No. 18-30136

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BONNIE M. O'DANIEL,

Plaintiff-Appellant

v.

INDUSTRIAL SERVICE SOLUTIONS; PLANT-N-POWER SERVICES, INCORPORATED; TEX SIMONEAUX, JR.; CINDY HUBER,

Defendants-Appellees

On Appeal from the United States District Court
For the Middle District of Louisiana
No. 3:17-CV-190, Hon. Richard L. Bourgeois, Jr.

BRIEF OF U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

The U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") is charged by Congress with administering, interpreting, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Title VII's antiretaliation provision prohibits discrimination against an employee who has "opposed any ... unlawful employment practice." 42 U.S.C. § 2000e-3(a). This appeal raises the question of whether an employee who has objected to sexual orientation discrimination could reasonably believe that he or she has opposed conduct that is unlawful under Title VII.

This question is important to the Commission's enforcement of Title VII. Since October 2011, the Commission has accepted and investigated charges alleging discrimination based on sexual orientation. In 2015, the EEOC issued an administrative decision concluding that Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015). Accordingly, the Commission respectfully offers its views to the Court. *See* Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE[1]

Whether an employee who has objected to sexual orientation discrimination could reasonably believe that he or she has opposed conduct that is unlawful under Title VII.

STATEMENT OF THE CASE

I. Factual Background[2]

Plaintiff Bonnie O'Daniel began working in human resources at Defendant Plant-N-Power Services, Inc.'s Louisiana location in 2013. ROA.105-07. Cynthia Huber was president of Plant-N-Power and Tex Simoneaux was a vice president. ROA.105. Defendant Industrial Service Solutions is Plant-N-Power's parent company. *Id.*

On April 22, 2016, O'Daniel made a Facebook post that she described as follows: "The post included a photo array of a man (or possibly a transgender woman) wearing a dress at Target[, a retail store]. The post expressed [O'Daniel's] views on an ongoing public debate, specifically her discontent with the possibility of this individual

[1] The Commission takes no position on the merits of this appeal.

[2] The Factual Background is based on O'Daniel's allegations in her Amended Complaint and her proposed Second Amended Complaint (SAC).

being permitted to use a women's bathroom and/or dressing room at the same time as [O'Daniel's] young daughters." Second Am. Compl. (SAC), District Ct. Docket No. 29-2 at 2-3; *see also* ROA.106.[3] Simoneaux informed O'Daniel that Huber was personally offended by the post. ROA.106.[4]

A couple of days later, O'Daniel received a text message from Huber telling her to be available for a telephone conference the next day. *Id.* O'Daniel sent Simoneaux a text message stating that she felt as though she was being discriminated against because she was heterosexual. *Id.* On the telephone conference, Huber and an attorney from Industrial Service discussed the Facebook post with O'Daniel.

[3] O'Daniel's proposed SAC was docketed as Docket Number 29-2 in the district court, as an attachment to O'Daniel's motion for leave to file a second amended complaint. *See* ROA.5 (docket entry). The document is not accessible via the district court's electronic docket due to an apparent technical problem. As a result, the SAC was not included in this Court's electronic Record on Appeal. However, the Commission believes that the SAC is properly part of the record on appeal and the district court relied on the SAC in dismissing O'Daniel's suit. *See, e.g.*, ROA.238-39, 243-44.

[4] O'Daniel's post stated: "So meet ROBERTa! Shopping in the women's department for a swimsuit at the BR Target. For all of you people who say you don't care what bathroom it's using, you're full of shit!! Let this try to walk in the women's bathroom while my daughters are in there. #hellwillfreezeoverfirst." ROA.160. The post included two photographs that appear to depict a shopper at a Target store. *Id.*

ROA.107. O'Daniel was directed to refrain from recruiting via social media and was required to take a sensitivity training. *Id.*

The following day, O'Daniel received a letter of reprimand from Huber regarding the Facebook post. ROA.108. The letter also identified several performance issues, but, according to O'Daniel, Huber had never previously informed O'Daniel of those performance issues. *Id.*

A few days later, Huber sent O'Daniel three dates for the sensitivity training. ROA.109. O'Daniel could not attend the first date due to her heavy workload, she missed another due to a family emergency, and the third was booked when O'Daniel returned to work after the emergency. ROA.109-10. O'Daniel took an alternative class through a different training provider at her own expense and Industrial Service's CEO, Leo Vandershuur, told O'Daniel she could take the next available class with the original training provider. ROA.110-11. Then, in late May, Simoneaux alerted O'Daniel that Huber had asked him to send O'Daniel an email acknowledging that she had missed all three training dates. ROA.111. At the end of May, O'Daniel learned of several new rules implemented by Huber: among other things, O'Daniel was required to use a time clock, her schedule was changed to conflict with

her children's schedules, and she lost the ability to work flexible hours. *Id.*

O'Daniel complained of her treatment to Simoneaux. ROA.111. In late May 2016, O'Daniel sent Simoneaux a text message stating that Huber's conduct amounted to harassment based on sex. SAC, District Ct. Docket No. 29-2 at 4; *see also* O'Daniel Br. 17. Later, O'Daniel informed Simoneaux that she would be filing a formal complaint with human resources. ROA.111. O'Daniel asserted that "[t]he formal complaint was to include, among other things, allegations that … Huber discriminated against [O'Daniel] on the basis of her sex, as a married, heterosexual female." ROA.244 (quoting SAC, District Ct. Docket No. 29-2 at 5). Simoneaux directed O'Daniel not to file the complaint and said he would contact human resources. ROA.112.

In early June 2016, Simoneaux sent O'Daniel an email criticizing her performance. ROA.112. Shortly afterwards, Simoneaux suggested to O'Daniel that layoffs and outsourcing might occur in the Louisiana office. ROA.113. Around the same time, O'Daniel "informed the Defendants in writing that she was being subjected to discrimination

and harassment, and planned to file a formal complaint so alleging." SAC, District Ct. Docket No. 29-2 at 7; *see also* O'Daniel Br. 17.

On June 17, 2016, Simoneaux informed O'Daniel that the following week would be her last week at Plant-N-Power. ROA.113. Simoneaux told O'Daniel that Huber wanted to fire O'Daniel but that Huber had decided to lay her off with other employees instead. *Id.* Then, on June 21, 2016, Simoneaux terminated O'Daniel. ROA.114. O'Daniel was the only person terminated that day. *Id.* After her termination, O'Daniel received a notice stating that she was "fired due to unsatisfactory job performance." *Id.*

O'Daniel filed an EEOC charge alleging retaliation. ROA.161. She filed this lawsuit pro se, asserting Title VII retaliation and other claims, and later obtained representation. ROA.5, 8-10.

II. District Court Decision

The district court granted the defendants' Rule 12(b)(6) motion to dismiss with prejudice and denied O'Daniel's motion to file a Second Amended Complaint (SAC). ROA.246. The district court dismissed O'Daniel's retaliation claim because, in the district court's view, O'Daniel could not establish a reasonable belief that she opposed

unlawful activity. ROA.245. As the district court explained, Title VII prohibits retaliation against employees who oppose employment practices that are unlawful under the statute. ROA.243 (citing 42 U.S.C. § 2000e-3(a)). The district court emphasized that, to bring a retaliation claim premised on opposition, a plaintiff must reasonably believe that the opposed conduct violates Title VII. ROA.243-44.

The district court noted that O'Daniel's proposed SAC asserted that O'Daniel "inform[ed] Defendants that she would file a formal complaint regarding alleged discrimination ... 'on the basis of her sex, as a married, heterosexual female.'" ROA.244 (quoting SAC, District Ct. Docket No. 29-2 at 5). However, the district court held: "It is unreasonable for [O'Daniel] to believe that discrimination based on her status as a married, heterosexual female constitutes discrimination on the basis of her sex. It is similarly unreasonable for [O'Daniel] to believe that [opposing] discrimination based on sexual orientation constitutes protected activity." ROA.245.

In support of this conclusion, the district court stated that "[t]he Fifth Circuit has specifically held that discharge based upon sexual orientation is not prohibited by Title VII." ROA.244 (citing *Blum v. Gulf*

Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)). The district court added that the Eleventh Circuit "recently held that *Blum* is binding precedent, and that nearly all Circuits have held that sexual orientation discrimination is not actionable under Title VII." ROA.244 (citing *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017)). The district court also quoted *Stewart v. BrownGreer, P.L.C.*, 655 F. App'x 1029, 1031 n.3 (5th Cir. 2016) (quoting *Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015)), for the proposition that "Title VII in plain terms does not cover 'sexual orientation.'" ROA.244.

The district court recognized that "discrimination on the basis of gender-non-conformity[] ... may constitute sex-based discrimination," but concluded that O'Daniel did not allege that she "faced discrimination on the basis of gender non-conformity." ROA.245. Finally, the district court opined that, "even if Title VII did offer protection regarding sexual orientation discrimination," O'Daniel did not adequately allege facts supporting a reasonable belief that she was subject to discrimination "on the basis of her being a 'married, heterosexual female.'" ROA.245. As the district court noted, O'Daniel asserted that Huber was a "member of the LGBT community" in

alleging that Huber objected to the post. ROA.234. However, the district court concluded, "[a]t most, [O'Daniel] alleges that ... Huber was offended by [O'Daniel's] Facebook post ... and ultimately directed [O'Daniel's] termination" for that reason. ROA.245. The district court also emphasized that Huber was aware that O'Daniel was heterosexual before O'Daniel made the Facebook post. ROA.245.

ARGUMENT

An employee may establish protected activity under Title VII's antiretaliation provision based on opposition to sexual orientation discrimination, including discrimination based on heterosexual orientation.

Title VII prohibits retaliation against an employee who "has opposed any practice made an unlawful employment practice" under the statute. 42 U.S.C. § 2000e-3(a). This Court interprets Title VII to provide that an employee engages in protected opposition only if he or she reasonably believed the opposed conduct was unlawful. *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996). An employee could reasonably believe that sexual orientation discrimination is unlawful under Title VII given recent appellate decisions reaching this conclusion, the EEOC's view that Title VII prohibits sexual orientation

discrimination, and the rapidly changing legal landscape with respect to sexual orientation discrimination in other contexts. At a minimum, sexual orientation discrimination falls within a gray area of potentially unlawful conduct, particularly from the perspective of a layperson who may not appreciate legal nuances concerning the meaning of statutory terms. Moreover, although this Court need not reach the question of whether Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination, this Circuit's precedents do not preclude an employee from reasonably believing that such discrimination is unlawful.

A. In recent years, numerous courts and the Commission have held that Title VII's prohibition on discrimination because of sex encompasses sexual orientation discrimination.

The law on sexual orientation discrimination in employment "has recently evolved," as district courts within this Circuit have emphasized. *Carr v. Humble Indep. Sch. Dist.*, No. 4:17-CV-0773, 2018 WL 1064583, at *5 (S.D. Tex. Feb. 23, 2018); *see also Wittmer v. Phillips 66 Co.*, No. H-17-2188, 2018 WL 1626366, at *5 (S.D. Tex. Apr. 4, 2018) (characterizing as "persuasive" recent decisions that "recognize

transgender status and [sexual] orientation as protected classes under Title VII"). The Commission's views are part of this shifting legal landscape. In *Baldwin v. Foxx*, the Commission held that "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." 2015 WL 4397641, at *5. Since *Baldwin*, the Second and Seventh Circuits have issued en banc decisions agreeing with the EEOC. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107-08 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). Numerous district courts share this view. *See, e.g.*, *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839-40 (W.D. Pa. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (Title IX); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222-25 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002).

Courts and the Commission have relied on three rationales for recognizing that Title VII's prohibition on sex discrimination

encompasses sexual orientation discrimination.[5] First, discrimination based on sexual orientation necessarily requires impermissible consideration of a plaintiff's sex, which Title VII prohibits. *Zarda*, 883 F.3d at 113; *id.* at 135 (Cabranes, J., concurring); *id.* at 136 (Lohier, J., concurring); *Hively*, 853 F.3d at 358-59 (Flaum, J., concurring); *Baldwin*, 2015 WL 4397641, at *5. A comparative approach reinforces the conclusion that sexual orientation discrimination is discrimination because of sex; for example, where an employer treats a female employee married to a woman differently from a male employee married to a woman, that is "paradigmatic sex discrimination." *Hively*, 853 F.3d at 345; *see also Zarda*, 883 F.3d at 116 (plurality opinion).

Second, sexual orientation discrimination involves gender-based associational discrimination. Courts have routinely found that race-based associational discrimination violates Title VII; relying on that principle, courts have recently concluded that associational discrimination claims are equally valid in the sex discrimination

[5] The Commission is not urging this Court to adopt the reasoning of *Zarda*, *Hively*, *Baldwin*, and other decisions because this Court need not resolve the question of whether Title VII prohibits sexual orientation discrimination to conclude that an employee who has objected to sexual orientation discrimination could reasonably believe that he or she has opposed unlawful activity.

context. *Zarda*, 883 F.3d at 124-25; *id.* at 136 (Sack, J. concurring); *Hively*, 853 F.3d at 349; *id.* at 359 (Flaum, J., concurring); *see also Baldwin*, 2015 WL 4397641, at *6-7. Third, sexual orientation discrimination may involve sex stereotyping, which would constitute sex discrimination under Title VII according to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See Zarda*, 883 F.3d at 119-23 (plurality opinion); *Baldwin*, 2015 WL 4397641, at *7-8.

As the Seventh Circuit emphasized in *Hively*, decisions holding that Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination "must be understood against the backdrop of [recent] Supreme Court[] decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation." *Hively*, 853 F.3d at 349-50. In recent years, the Supreme Court has issued landmark decisions endorsing the right of gay and lesbian individuals to be free from discrimination, including *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-08 (2015), and *United States v. Windsor*, 570 U.S. 744, 769-75 (2013), which held that laws refusing to permit or recognize same-sex marriages are invalid. The Supreme Court is now considering a high-profile First Amendment case

implicating the rights of gay and lesbian citizens with respect to public accommodations. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (granting certiorari on the question of whether a bakery may refuse to make a wedding cake for a same-sex couple for religious reasons, where state law prohibits sexual orientation discrimination). In summary, the relevant landscape includes not only courts' and the EEOC's determinations that Title VII prohibits sexual orientation discrimination in employment, but also developments in other areas of the law amounting to "something of a revolution in American law respecting gender and sex." *Zarda*, 883 F.3d at 135 (Sack, J., concurring).

B. Based on recent legal developments, an employee could reasonably conclude that the law prohibits sexual orientation discrimination in employment.

Given the legal developments described above, an employee who objects to sexual orientation discrimination may act on a reasonable belief that the opposed conduct violates Title VII. To establish opposition, a plaintiff must demonstrate "at least a 'reasonable belief' that the practices [] [she] opposed were unlawful." *Long*, 88 F.3d at 304. "[T]he reasonable belief standard recognizes there is some zone of

conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII"; that is, there is a "gray area between actual violation[s] and perceived violation[s]." *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 242 (5th Cir. 2016). Accordingly, "[w]hether the plaintiff was mistaken about the alleged discrimination is not fatal to the claim." *Brandon*, 808 F.3d at 270. Here, therefore, the question is not whether sexual orientation discrimination violates the law in this Circuit. Instead, the central issue is whether an employee could reasonably believe that sexual orientation discrimination is unlawful.

In light of out-of-circuit decisions holding sexual orientation discrimination actionable under Title VII, an employee could reasonably conclude that Title VII's prohibition against sex discrimination encompasses discriminatory conduct based on sexual orientation. That two courts of appeals have recognized sexual orientation discrimination is enough to support "at least a 'reasonable belief' that ... [such discrimination is] unlawful." *Long*, 88 F.3d at 304. The present legal debate and national discussion over the scope of civil rights for gay and lesbian citizens also bears on the question of whether an employee could reasonably believe that the law prohibits sexual orientation

discrimination in employment. *See Zarda*, 883 F.3d at 135 (Sack, J., concurring); *Hively*, 853 F.3d at 349-50. Given this national debate and the well-publicized Supreme Court decisions recognizing civil rights for gay and lesbian individuals, *e.g.*, *Obergefell*, 135 S. Ct. at 2604-08; *Windsor*, 570 U.S. at 769-75, an employee could readily conclude that sexual orientation discrimination in employment is unlawful.

An employee could also reasonably believe that sexual orientation discrimination is unlawful under Title VII because the Commission, the primary agency charged with enforcement of Title VII, has adopted that interpretation. The EEOC has stated that position in *Baldwin* and other Commission decisions and has engaged in enforcement efforts to address sexual orientation discrimination. The Commission's website, on which the public relies for information about Title VII, identifies sexual orientation discrimination as a subset of sex discrimination. *See Sex-Based Discrimination*, https://www.eeoc.gov/laws/types/sex.cfm (last visited May 1, 2018). The Commission's website also includes resources focused on sexual orientation discrimination. *See, e.g.*, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt

_workers.cfm (last visited May 1, 2018) (listing examples of sexual orientation discrimination including "[d]enying an employee a promotion because he is gay or straight"). And the EEOC routinely processes charges of sexual orientation discrimination. Between January 1, 2013 (when the EEOC began tracking the data), and September 30, 2017, the EEOC received 5,822 charges of sexual orientation discrimination against private sector employers, labor organizations, employment agencies, and state or local government employers; in fiscal year 2017 alone, the EEOC received 1,522 such charges.

The Ninth Circuit has explicitly recognized that Title VII's antiretaliation provision may protect an employee who opposes sexual orientation discrimination. *Dawson v. Entek Int'l*, 630 F.3d 928, 936 (9th Cir. 2011). Several district courts—including courts in circuits with precedent holding that Title VII does not cover sexual orientation discrimination—have also endorsed this idea. *See Swift v. Countrywide Home Loans*, 770 F. Supp. 2d 483, 489 (E.D.N.Y. 2011) (observing, before *Zarda*, that "[t]he fact that Title VII does not protect against sexual orientation discrimination [under then-current Second Circuit

law] does not necessarily negate Plaintiff's good faith belief that he engaged in protected activity when making a complaint of discrimination"); *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 448 (N.D.N.Y. 2002) (same); *see also Bennefield v. Mid-Valley Healthcare*, No. 6:13-cv-00252-MC, 2014 WL 4187529, at *4 (D. Or. Aug. 21, 2014); *Terveer*, 34 F. Supp. 3d at 118; *Centola*, 183 F. Supp. 2d at 412-13.

Protection for opposing sexual orientation discrimination is not limited to jurisdictions that have recognized that Title VII encompasses sexual orientation discrimination. At a minimum, outside those jurisdictions, sexual orientation discrimination falls in a "gray area" or "zone of conduct that falls short of an actual [Title VII] violation." *Rite Way*, 819 F.3d at 242. Alternatively, even if sexual orientation discrimination did not fall within the "zone of [prohibited] conduct," an employee could reasonably believe that it did for the purposes of Title VII's antiretaliation provision. Again, "[w]hether the plaintiff was mistaken about the alleged discrimination is not fatal to the claim." *Brandon*, 808 F.3d at 270. That is, "[a]n erroneous belief that an employer engaged in an unlawful employment practice is reasonable ...

if premised on ... [a] good-faith mistake ... of fact or law." *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

Applying this standard, an employee—typically a layperson without legal expertise—could readily conclude that sexual orientation discrimination in employment violates Title VII, particularly because sexual orientation discrimination law is complex and ever-shifting. As courts have commented (including courts in circuits that have concluded that Title VII does not prohibit sexual orientation discrimination), "the line between sex discrimination and sexual orientation discrimination is difficult to draw." *Zarda*, 883 F.3d at 122 (plurality opinion); *see also, e.g.*, *Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App'x 281, 285 (6th Cir. 2017) (Title IX); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009). If identifying actionable discrimination presents a challenge for courts, then laypersons cannot be expected to master the subtleties of sexual orientation discrimination law. Employees who assert opposition are "not instructed on Title VII law as a jury would be," *Rite Way*, 819 F.3d at 242, and may have "limited knowledge ... about the factual and legal bases of their claim." *Moyo*, 40 F.3d at 985. In general, there is no "reason why such

knowledge should be imputed to non-lawyers." *Martin*, 224 F. Supp. 2d at 448 (explaining that, although then-current Second Circuit law held that "sexual orientation is not protected by Title VII," the record lacked evidence that the plaintiff, "a lay person, was aware of Second Circuit case law").

The same reasoning applies when an employee objects to discrimination based on heterosexual orientation. Courts have held that "sexual orientation discrimination is a form of sex discrimination," *Zarda*, 883 F.3d 100 at 131-32, without limiting that holding to discrimination based on a particular orientation. *See Hively*, 853 F.3d at 351-52 ("We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes."). In *Baldwin*, the Commission explicitly recognized that discriminating against an employee because he or she is heterosexual violates Title VII. *Baldwin*, 2015 WL 4397641, at *5-6. It is true that *Zarda*, *Hively*, and other leading decisions have involved sexual orientation discrimination claims by gay or lesbian employees. But there is no "reason why" employees who are "not instructed on Title VII law"

should be expected to know the precise factual details of opinions recognizing sexual orientation discrimination under Title VII, at least for the purpose of establishing a reasonable belief.

Finally, contrary to the district court's suggestion, *see* ROA.245, an employee need not allege sex stereotyping in a complaint to establish a reasonable belief that he or she has opposed unlawful sexual orientation discrimination. "[H]eightened fact pleading of specifics" is not necessary to survive a Rule 12(b)(6) motion to dismiss, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and mandating that plaintiffs provide examples of stereotyping at the complaint stage—or that plaintiffs plead any particular theory of sexual orientation discrimination—exceeds the requirements of Rule 8(a)(2).

But in any event, as explained *supra* p. 11-12, sex stereotyping is only one rationale that courts and the Commission have adopted in recognizing sexual orientation discrimination. Another rationale is that sexual orientation discrimination necessarily requires consideration of a plaintiff's sex, which contravenes Title VII's rule that "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. *See Zarda*, 883 F.3d at 113; *Baldwin*, 2015 WL 4397641, at *5.

Moreover, an employee could reasonably believe that sexual orientation discrimination is unlawful because it constitutes associational discrimination, i.e., discrimination against an individual because of his or her association with a member of the same (or opposite) sex. *Zarda*, 883 F.3d at 124-25; *Hively*, 853 F.3d at 349; *Baldwin*, 2015 WL 4397641, at *6-7. An employee's assumption that Title VII prohibits associational discrimination related to sexual orientation would be reasonable given that Title VII "treats each of the enumerated categories exactly the same," *Price Waterhouse*, 490 U.S. at 243 n.9, and because courts (including this Court) have routinely found that associational discrimination based on race violates Title VII. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (Fourteenth Amendment; interracial marriage); *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (Title VII; interracial friendship).

C. This Court's precedents do not preclude a reasonable belief that sexual orientation discrimination is unlawful.

The district court rejected the idea that an employee could reasonably believe that sexual orientation discrimination is unlawful on the rationale that "[t]he Fifth Circuit has specifically held that

discharge based upon sexual orientation is not prohibited by Title VII." ROA.244. But a close examination of the decisions the district court cited (*Blum*, *Stewart*, and *Brandon*) shows that this Court's precedents do not preclude a reasonable belief that sexual orientation discrimination is unlawful under Title VII for purposes of Title VII's antiretaliation provision, even if a layperson could be charged with knowing the nuances of circuit law. Of course, because an employee could reasonably form such a belief given recent legal developments, *see supra* p. 14-16, this Court need not reach the question of whether Title VII covers sexual orientation discrimination within this Circuit.

First, although *Blum* stated in dicta that "[d]ischarge for homosexuality is not prohibited by Title VII," *Blum*'s holding centered on the plaintiff's inability to demonstrate pretext. 597 F.2d at 937-38. This Court questioned whether the plaintiff established a prima facie case on his claims that "he was fired because he was Jewish, male, white, and homosexual," but resolved the appeal on the pretext question. *Id.* After concluding that the plaintiff's claims failed at the pretext stage, the panel added that it would "comment briefly on the other issues raised on appeal." *Id.* at 938. Without further discussion,

the panel stated that Title VII did not cover sexual orientation discrimination, citing *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978). *Blum*, 597 F.2d at 938.

To be sure, as the district court observed, ROA.244, in *Evans* the Eleventh Circuit deemed *Blum*'s comment regarding sexual orientation discrimination an "alternative holding" binding on that circuit. *Evans*, 850 F.3d at 1255-56. But *Blum*'s "peripheral" statement is more accurately characterized as dictum because it did not "receive[] the full and careful consideration of the court" and "could have been deleted without seriously impairing the analytical foundations of the holding." *United States v. Segura*, 747 F.3d 323, 328-29 (5th Cir. 2014) (quoting *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004)). No Fifth Circuit case has subsequently cited *Blum* for this proposition.

Next, although *Blum* relied on *Smith*, *Smith* is in tension with decisions of the Supreme Court and this Court issued after *Blum*. *Smith* involved plaintiff's perceived effeminacy rather than his sexual orientation: the court rejected the plaintiff's sex discrimination claim even though the employer concededly refused to hire the plaintiff "because the interviewer considered [the plaintiff] effeminate." 569 F.2d

at 326. Therefore, it is difficult to harmonize *Smith* with the Supreme Court's subsequent decision in *Price Waterhouse*, which held that an employer who bases employment decisions on stereotypical views of how men and women should or should not behave violates Title VII's ban on sex discrimination. 490 U.S. at 248-51; *see also Carr*, 2018 WL 1064583, at *5 (describing how the law on sexual orientation discrimination has "evolved" and noting that, after *Blum*, *Price Waterhouse* recognized that Title VII prohibits discrimination based on sex stereotyping).

Also, applying this Court's decision in *EEOC v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013) (en banc), the *Smith* plaintiff's claim could now prove viable. *Boh Brothers* recognized that "a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes." 731 F.3d at 454. The *Smith* plaintiff's claim that he was denied employment "because he was too womanly," 569 F.2d at 327, would presumably pass muster after *Boh Brothers*, which held that a jury reasonably could have found that a heterosexual construction worker was targeted because he "fell outside of [his supervisor's] manly-man stereotype." 731 F.3d at 453, 458-60.

In addition to *Blum*, the district court quoted *Stewart* for the proposition that "Title VII in plain terms does not cover 'sexual orientation.'" ROA.244 (quoting *Stewart*, 655 F. App'x at 1031 n.3). The "plain terms" language originated in a prior decision, *Brandon*, 808 F.3d at 270 n.2, which involved a retaliation claim predicated on the plaintiff's opposition to discrimination against a transgender employee. *Id.* at 268-69. Both *Stewart* and *Brandon* declined to reach the question of whether an employee could reasonably believe that sexual orientation discrimination is unlawful under Title VII, and this Court affirmed summary judgment for the employer on the employees' retaliation claims for other reasons.

In *Brandon*, the panel assumed that the plaintiff's asserted opposition (objecting to discrimination against a transgender employee) would constitute protected activity and affirmed summary judgment on the rationale that the plaintiff could not establish an adverse action. 808 F.3d at 270-72. In *Stewart*, the plaintiff had complained of conduct that he characterized as sexual orientation-based harassment: a coworker's "comments in a high-pitched voice, using a stereotypical hand gesture" and "coworkers' derogatory comments about 'fat people,'

which [the plaintiff] interpreted as coded statements about homosexuals." *Stewart*, 655 F. App'x at 1030. The panel affirmed summary judgment because "no reasonable person could have believed" "that the actions [the plaintiff reported] constituted a violation of Title VII." *Id.* at 1030-31; *see also id.* at 1032 ("[M]any of the coworkers' statements ... are facially innocuous, and [the plaintiff] has failed to present evidence supporting his interpretation of those statements as discriminatory.").

Although *Brandon* and *Stewart* commented on Title VII's "plain terms," both decisions declined to address the question of whether an employee could reasonably believe that Title VII covers sexual orientation discrimination. In a footnote, *Brandon* stated, "Title VII in plain terms does not cover 'sexual orientation,'" but immediately added, "We do not opine here whether [the plaintiff] correctly surmised that [her fellow employee] may claim some protection under Title VII." 808 F.3d at 270 n.2. *Stewart* echoed *Brandon*'s "plain terms" statement (again, in a footnote), but underscored that the panel would "decline to decide here whether a plaintiff 'may claim some protection under Title VII.'" *Stewart*, 655 F. App'x at 1031 n.3 (quoting *Brandon*, 808 F.3d at

270 n.2). Instead, as described, *Brandon* and *Stewart* affirmed summary judgment on other rationales.

In both cases, the comment about Title VII's "plain terms" "could have been deleted without seriously impairing the analytical foundations of the holding," *Segura*, 747 F.3d at 328-29, given that the panels explicitly stated that they would not reach the issues of whether Title VII protects against sexual orientation discrimination (*Stewart*) or whether an employee could reasonably believe that such protection exists (*Brandon*). *Brandon*'s "plain terms" statement was especially removed from the issues on appeal because the plaintiff's asserted protected activity was opposition to transgender discrimination rather than sexual orientation discrimination. 808 F.3d at 268-69.[6]

Moreover, *Brandon*'s and *Stewart*'s comment about Title VII's "plain terms" would not preclude an employee from reasonably assuming that Title VII prohibits sexual orientation discrimination.

[6] The district court in *Stewart* also did not reach whether Title VII covers sexual orientation discrimination and the defendants did not assert lack of coverage as a basis for affirmance on appeal, so the issue was not briefed on appeal. *See Stewart v. BrownGreer PLC*, No. 14-1980, 2015 WL 6620619 (E.D. La. Oct. 30, 2015); *Stewart v. BrownGreer PLC*, No. 14-1980, 2015 WL 6159127 (E.D. La. Oct. 20, 2015); Brief of Appellee BrownGreer PLC, *Stewart*, 655 F. App'x 1029 (No. 15-31022), 2016 WL 3215387; Brief of Appellee Robert Half Int'l, Inc., *Stewart*, 655 F. App'x 1029 (No. 15-31022), 2016 WL 3215386.

Brandon's and *Stewart*'s reference to the statute's "plain terms" may be read as an unremarkable observation that sexual orientation "is not" "explicitly listed in Title VII as a prohibited basis for employment actions." *Baldwin*, 2015 WL 4397641, at *4; *see also* 42 U.S.C. § 2000e-2(a). As the Supreme Court has recognized, Title VII's prohibition on sex discrimination reaches a broad range of conduct not specified in the statute. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (same-sex harassment); *Price Waterhouse*, 490 U.S. at 250-51 (sex stereotyping); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (hostile work environment). Also, because this Court has endorsed associational discrimination and sex stereotyping as bases for recovery under Title VII, *see Floyd*, 581 F.3d at 249-50 (associational discrimination); *Boh Bros.*, 731 F.3d at 454 (sex stereotyping), an employee could reasonably believe that Title VII prohibits sexual orientation discrimination on those grounds regardless of *Brandon*'s and *Stewart*'s "plain terms" comment. In summary, this Court's decisions in *Brandon*, *Stewart*, *Smith*, and *Blum* do not preclude an employee from reasonably concluding that sexual orientation

discrimination is unlawful under Title VII for the purposes of establishing protected opposition.

CONCLUSION

The Commission urges this Court to determine that an employee who has objected to sexual orientation discrimination could reasonably believe that he or she has opposed conduct that is unlawful under Title VII.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will transmit a Notice of Electronic Filing to all participants in this case, who are all registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7)(B), and Fifth Circuit R. 29.3 & 32.2, because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 5,590 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font in the body and 12-point Century Schoolbook font in the footnotes.

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