Case 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.; AND CINDY HUBER,
Defendants-Appellees

Appeal from the United States District Court
For the Middle District of Louisiana
Civil Case No. 3:17-cv-190-RLB
The Honorable Richard L. Bourgeois, Jr. Presiding

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that these listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome.

1. Bonnie O'Daniel, Appellant
2. Arthur Smith, III, counsel for Appellant
3. Industrial Service Solutions, Appellee
4. Plant-N-Power Services, Inc., Appellee
5. Ted Simoneaux, Jr., Appellee
6. Cindy Huber, Appellee
7. Timothy Scott of Fisher & Phillips, LLP, counsel for Appellee
8. Larry Sorohan of Fisher & Phillips, LLP, counsel for Appellee
9. American Civil Liberties Union Foundation, Inc., non-government amicus curiae
10. American Civil Liberties Union Foundation of Louisiana, Inc., non-government amicus curiae
11. GLBTQ Legal Advocates & Defenders, Inc., non-government amicus curiae
12. Lambda Legal Defense and Education Fund, Inc., non-government amicus curiae
13. National Center for Lesbian Rights, non-government amicus curiae
14. Gregory R. Nevins, counsel for non-government amicus curiae
15. Kenneth Dale Upton, Jr., counsel for non-government amicus curiae

These representations are made so the judges of this court may evaluate possible disqualification or recusal.

/s/Timothy H. Scott
TIMOTHY H. SCOTT

STATEMENT REGARDING ORAL ARGUMENT

The district court dismissed Appellant's claims in connection with Appellees' Motion to Dismiss applying well-settled jurisprudence. Appellant's legal theories do not warrant oral argument. To the extent the Court determines oral argument would help its consideration of the issues on appeal, Appellees will participate.

TABLE OF CONTENTS WITH PAGE REFERENCES, FED. R. APP. P. 28(A)(2)

TABLE OF AUTHORITIES, FED. R. APP. P. 28(A)(3)

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

On April 22, 2016, Bonnie O'Daniel, while employed by ISS as a human resources professional, decided to post an offensive message on her Facebook page both disparaging and threatening a transgender individual she encountered at a Target store. Her inappropriate post was brought to the attention of her supervisors, Cynthia Huber and Tex Simoneaux. According to O'Daniel, her post resulted in formal discipline and ultimately the loss of her job approximately two months later.

In an effort to shoehorn the foregoing alleged facts to somehow create a viable lawsuit, O'Daniel submitted three separate complaints to the district court. Each one was legally deficient and failed to state a valid claim. Nevertheless, she pursues this appeal in the face of well-settled authority in this Circuit.

In essence, O'Daniel's belief is that because Huber is gay, she must have taken greater offense to the post than she would have taken if she were heterosexual. It is through the prism of this conclusory and speculative viewpoint that O'Daniel seeks to establish that she was retaliated against in violation of Title VII and/or that her freedom of expression rights were unlawfully denied by Appellees. As shown below, O'Daniel cannot pursue either of the remaining two claims she seeks to pursue and, therefore, the correctly-decided ruling of the district court should not be disturbed.

JURISDICTIONAL STATEMENT

Appellees agree that the Court has jurisdiction and that O'Daniel filed a timely notice of appeal. Appellees note, however, that O'Daniel's jurisdictional statement purports to base federal question jurisdiction on a claim under 42 U.S.C. § 1983. No such claim has ever been asserted in this litigation, and Appellees assume that this statute was referenced inadvertently. Rather, O'Daniel's attempted federal claim arose under Title VII, 42 U.S.C. § 2000e-(3)(a).

STATEMENT OF THE ISSUES

1. Whether the district court properly held that O'Daniel failed to state a claim for retaliation under Title VII when the only alleged protected activity concerned her alleged complaints about discrimination based on heterosexuality.

2. Whether the district court properly held that O'Daniel failed to state a claim against private actors under the Louisiana Constitution.

3. Whether the district court properly held that the free speech provisions of the Louisiana Constitution do not set forth an exception to the at-will employment doctrine.

4. Whether O'Daniel waived her claims against Simoneaux and Huber and any claim for right to privacy, discrimination based on sex, reverse discrimination based on retaliation, discrimination based on gender, defamation, and intentional infliction of severe emotional distress.

5. Whether the district court properly denied O'Daniel's attempt to file a Second Amended Complaint on futility grounds.

STATEMENT OF THE CASE

Statement of Facts

Appellant Bonnie O'Daniel, who identifies as heterosexual, worked for Appellee Plant-N-Power ("PNP") as the HR Manager/Recruiter in Gonzales, Louisiana starting in 2013.[1] She reported directly to Appellee Tex Simoneaux, Jr. – an owner of PNP.[2] Appellee Cindy Huber was also an owner of PNP and worked in Pasadena, Texas.[3] On December 31, 2015, Appellee Industrial Service Solutions, Inc. ("ISS") acquired PNP and operated it as a separate division, with Huber as its President and Simoneaux as a Vice President.[4]

From February 2013 to April 2016, O'Daniel allegedly performed her job well.[5] Then, on April 22, 2016, she publicly posted a highly offensive image/message on Facebook.[6] As innocuously stated by O'Daniel in her Amended Complaint, on:

> April 22, 2016, Ms. O'Daniel made a Facebook post that ultimately led to her dismissal. The photo was that of a man at Target wearing a dress and noted his ability to use the women's bathroom and/or dressing room with Mrs. O'Daniel's young daughters.[7]

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[1] ROA.105.
[2] ROA.105.
[3] ROA.105.
[4] ROA.105.
[5] ROA.105-06.
[6] ROA.105-06.
[7] ROA.106.

The *actual* language of the post belies this innocuous rendition. In full, 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. #hellwilllfreezeoverfirst.[8]

According to O'Daniel, the post was subsequently "shared" with Simoneaux and Huber through multiple e-mails from others about the post.[9] The First Amended Complaint alleged that Huber, who is gay and senior to O'Daniel in the corporate chain-of-command, took offense to the post and wanted to discharge O'Daniel.[10] It further alleged that O'Daniel was reprimanded, required to undergo sensitivity training, and received additional scrutiny from Huber about issues such as her scheduled hours and ability to work from home.[11] Ultimately, O'Daniel alleged she was discharged and that the true basis underlying her termination was Huber's disapproval of O'Daniel's April 22nd Facebook post.[12] In addition, O'Daniel claimed that, prior to her discharge, she informed Simoneaux that Huber's conduct had reached a "harassing" level and sent a message to him saying she believed she

[8] ROA.160. O'Daniel makes no argument that the actual post was improperly provided to the district court for consideration as it was specifically referenced in all three of the Complaints filed or attempted to be filed by O'Daniel.
[9] ROA.106.
[10] ROA.106-07.
[11] ROA.107-11.
[12] ROA.106.

was being discriminated against "because she was heterosexual."[13] She also alleged she told Simoneaux that she intended to file a formal complaint.[14]

In June 2016, ISS terminated O'Daniel's employment.[15] After her discharge, O'Daniel filed an EEOC Charge.[16] In it, she complained about retaliation only.[17] The EEOC issued a right to sue shortly thereafter.[18]

Statement of Procedure

On March 27, 2017, O'Daniel initially filed this matter *pro se* against Appellees/Defendants PNP, ISS, Simoneaux, and Huber.[19] O'Daniel asserted various claims under inapplicable legal theories, including several claims under California law.[20] Factually, her claims centered on ISS's response to O'Daniel's offensive Facebook post, denigrating a transgender individual in Target.[21] Defendants filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) on July 24, 2017.[22] In response, O'Daniel filed her First Amended Complaint, mooting the Motion to Dismiss.[23] Because the First Amended Complaint continued

[13] ROA.106, 110-12.
[14] ROA.110-12. The proposed Second Amended Complaint attempted to add legally conclusory language on "sex-based harassment."
[15] ROA.105.
[16] ROA.115.
[17] ROA.23, 115.
[18] ROA.24, 115.
[19] ROA.105.
[20] ROA.8-25.
[21] ROA.12.
[22] ROA.65-89.
[23] ROA.130-121, 136-37.

to fail to state a claim, Defendants filed a second Motion to Dismiss on August 28, 2017.[24]

On September 15, 2017, Arthur Smith enrolled as counsel on behalf of O'Daniel.[25] And on October 3, 2017, O'Daniel opposed the Motion to Dismiss, stating she was pursuing three claims: (1) a violation of her right to privacy under the Louisiana Constitution; (2) a violation of her right to expression under the Louisiana Constitution; and (3) retaliation under Title VII.[26]

O'Daniel also moved for Leave to File a Second Amended Complaint, which contained the same three claims.[27] Her Second Amended Complaint substantially mirrored the allegations in her First Amended Complaint. Defendants opposed the Motion for Leave under Rule 15 of the Federal Rules of Civil Procedure and also filed a Reply in support of their Motion to Dismiss on October 23, 2017.[28]

O'Daniel filed a Sur Reply on October 25, 2017.[29] In it, she withdrew her right to privacy claim and limited her argument to two remaining claims: freedom of expression and Title VII retaliation.[30]

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[24] ROA.138-61.
[25] ROA.164-66, 5.
[26] ROA.177-84.
[27] ROA.174-76.
[28] ROA.186-90, 191-202. On October 24, 2017, Defendants moved to correct a deficiency of an over-length brief and was granted such relief. ROA.6, 203-17.
[29] ROA.228-32.
[30] ROA.228.32.

On January 2, 2018, United States Magistrate Judge Richard Bourgeois, Jr.,[31] entered an Order granting the Motion to Dismiss the First Amended Complaint and denying the Motion for Leave to Amend and File the Second Amended Complaint.[32] The district court dismissed all claims in the First Amended Complaint against individual Defendants Simoneaux and Huber, and, as unopposed, the previously-asserted claims for discrimination based on sex, reverse discrimination based on retaliation, discrimination based on gender, defamation, and intentional infliction of severe emotional distress.[33] The district court also recognized that O'Daniel withdrew her claim based on a state constitutional right to privacy.[34]

Next, the district court addressed O'Daniel's two remaining claims and concluded the Title VII retaliation claim failed because O'Daniel's allegations did not constitute protected activity under the law.[35] First, the district court noted that O'Daniel's complaints concerned conduct not prohibited under Title VII, as they were based purely on her heterosexuality. Thus, her alleged belief that she was complaining about conduct that was illegal under Title VII was not objectively reasonable.[36] Second, and alternatively, the district court recognized that neither the

[31] The parties consented to proceed before Magistrate Judge Bourgeois, and the matter was referred by the District Judge on August 15, 2017. ROA.22.
[32] ROA.233-46.
[33] ROA.238-39.
[34] ROA.239.
[35] ROA.243.46.
[36] ROA.244-45.

First Amended Complaint nor the proposed Second Amended Complaint stated sufficient factual allegations of alleged heterosexual bias such that O'Daniel could have formed a reasonable belief that she was complaining about illegal behavior under Title VII. [37]

The district court properly ruled that O'Daniel's freedom of expression claim failed because the alleged state constitutional provision did not apply to actions by private entities.[38] It also recognized there is no applicable exception to Louisiana's settled at-will employment doctrine.[39] Accordingly, the district court ruled that the First Amended Complaint should be dismissed.[40] Because the Second Amended Complaint contained essentially the same facts and legal theories, leave to amend was denied as futile. Judgment was entered on January 2, 2018.[41]

O'Daniel filed her notice of appeal on January 29, 2018.[42]

[37] ROA.245-46.
[38] ROA.239-40.
[39] ROA.240-43.
[40] ROA.246.
[41] ROA.246.
[42] ROA.248.

SUMMARY OF THE ARGUMENT

Although O'Daniel characterizes her actions as "pro-heterosexual conduct," justifying the need for groundbreaking new precedent, both the factual allegations and legal theories are much more mundane and subject to settled Circuit precedent. O'Daniel worked for ISS as a private sector, at-will employee. In 2016, while shopping at Target, O'Daniel, *a human resources professional*, took a picture of a transgender individual and then posted a patently offensive message on her Facebook page, with the photo. O'Daniel's post (1) described the individual as "it" and "this," (2) equated transgender individuals to pedophiles, and (3) potentially threatened transgender individuals seeking to use the women's room with the hashtag "#hellwillfreezeoverfirst."

The district court properly dismissed under Federal Rule of Civil Procedure 12(b)(6). At the outset, O'Daniel's assumption that making disparaging comments about transgender individuals somehow embodies "pro-heterosexual" values is itself offensive. The reckless and inappropriate stereotypes espoused in O'Daniel's post constitute the core of her claims, should not be ignored, and are relevant to this Court's legal analysis.

The district court found that the First Amended Complaint fell short of stating a claim and denied leave to file the Second Amended Complaint on futility grounds. O'Daniel's plea for leniency based on her *pro se* status misreads the lower court's

analysis, which properly evaluated her request and found her Second Amended Complaint, one drafted and submitted by her attorney, also failed to state a claim. Thus, allowing it to be filed would be futile.

In summary, the district court also properly analyzed the purported and proposed claims in the Amended Complaints. Before both the district court and this Court, O'Daniel only asserts arguments advancing her claims for retaliation under Title VII and breach of her free speech rights under the Louisiana Constitution. She waived any argument about the dismissal of her claims against the individuals (Huber and Simoneaux) and any claims for discrimination based on sex, reverse discrimination based on retaliation, discrimination based on gender, defamation, and intentional infliction of emotional distress.

The district court dismissed O'Daniel's Title VII retaliation claim on two independent grounds. First, the law of this Circuit dating back to the 1970's holds that sexual orientation is not a protected classification under Title VII. This Circuit's precedent is directly at odds with O'Daniel's retaliation theory. She asks this Court provide her a remedy because she was terminated after she complained about sexual orientation discrimination, even though this Circuit categorially does not afford a remedy for a termination due to sexual orientation discrimination.

Second, neither the First nor Second Amended Complaints sufficiently allege O'Daniel was either: (1) targeted or (2) reasonably complained about being targeted

based on her *own* heterosexuality. Instead, her allegations do nothing more than stereotype Huber based upon *Huber's* sexual orientation. Asserting no facts showing anti-heterosexual animus, O'Daniel's claim hinges on the conclusion that Huber must have taken offense to O'Daniel's offensive post only *because* Huber is gay. O'Daniel does not focus on her own heterosexual orientation and ignores that her Facebook post was bigoted and unacceptable, regardless of the sexual orientation of the individual creating or viewing it. Under either analysis, O'Daniel's complaints did not objectively constitute reasonable opposition to conduct prohibited by Title VII.

Finally, ignoring the plain text of the Louisiana Constitution, O'Daniel asks this Court to be the first ever to hold that Article I, Section 7 on free speech applies to non-state actors. It does not. Nor, as recognized by the district court's citation to consistently-applied Louisiana state court precedent, does Article I, Section 7 of the Louisiana Constitution provide a valid ground for an exception to the at-will employment doctrine.

The district court properly dismissed the action.

ARGUMENT

A. Standards of Review

1. Motion to Dismiss: *De Novo*

The Court applies *de novo* review to the dismissal under Rule 12(b)(6). *Vaughan v. Anderson Reg'l Med. Ctr.,* 849 F.3d 588, 590 (5th Cir. 2017). When reviewing an order granting a motion to dismiss, this Court must accept the complaint's factual allegations as true, viewing them in a light most favorable to plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009), "[t]o 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." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).

But, "the tenet that a Court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

Plaintiff's First Amended Complaint was filed *pro se.* Although *pro se* complaints are generally held to a less strict standard on review, O'Daniel must nonetheless conform to procedure. *Martin v. Harrison County Jail,* 975 F.2d 192, 193 (5th Cir. 1992). Even for *pro se* plaintiffs, "bald assertions and conclusions of law will not suffice." *See, e.g. Leeds v. Melts,* 85 F.3d 51, 53 (2nd Cir. 1996). "[A] court's duty to liberally construe a plaintiff's complaint in the face of a motion to dismiss is not the equivalent of a duty to rewrite it for her." *Peterson v. Atlanta Hous. Auth.,* 998 F.2d 904, 912 (11th Cir. 1993).

2. Motion for Leave to Amend: *De Novo*

O'Daniel's *pro se* status no longer existed when she filed her opposition to dismissal and sought leave to file a Second Amended Complaint. The Court denied her request for leave to file based on futility.

A motion for leave arises under Federal Rule of Civil Procedure 15(a)(2), which instructs district courts to grant leave to amend "freely … when justice so requires." Fed. R. Civ. P. 15(a)(2). Although Rule 15(a) "evinces a bias in favor of granting leave to amend," a court may nonetheless deny such leave when it finds a "substantial reason" for such denial. *Jones v. Robinson Prop. Grp., L.P.,* 427 F.3d 987, 994 (5th Cir. 2005) (internal quotations and citations omitted). District courts are empowered to deny a motion to amend when an amendment would be futile. *Id.* Futility means that the amended complaint would fail to state a claim upon which

relief could be granted when viewed under Rule 12(b)(6) standards. *Stripling v. Jordon Prod. Co., LLC,* 234 F.3d 863, 872-873 (5th Cir. 2000).

This Court generally reviews the denial of a motion to amend for abuse of discretion. However, where the district court bases its denial of leave to amend solely on futility grounds, *de novo* review applies. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016).

B. The district court applied the proper standard when it denied O'Daniel leave to amend and file the proposed Second Amended Complaint.

In her opening Brief, O'Daniel attempts to blend the standards of review to support her argument that the district court should have given her greater leeway to file her Second Amended Complaint based on her initial *pro se* status. She makes this claim despite her having legal representation when opposing the Motion to Dismiss and crafting the futile Second Amended Complaint and accompanying Motion for Leave to File. Respectfully, once O'Daniel engaged counsel, there was no reason to apply a less rigorous standard when evaluating the motion's potential futility. The district court applied the proper standards in these circumstances.

In addition, O'Daniel misstates the holding of the district court.[43] At no point did the district court indicate that because the First Amended Complaint failed to state a claim, it would not allow further amendment due to futility. Rather, it

[43] Appellant's Brief at 16.

analyzed O'Daniel's only claims that are contained in *both* her First Amended Complaint (as clarified in her Opposition to the Motion to Dismiss) and proposed Second Amended Complaint.

Therefore, the alleged "additional" facts and allegations O'Daniel contends would have been presented in the Second Amended Complaint were considered by the district court when it denied leave to amend.[44] Further, a comparison of the First Amended Complaint and the proposed Second Amended Complaint language cited by O'Daniel in her brief illustrates that they both contain virtually the same allegations. The Second Amended Complaint did not contain any "new" allegations that materially differed from the First Amended Complaint.

The district court applied the proper standards. It also applied them in a proper manner and reached a proper result.

C. The district court properly ruled that O'Daniel failed to state a claim for retaliation as a matter of law under this Circuit's Title VII precedent.

1. O'Daniel did not allege a sex discrimination claim.

As a preliminary matter, O'Daniel appears to claim that the district court erred in considering her Title VII claim as one for retaliation, as opposed to sex discrimination.[45] Yet, she acknowledges she is "not asserting [a] discrimination

[44] This is illustrated by the district court's discussion of the retaliation claim: "Plaintiff does not allege, or propose, any allegations that Defendants terminated her because of her sexual orientation." ROA.245.
[45] Appellant's Brief at 18-20.

claim under Title VII but rather a retaliation claim…"[46] O'Daniel may be arguing the underlying standards for sex discrimination are relevant to her retaliation claim. If so, she is correct. Yet, the district court evaluated those standards in its analysis. To the extent she is now trying to assert a sex discrimination claim, O'Daniel made no such argument to the district court and so she waived it. *See Doe v. MySpace, Inc.,* 528 F.3d 413, 422 (5th Cir. 2008).

Notably, O'Daniel's EEOC Charge, filed after her discharge, identified *only* retaliation as its basis but claimed retaliation for making the offensive Facebook post.[47] As Appellees stated in the district court, even if she had attempted to bring a sex discrimination claim, it would be futile because she did not exhaust her administrative remedies by first making such a claim to the EEOC. *Manning v. Chevron Chem. Co.,* 332 F.3d 874, 879 (5th Cir. 2003) (exhaustion of one type of EEOC claim does not automatically exhaust others).

2. O'Daniel failed to allege she engaged in protected conduct to support her Title VII retaliation claim.

Title VII prohibits an employer from retaliating against an employee "who has opposed any practice made an unlawful employment practice by this subchapter…" 42 U.S.C. § 2000e-3(A). To establish a claim of retaliation, an employee must show she engaged in protected conduct. This can be pleaded in one

[46] Appellant's Brief at 34.
[47] ROA.161.

of two ways. She can show she: (1) opposed any practice made an unlawful employment practice by Title VII (opposition clause); or (2) made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing (participation clause). 42 U.S.C. § 2000e-3. The statute unequivocally requires the protected conduct in opposition concern a matter *prohibited* under the statute. *Id*.

a. O'Daniel's Complaints do not allege facts showing that she engaged in protected conduct under the participation clause.

O'Daniel contends she met the participation clause by filing her EEOC Charge and threatening internally to file a formal complaint. This is incorrect.

Initially, any alleged participation based on her EEOC Charge is irrelevant. While such filing could be considered "participation," O'Daniel's complaints consistently (and correctly) allege that she filed her EEOC Charge *after* her discharge.[48] Thus, as a matter of cause and effect, the subsequent filing of her EEOC Charge is irrelevant to the retaliation analysis as it could not have formed the basis of her alleged protected activity.

Next, regarding her alleged threats to go to the EEOC, O'Daniel misrepresents the substance of her Complaints and her prior argument. Neither the First Amended Complaint nor the proposed Second Amended Complaint, alleged that O'Daniel told Appellees that she intended to file an EEOC Charge. While these allegations are

[48] ROA.114-15, 161.

missing from O'Daniel's Complaints, complaining to one's employer about harassment or even threatening to file a charge falls under the opposition clause – not the participation clause. *Byers v. Dallas Morning News, Inc.,* 209 F.3d 419, 428 (5th Cir. 2000) ("[T]he 'participation clause' is irrelevant because [Plaintiff] did not file a charge with the EEOC until *after* the alleged retaliatory discharge took place."); *E.E.O.C. v. Rite Way Serv., Inc.*, 819 F.3d 235, n. 2 (5th Cir. 2016) ("Every Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause.") (quoting *Townsend v. Benjamin Enters., Inc.,* 679 F.3d 41, 49 (2d Cir.2012)).

The same is true for O'Daniel's arguments before the district court. There, O'Daniel consistently described her actions as "opposition" and not as "participation," stating "Plaintiff has alleged the majority of the 'protected activity' (opposing sex-based discrimination by informing her employer she planned to file a complaint), took place prior to her termination."[49]

Because O'Daniel's retaliation claim rests on the opposition clause alone, she has failed to state a claim based upon the plain and unmistakable language of the statute.

[49] ROA.231.

b. O'Daniel did not allege that she opposed any practice "made unlawful" by Title VII.

The nature of the type of complaint, or opposition activity, allegedly made by O'Daniel is important. O'Daniel's retaliation claim (and as asserted in her proposed Second Amended Complaint) alleges she engaged in protected activity by opposing unlawful practices about sexual orientation discrimination. But, her complaints contain no allegations that she complained about any practice the Fifth Circuit has ever recognized as unlawful under Title VII. That is, O'Daniel did not allege she opposed same-sex harassment, nor did she allege she opposed impermissible sex stereotyping. Rather, O'Daniel alleged that she lodged an internal complaint with her supervisor because O'Daniel believed she was being harassed due to her "heterosexual" orientation.[50] As explained below, these allegations failed to state a claim on two independent grounds.

3. The district court found O'Daniel failed to state a retaliation claim even if Title VII covered sexual orientation.

The arguments of O'Daniel and *amici curiae* focus primarily on two related questions: (1) whether the district court erred in its holding that Title VII does not cover sexual orientation discrimination; and (2) whether O'Daniel's alleged complaint of discrimination because of her heterosexuality is reasonable, given how various other courts and the EEOC have recently interpreted Title VII's coverage.

[50] ROA.106.

Both arguments fail to address the district court's alternative holding that O'Daniel's complaint failed to plead the requisite reasonable belief of discrimination to support a retaliation claim. The district court's ruling is appropriate and conclusive regardless of whether heterosexuality was a protected classification under Title VII. Upholding the decision on this basis pretermits the need to reach the sexual orientation coverage questions.

a. O'Daniel failed to allege a reasonable belief of unlawful discrimination to support a retaliation claim.

An employee alleging protected conduct under the opposition clause must show "a reasonable belief that the employer was engaged in unlawful employment practices." *Byers v. Dallas Morning News, Inc.,* 209 F.3d 419, 428 (5th Cir. 2000)). A plaintiff's complaints must be objectively reasonable for them to constitute protected activity. *Clark County Sch. Dist. v. Breeden*, 532 U.S 268, 271 (2001).

In its decision, the district court concluded, "Plaintiff does not allege, or propose any allegations, indicating that Defendants terminated her because of her sexual orientation. At most, Plaintiff alleges that Ms. Huber was offended by Plaintiff's Facebook post, and ultimately directed Plaintiff's termination."[51]

Having discussed the lack of specific allegations relating to actual discrimination based on her heterosexuality, the district court said, "[a]ccordingly,

[51] ROA.245.

Plaintiff's assertion that she has a claim for retaliation based on unlawful acts regarding her sex or sexual orientation are conclusory and fail to state a claim upon which relief can be granted."[52] Correctly applying *Iqbal/Twombly*, the district court properly concluded that O'Daniel failed to plead facts, as opposed to legally conclusory language, to show a reasonable belief in illegality when she complained of being targeted because she was heterosexual.

This analysis was correct. There is no gender or sexual orientation specific stereotype about employees refraining from disparaging apparent transgender individuals. The offensive nature of the posting is not dependent upon it being made by a male, female, heterosexual, or non-heterosexual individual. O'Daniel's allegations only affirm this point. O'Daniel fails to allege that a non-heterosexual employee was not disciplined/discharged after publicly disparaging a transgender individual. She does not allege any disparaging comments by Huber, or anyone at Appellees' worksite, about O'Daniel's sexual orientation. Instead, O'Daniel alleges she worked well with Huber and had a "great relationship" outside the office prior to O'Daniel's offensive post.[53]

As O'Daniel pleads, the sole change with Huber followed O'Daniel's offensive Facebook post. Or, as put by the district court, "[a]t most, Plaintiff alleges

[52] ROA.246.
[53] ROA.107-08.

that Ms. Huber was offended by Plaintiff's Facebook post, and ultimately directed Plaintiff's termination."[54] There is no possible claim, nor argument, that the Facebook post itself constituted protected conduct for purposes of Title VII retaliation. Consequently, the allegations failed to state a claim.

b. The district court applied the correct pleading standard under *Twombly* and *Iqbal.*

In her sole argument against this portion of the holding,[55] O'Daniel contends that by reciting the elements of a retaliation claim, the district court wrongfully applied the *McDonnell Douglas* test on a motion to dismiss. It did not.

Undoubtedly, the application of a burden-shifting analysis would be improper under *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Yet, it is equally clear that merely recognizing the elements of a claim in conducting a 12(b)(6) analysis does not run afoul of the law. *See, e.g. Body by Cook, Inc. v. State farm Mut. Auto. Ins.,* 869 F.3d 381, 386-87 (5th Cir. 2017); *Breeden*, 532 U.S. at 273. This is particularly true in light of the guidance of *Iqbal/Twombly.*

The *Twombly* Court clarified the relationship between Rule 8(a) and 12(b)(6), explaining that, to survive a motion to dismiss, a complaint must contain "enough

[54] ROA.245.

[55] The ACLU and Lambda Legal appear to agree with this holding. As stated in their summary of argument, "[w]hile those complaints do not support a reasonable belief that the employer's disciplinary actions treated O'Daniel differently because of her sexual orientation, amici express no ultimate opinion about the resolution of the leave to amend issue." Amici Brief by ACLU *et al.* on behalf of Neither Appellant nor Appellees, 18-30136, ECF No. 00514456096 (5th Cir. 5/02/2018) at 4-5.

facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. But "labels and conclusions" or "formulaic recitation of the elements of a cause of action" are insufficient. *Id.* at 555. The Supreme Court expanded on this in *Iqbal*, stating that legally conclusory allegations need not be accepted as true. 556 U.S. at 678.

As explained by this Court, the takeaway from these decisions is that a complaint may satisfy the bare requirements of Rule 8(a) that it inform a defendant of the claim, yet still fail to state a claim under Rule 12(b)(6). *Body by Cook,* 869 F.3d at 386. An examination of the elements of a claim properly inform the analysis. *Id.* at 387 n.1 (collecting cases); *See also, Khalik v. United Air Lines,* 671 F.3d 1188, 1192 (10th Cir. 2012) ("While the 12(b)(6) standard does not require that [a plaintiff] establish a prima facie case in her complaint, the elements of each alleged cause of action help to determine whether [she] has set forth a plausible claim.").

It is difficult to determine, and O'Daniel offers no alternative means on how else a court might evaluate a claim. Nevertheless, the district court did not err, nor did it require O'Daniel to make out a case under *McDonnell Douglas* in its Rule 12(b)(6) analysis.

There is good reason for O'Daniel to assert pleading technicalities alone to attack the district court's alternative rationale. O'Daniel's Amended Complaint (and proposed Second Amended Complaint) does nothing more than stereotype Huber

because of Huber's sexual orientation. She is not alleged to be transgender. But O'Daniel blindly assumes two propositions: (1) that all non-heterosexual employees would take offense to her post; and (2) that no heterosexual person would be upset and offended by her disparaging comments.[56]

An internal complaint of discrimination that relies solely on impermissible stereotypes is not objectively reasonable and cannot support a claim for retaliation. *See, e.g. Armstrong v. K&B La. Corp.,* 488 Fed. Appx. 779, 782 (5th Cir. 2012) (dismissing a race claim on summary judgment due to lack of showing of reasonable belief in protected activity). This ends any need for further analysis under Title VII.

4. The district court also properly recognized that sexual orientation is not covered by Title VII under this Circuit's precedent.

Besides the alternative holding, the district court determined that because discrimination based on sexual orientation, including heterosexuality, is not covered under Title VII, complaints about such discrimination objectively do not constitute opposition to "any practice made an unlawful employment practice by this subchapter…" 42 U.S.C. § 2000e-3(A). The district court – as it must – applied the

[56] In another stereotype, O'Daniel asserts in her offensive post, she "expressed a heterosexual parent's concern about her daughters using the same bathroom and/or dressing room with men at the same time." Appellant's Brief at 11-12. Caring for the well-being of one's children in no way depends on the sexual orientation of a parent. Plainly, the word "heterosexual" bears no relationship to the rest of the sentence just as it did not to any of O'Daniel's alleged complaints of harassment based on the content of the offensive Facebook post.

"plain terms" of Title VII and its retaliation provisions. *Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015).

This Court has repeatedly and consistently held that sexual orientation is not covered by Title VII. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII or section 1981"); *Brandon*, 808 F.3d at 270 n. 2 ("Title VII in plain terms does not cover 'sexual orientation.'"); *Stewart v. Browngreer,* 655 Fed.App'x 1029, 1032 n.3 (5th Cir. 2016) (quoting *Brandon*). Thus, just as someone identifying as homosexual is not covered under this Court's Title VII precedent, so too is O'Daniel not covered due to her identification as heterosexual.

When repeatedly asking the Court to "refer" the matter to an *en banc* panel, O'Daniel implicitly recognizes that Fifth Circuit precedent mandates a finding of no coverage for sexual orientation. O'Daniel properly understands that three-judge panels are required to "abide by a prior Fifth Circuit decision until the decision is overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting *en banc*." *United States v. Kirk,* 528 F.2d 1057, 1063 (5th Cir.1976). The binding force of a prior-panel decision applies "not only [to] the result but also [to] those portions of the opinion necessary to that result." *Gochicoa v. Johnson,* 238 F.3d 278, 286 n. 11 (5th Cir.2000) (quoting *Seminole Tribe v.*

Florida, 517 U.S. 44, 67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)). *En banc* review provides her only means to overturn this precedent.

a. Under Fifth Circuit precedent, Title VII does not prohibit discharge based on sexual orientation.

The legal gymnastics employed by *amici curiae* aside, there should be no question but that *Blum* established that "[d]ischarge for homosexuality is not prohibited by Title VII or section 1981." 597 F.2d at 938. In *Blum,* the plaintiff sued Gulf Oil under Title VII and section 1981 alleging discrimination because he was Jewish, white, male, and homosexual. *Id.* at 937. In affirming the denial of relief, the Fifth Circuit specifically noted that the rejection of claims reaching trial would be upheld because the plaintiff could not show pretext regarding the discharge decision. *Id.* at 938. The Court specifically addressed "other issues raised on appeal." *Id.* at 938. In doing so, it directly decided the issue of Title VII providing no protection based on sexual orientation. The Fifth Circuit did not merely recite superfluous dicta, it directly addressed an issue it identified as properly before it. *Bohannon v. Doe,* 527 Fed.App'x 283, 300 (5th Cir. 2013) ("[D]icta involves the consideration of abstract and hypothetical considerations not before the Court." (internal quotation marks and alterations omitted)).

The novel argument that a direct holding on an issue identified as before the Court constitutes dicta cannot be squared with the treatment received by *Blum* in the courts for almost thirty years. Recently, in *Evans v. Ga. Reg'l Hosp.,* 850 F.3d 1248

(11th Cir. 2016), the Court rejected the exact same argument by the EEOC in attempting to spin *Blum* as dicta on the issue. *Id.* at 1255-56 (noting the *Blum* holding was not dicta and finding it binding even if viewed as alternative holding). Similarly, district courts from each state in this circuit have repeatedly relied on *Blum* as authority on this issue. *See, e.g. Williams v. Waffle House,* 2010 WL 4512819 *3 (M.D. La. Nov. 2, 2010) (collecting cases from the Fifth Circuit and its district courts for the longstanding proposition that sexual orientation is not protected under Title VII); *Bighorn v. Texas Workforce Comm'n,* 2017 WL 5479592 *3 (N.D.Tex. Nov. 15, 2017); *Brown v. Subway Sandwich Shop of Laurel, Inc.*, 2016 WL 3248457 *2 (S.D. Miss. June 13, 2016).

Prior to its more recent attempts to re-write Title VII to provide such protection, the EEOC itself cited *Blum* for the proposition that "[t]he federal courts have clearly expressed their opinion that claims of sex discrimination brought by homosexuals or individuals perceived as homosexual, are not within the purview of Title VII." *Morrison v. Dalton,* EEOC DOC 05930964, 1994 WL 746296 (June 16, 1994); *Murray v. Dept. of Navy,* EEOC DOC 01841838, 1985 WL 690547 (April 4, 1985).

It is well-settled that *Blum* established the law of this Circuit on coverage of sexual orientation under Title VII.

b. The Fifth Circuit precedent correctly reads Title VII as not prohibiting discharge based on sexual orientation.

Historically, the Fifth Circuit did not stand alone in its reading of the Title VII text. While federal courts and this Circuit recognize sexual-stereotyping claims, the federal circuit courts were unanimous that sexual orientation discrimination claims are not actionable under Title VII at the time of O'Daniel's complaints. *Evans,* 850 F.3d at 1256-57 (*citing Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002); *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005). Aside from the recent Second and Seventh Circuits, this view continues.

It should be noted that nothing in the Fifth Circuit's precedent, nor Appellees' argument, should be considered any sort of moral position regarding sexual orientation discrimination.[57] The issue turns on the language in the statute itself. As

[57] Rather, as noted by the *amici*, the only allegations of sexual orientation bias with any support in the Complaints is O'Daniel's own. This bias is reflected by her offensive post concerning transgender individuals and her continued stereotyping of Huber.

stated by *Brandon,* the "plain terms" of the statute fail to provide such protection. It is not a matter for the EEOC, or the courts, to read into the statutory text that which plainly cannot be found. It is a founding principle that an amendment to an existing law (or creation of a new law) is a legislative function. As illustrated by the repeated rejection by Congress to amend Title VII to cover sexual orientation, it simply cannot be argued that such coverage exists under the present state of the law.[58]

In the face of this binding Fifth Circuit precedent and legislative backdrop, the *amici* and O'Daniel characterize their arguments as calling only for interpreting the statutory language prohibiting "sex" discrimination. In doing so, they repeat the arguments relied on by other circuits (ones decided *after* O'Daniel's complaints) in *Hively v. Ivy Tech Cmty. College,* 852 F.3d 339 (7th Cir. 2017) and *Zarda v. Altitude Express, Inc.,* 883 F.3d 100 (2nd Cir. 2018).

In *Hively,* the Seventh Circuit reaches for a statutory construction argument by claiming that the case and sexual orientation discrimination can be viewed as a "tried and true comparative method" under Title VII. 852 F.3d at 345. There, the plaintiff – a woman – alleged she was discriminated against because she married a woman. *Id.* The Seventh Circuit phrased the comparison for coverage as "a situation

[58] Amicus brief by U.S. Dept. of Justice on behalf of United States, 15-3775, ECF No. 417, at Addendum A (2nd Cir. 7/26/2017) (listing over 60 proposed statutory amendments introduced in Congress since 1974).

in which Hively is a man, but everything else stays the same." *Id.* The court then asked if the same adverse action would apply if, as a man, Hively had married with women. *Id.*

The comparison recognized by *Hively*, however, cannot be made logically under the facts pleaded by O'Daniel. Based on her own allegations, had O'Daniel been a man and made the same offensive posting, she would have presumably faced the same alleged adverse actions.[59] This case illustrates that the sweeping holding of "sexual orientation" protection in *Hively* is not statutorily justified on the grounds set forth therein.

Next, the *Hively* and *Zarda* analyses based on associational discrimination fail for similar reasons. The offensive content of O'Daniel's Facebook post does not change based on the sex of the person to whom O'Daniel is attracted. It literally has nothing to do with O'Daniel's heterosexuality. The substance of the post is offensive no matter who made it.

Finally, the alternative basis for the holding in *Zarda* attempts to justify itself statutorily by asserting "sex" forbids all acts based on "traits that are a function of sex..." 883 F.3d at 112. This provides absolutely no meaningful basis to limit Title

[59] Similarly, the related gender stereotyping analysis of *Hively* cannot be applied to O'Daniel's theory. This again illustrates the propriety of the district court's alternative holding. Nothing in complaining about being harassed based on a wildly offensive posting reasonably implicates gender or heterosexuality.

VII and would sweep away decades of precedent in an unintended way. For example, employing this justification, an employer with lifeguards would be prohibited from disciplining a female who went topless on the job. Some might argue that should be the law. If so, however, it is once again Congress' role to make that decision.

Further, as with *Hively,* attempting to square O'Daniel's claim with the reasoning in *Zarda* cannot be done unless the Court accepts a principle that bigotry or, as she puts it, "caring for one's children," are sole traits of heterosexuality. This is unreasonable and wrong. Or, in terms of retaliation, neither assumption could be deemed to support an objectively reasonable complaint.

The attempts by the Seventh Circuit and Second Circuit to frame their holdings in the face of clear statutory text are simply not persuasive, particularly when viewed under the specific facts pleaded by O'Daniel. Rather, they are better seen as examples of "judicial statutes." As acknowledged by Judge Posner in his concurrence in *Hively,*

> 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.

Hively, 853 F.3d at 357.

The Court should decline the request to judicially amend Title VII.

5. Because sexual orientation is not protected under Title VII, neither is complaining about "heterosexual discrimination" protected conduct.

This returns the analysis to O'Daniel's specific retaliation claim. Again, the statute prohibits retaliation against an employee who "has opposed any practice made unlawful employment practice by this subchapter…" 42 U.S.C. § 2000e-3(A). Title VII protects an employee from "retaliation for complaining about the types of discrimination it prohibits." *Miller v. Am. Family Mut. Ins. Co.,* 203 F.3d 997, 1007 (7th Cir. 2000).

This straightforward principle was recognized through the years in directly analogous situations by various circuits. *Gilbert v. Country Music Ass'n,* 432 Fed.Appx. 516, 520 (6th Cir. 2011); *Larson v. United Air Lines*, 482 Fed.App'x 344 (10th Cir. 2012); *Hamm v. Weyauwega Milk Prods., Inc.,* 332 F.3d 1058 (7th Cir. 2000).[60] For example, in *Gilbert,* the Sixth Circuit rejected the Plaintiff's attempt to base a retaliation claim on complaints he made about sexual orientation discrimination. Having found that Title VII did not cover sexual orientation, the Court stated, "[b]ecause the conduct Gilbert opposed was not an 'unlawful employment practice,' … his retaliation claims must also fail." *Gilbert,* 432 Fed.App'x at 520 (internal citations omitted).

[60] *Hamm's* rejection of Title VII protection for sexual orientation was overturned by *Hively.* Yet, the principle that the alleged protected activity must concern an unlawful employment practice stands.

These holdings adhere to the statutory text and in no way conflict with the "objective reasonableness" standard used to evaluate opposition claims. While true that objective reasonableness under Title VII does not require that a complaint ultimately be proven meritorious, it "must still concern a *discriminatory practice* in order to form the basis of a retaliation claim under *anti-discrimination* law." *Guillen v. Calhoun County,* 2012 WL 1802617 at *3 (S.D. Tex. May 16, 2012) (emphasis in original). As put by one court, the reasonable belief inquiry "does not mean that an employee is protected from retaliation when complaining about conduct that is categorically and as a matter of law not an 'unlawful employment practice' under Title VII." *Schwinghammer v. Alto-Shaam, Inc.,* 2010 WL 4973758 * 2 (E.D. Wis. Nov. 30, 2010).

Despite this, O'Daniel and *amici* contend that O'Daniel may somehow have had a reasonable belief about protections for heterosexuality even if discrimination against heterosexuals was not prohibited by Title VII. They contend her complaints were objectively reasonable for two competing reasons: (1) the somewhat confusing state of the law about same-sex harassment or gender stereotyping as opposed to sexual orientation discrimination; and (2) the developing law and interpretation from other courts and the EEOC about sexual orientation discrimination. This is not just incongruous; it refuses to acknowledge the terms of Title VII's retaliation provisions

and amounts to an attempt to bootstrap coverage of sexual orientation into the statute.

The initial problem with these arguments is that they rely on two contradictory assumptions. O'Daniel asks this Court to find it would be reasonable for her, or other employees in Louisiana, to receive credit for being informed on the state of legal precedent and EEOC pronouncements throughout the country, yet not be penalized for failing to know that "[d]ischarge for [heterosexuality] is not prohibited by Title VII or section 1981" in this Circuit. 597 F.2d at 938.[61]

The second, possibly more significant, problem with O'Daniel's argument is that it requires judgment of the reasonableness in a vacuum. Even assuming she could rely on unpublished decisions from district courts in other circuits to establish a reasonable belief, she failed to allege in her First or Second Amended Complaints she had actually formed a subjective belief on this basis.

The Court should reject the invitation to contradict, or even disregard, the specific language contained in Title VII limiting actionable "opposition" to "any practice made an unlawful employment practice by this subchapter…" 42 U.S.C. § 2000e-3(a). In *E.E.O.C. v. Rite Way Serv., Inc.,* 819 F.3d 235 (5th Cir. 2016), the Court recognized this as the EEOC's own position on the matter:

[61] The idea that O'Daniel's alleged complaint(s) may have been reasonable based on decisions announced after her alleged complaint is patently specious.

> Indeed, despite its attempt to do away with the reasonable belief standard in *Crawford* cases, the EEOC recognizes that the opposed conduct must have something to do with Title VII in order to support a retaliation claim. We do not understand it to be arguing, for example, that an employee who believes she was fired for making statements about accounting fraud in response to an internal investigation would be able to bring a Title VII retaliation case.

Id. at 242.

Sexual orientation discrimination may not be palatable or even understandable. Yet, for decades the Circuit has had held that discrimination based on being heterosexual does not implicate Title VII based upon the text of the statute.

Whether O'Daniel's alleged "opposition" activity concerns conduct "made unlawful" constitutes a threshold requirement under the statute. *Gilbert,* 432 Fed.Appx. at 520; *Larson v. United Air Lines*, 482 Fed.App'x at 350-51. A mistake about the facts underlying the complaint may be reasonable. *Rite Way,* 819 F.3d at 242-43; *But, see Breeden,* 532 U.S at 271 (not reasonable to believe a single off color comment was made illegal under the severe or pervasive standard of harassment coverage). A mistake on the illegality of the *type* of conduct supporting the complaint cannot be reasonable. The district court properly determined that her Complaints failed to state a claim of retaliation.

D. The District Court Properly Dismissed the Free Expression Claim.

In her only other claim argued on appeal, O'Daniel asserts that not only should her offensive post be afforded some constitutional protection, the district court erred

in determining that she could not assert a cause of action under Article I, Section 7 of the Louisiana Constitution. As explained by the district court, this argument failed due to the absence of any allegations that the Defendants/Appellees were state actors. O'Daniel asks the Court to certify this question to the Louisiana Supreme Court.

As O'Daniel admits, the Louisiana constitutional protections for speech mirror those in the United States Constitution. *Heany v. Roberts,* 846 So.2d 795. 802 n.2 (5th Cir. 2017). Further, a cause of action under the First Amendment to the United States Constitution can only be brought against a public (or state) actor. *See, e.g. Turner v. Lieutenant Driver,* 848 F.3d 678 (5th Cir. 2017); *Pickering v. Bd. Of Edu.,* 391 U.S. 563 (1968). The same is true in Louisiana.

To support her claim, O'Daniel cherry-picks language and urges the Court to review only parts of the applicable constitutional provision. As it states in its entirety:

> No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.

Clearly, by opening with the phrase "no law," Art. I, section 7 contemplates state action. *Baynard v. Guardian Life Ins. Co.,* 399 So.2d 1200 (La.App. 1st Cir. 1981) (denying a claim under Art. I, section 3 of the Louisiana Constitution). For this simple reason, O'Daniel cannot assert a freedom of expression claim.

Rather than addressing this language, O'Daniel contends that the Louisiana Supreme Court has intimated that Article I, section 7 may apply to private actors. This is apparently so because the Louisiana Supreme Court has indicated that the state provision may provide broader protection than the federal Constitution. This misreads the meaning of this pronouncement.

Each case cited by O'Daniel to support this proposition is inapposite to her attempt to have this Court be the first ever to recognize a claim against a private entity under Article I, Section 7. Rather, they involve discussions of speech by the press that may be protected by constitutional privilege against tort claims and/or state action. *Mashburn v. Collin,* 355 So.2d 879 (La. 1977) (discussing free speech protections in libel actions); *Jaubert v. Crowley Post-Signal, Inc.,* 375 So.2d 1386 (La. 1979) (discussing right to privacy claims against newspapers); *Guidry v. Roberts,* 335 So.2d 438, 448 (La. 1976) (Article I provides "more specific protections of the individual **against governmental power…"**) (emphasis added); *Ieyoub v. Ben Bagert for Attorney General Comm., Inc.*, 590 So.2d 572 (1991) (reviewing the state court's prior restraint on political speech through an injunction).

At most, the Louisiana Supreme Court has suggested that the Louisiana Constitution may provide broader protection "against governmental power." *Guidry,* 335 So.2d at 448. This does not justify a holding that this intimation authorizes Constitutional claims against private entities.

As discussed by the district court, O'Daniel is actually attempting to plead a tort exception to her at-will employment by her speaking on a matter of public concern. Louisiana courts have routinely rejected such attempts. "Aside from the federal and state statutory exceptions, there are no '[b]road policy considerations creating exceptions to employment at will and affecting relations between employer and employee.'" *Quebedeaux v. Dow Chem. Co.*, 2001-2297, pp. 5-6 (La. 6/21/02), 820 So. 2d 542, 546 (quoting *Gil v. Metal Serv. Corp.,* 412 So. 2d 706, 707-08 (La. App. 4 Cir. 1982).

Opposing this precedential statement of the Louisiana Supreme Court, O'Daniel cites to the general principle that an employer cannot discharge an at-will employee in derogation of his or her constitutional rights. *Wusthoff v. Bally's Casino Lakeshore Resort, LLC,* 709 So.2d 913, 914 (La. App. 4th Cir. 1998). As applied to this case, *Wusthoff* is dicta. There, the plaintiff could not assert a wrongful discharge cause of action based upon an alleged termination for refusing to participate in an illegal act. The "private vs. public" actor issue was not addressed.

O'Daniel cannot cite to a single case in Louisiana holding that a discharge of a private sector employee for engaging in speech creates an at-will employment exception or otherwise creates a legal claim under any other theory. As correctly found by the district court, no cause of action exists against a non-governmental entity or an individual under the circumstances alleged by O'Daniel.

The district court properly dismissed the freedom of expression claim.[62]

E. The Remaining Claims Dismissed by the District Court.

O'Daniel still advances no arguments supporting any claims against Simoneaux and Huber; discrimination based on right to privacy; discrimination based on sex or gender; reverse discrimination based on retaliation; defamation; and/or intentional infliction of severe emotional distress. The district court's ruling on those previously-asserted claims is not before this Court on appeal. *See Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009) (issues inadequately briefed on appeal are waived).

[62] Throughout these proceedings, O'Daniel has also ignored the final clause of Article I, Section 7 that provides a person "is responsible for abuse of that freedom." As pointed out by Appellees previously, O'Daniel's Facebook post potentially defamed the transgender individual and, almost certainly, violated that individual's right to privacy by employing the individual's image without permission to make disparaging comments. O'Daniel's "abuse" of her freedom, in effect, resulted in her separation.

CONCLUSION

Appellees respectfully pray that the decision of the district court be affirmed in full.

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