). Plaintiff-Appellant Jameka Evans brought a Title VII lawsuit against her employer Georgia Regional Hospital claiming that she was discriminated and retaliated against because of her sexual orientation and her nonconformity to gender-based stereotypes. The district court for the Southern District of Georgia dismissed Evans' complaint for failure to state a claim on which relief may be granted. The district court concurred with the magistrate judge's report and recommendation, which stated that sexual orientation discrimination is not protected under Title VII. The magistrate judge explained that Title VII "was not intended to cover discrimination against homosexuals." Additionally, the magistrate judge said that Evans could not state a claim for retaliation because she could not have had a reasonable belief that she was opposing conduct made unlawful by Title VII. The district court conducted a de novo review of the record and, without any discussion, adopted the magistrate judge's report and recommendation and dismissed the complaint with prejudice.

In its amicus brief, the EEOC argued that Title VII's prohibition on sex discrimination encompasses a prohibition on discrimination because of sexual orientation. This is a question of first impression in the Eleventh Circuit. Consistent with *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015), the EEOC argued that sexual orientation discrimination is covered under Title VII because Title VII prohibits discrimination based on sex stereotypes, prohibits discrimination based on association, and prohibits employers from considering a plaintiff's sex.

The EEOC also argued that the district court erred in dismissing Evans's retaliation claim. First, the EEOC argued that in complaining about discrimination based on sexual orientation, Evans opposed conduct that was actually made unlawful by Title VII. Second, the EEOC argued that even if the Eleventh Circuit disagrees that sexual orientation discrimination is covered by Title VII, the statute shields not only employees who oppose acts that are illegal under the statute, but also employees who object in good faith to practices that they reasonably believe are illegal, even if they are not. Based on the Eleventh Circuit's precedent holding that Title VII prohibits discrimination against transgender individuals, coupled with the EEOC's well-publicized position that Title VII prohibits discrimination based on sexual orientation, Evans's belief that she was opposing unlawful conduct was objectively reasonable.

- ***Burrows v. The College of Central Florida***(11th Cir. No. 15-14554) (amicus brief filed January 6, 2016). Plaintiff-Appellant Barbara Burrows filed a Title VII suit against her employer, The College of Central Florida, alleging that because of her sexual orientation, her employer did not renew her contract as an administrator and later eliminated her position as a professor as part of a series of cutbacks. The district court for the Middle District of Florida held that Burrow's claim of gender discrimination failed because it constituted a "repackaged" claim of sexual orientation discrimination, which is not prohibited under Title VII. Plaintiff appealed the decision to the Eleventh Circuit. The EEOC filed an amicus brief in support of Burrows, arguing that the district court's interpretation of Title VII is contrary to a growing consensus that sexual orientation discrimination claims involve (1) illegal sex stereotyping, (2) illegal gender-based associational discrimination, and (3) impermissible consideration of a plaintiff's sex. See Brief for U.S. Equal Employment Opportunity Commission as Amicus Curiae Supporting Appellant, *Burrows v. The College of Central Fla.*, at \*7-8 (11th Cir. No. 15-14554). The Commission cited to the Eleventh circuit decision holding that non-conformity to gender stereotypes is a form of sex discrimination. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). Thus, discrimination based on sexual orientation cannot be separated from an individual's sex, because the root of discrimination is that the individual discriminated against is not adhering to heterosexual concepts of behavior normative of each sex.

The EEOC further argued that discrimination based on sexual orientation also constitutes associational discrimination, because the individual is treated differently based on the sex of those with whom they associate. Race-based association discrimination has been prohibited under Title VII, and so it follows that this prohibition should apply to claims of sex-based association discrimination. Finally, the EEOC reiterated that the broad concept of sexual orientation cannot be understood without reference to an individual's sex; thus, any discrimination based on sexual orientation necessarily involves the impermissible consideration of an employee's sex.

- ***Muhammad v. Caterpillar Inc.*** (7th Cir. No. 12-173) (amicus brief filed October 9, 2014). Plaintiff-Appellant Warnether Muhammad filed this Title VII suit against his employer Caterpillar, Inc., alleging that his co-workers

created a sex- and race-based hostile work environment. He also alleged that his supervisor unlawfully retaliated by suspending him after he complained about the harassment. The alleged harassment included anti-gay comments and conduct. The district court granted the defendant's motion for summary judgment on all claims. A panel of the U.S. Court of Appeals for the Seventh Circuit affirmed, in part on the grounds that Title VII does not prohibit sexual-orientation harassment, or retaliation against individuals who oppose it in the workplace. Muhammad petitioned for panel rehearing.

In an amicus curiae brief supporting the petition, the Commission argued that part of the panel's ruling rests on the sweeping proposition that Title VII's prohibition on discrimination "because of sex" does not prohibit discrimination based on sexual orientation. Yet an increasing number of courts, as well as the EEOC (the primary Agency charged with enforcing the statute), have recognized that intentional discrimination based on an individual's sexual orientation can be proved to be grounded in sex-based norms, preferences, expectations, or stereotypes. For example, in *Terveer v. Billington*, 2014 WL 1280301 (D.D.C. Mar. 31, 2014), the U.S. District Court for the District of Columbia held that a plaintiff's allegation that discrimination occurred because of "plaintiff's status as a homosexual" - without more - plausibly suggested the discrimination was based on gender stereotypes, and thus stated a Title VII sex-discrimination claim. Accordingly, Title VII's anti-retaliation rule protects individuals who in good faith oppose sexual-orientation discrimination in the workplace. The EEOC argued that for these reasons, the panel should modify the categorical statements to the contrary in its opinion, overruling the Circuit's precedent if necessary.

On October 16, 2014, the panel denied the petition for rehearing. But in a significant step, the panel issued an amended opinion removing its original rulings regarding the scope of Title VII coverage. The opinion no longer repeats or relies upon statements from prior Seventh Circuit decisions that Title VII does not prohibit sexual-orientation discrimination or retaliation for related opposition conduct. The revised panel opinion affirms the district court's summary-judgment for Caterpillar on other grounds, on which the Commission took no position. See 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014).