No. 18-30136

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BONNIE 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
Civil Action No. 3:17-CV-00190-RLB

ORIGINAL BRIEF FILED ON BEHALF OF

PLAINTIFF - APPELLANT

J. Arthur Smith, III (#07730)
SMITH LAW FIRM
830 North Street
Baton Rouge, LA 70802
Telephone: (225) 383-7716
Facsimile: (225) 383-7773
E-mail: jasmith@jarthursmith.com
Attorney for Plaintiff-Appellant, Bonnie O'Daniel

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record respectfully certifies the following listed persons have an interest in the outcome of this case.

Plaintiff-Appellant:	**Bonnie O'Daniel**
Counsel for Plaintiff-Appellant:	J. Arthur Smith, III
Defendant-Appellee:	**Industrial Service Solutions; Plant-N-Power Services, Inc.; Tex Simoneaux, Jr.; and Cindy Huber**
Counsel for Defendants-Appellees:	Timothy H. Scott, Lawrence Sorohan

STATEMENT REGARDING ORAL ARGUMENT

The Appellant respectfully requests that oral argument be granted in this case. Counsel believes that oral argument would allow for a full discussion of the legal issues and may assist the Court in resolving these issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Statutes

State Cases

Administrative Decisions

Secondary Sources

I. STATEMENT OF JURISDICTION

This is an appeal pursuant to 28 U.S.C. § 1291 from a final judgment of the district court that dismissed all of the Plaintiff's claims. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(3), and 1367 arising from the Plaintiff's 42 U.S.C. § 1983 claims for violations of procedural due process, as protected by the Fourteenth Amendment to the United States, and La. Const. Art. I § 2. Final judgment was entered on January 2, 2018, granting the Defendant's Motion to Dismiss and dismissing the Plaintiff's claims with prejudice.[1] The Plaintiff filed a Notice of Appeal on January 29, 2018.[2]

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Plaintiff, Bonnie O'Daniel brings this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) to remedy Defendants Industrial Service Solutions and Plant-N-Power Services, Incorporated's terminating her employment due to the Plaintiff's sexual orientation and Ms. Huber's reaction to the Plaintiff's pre-heterosexual speech. Plaintiff also brings a state law claims pursuant to La. Const. art. I, § 7. *To wit,* Mrs. O'Daniel contends that Defendants retaliated against her by terminating her employment because she exercised her constitutionally protected right to freedom of expression, in violation of La. Const. Art. I, § 7.

[1] (ROA.246).
[2] (ROA.248).

The Plaintiff submits the following issues for review by this Honorable Court:

1. Whether the magistrate judge abused his discretion in denying the Plaintiff's motion for leave to file a Second Amended Complaint
2. Whether Title VII Prohibits Discrimination on the Basis of Sexual Orientation
3. Whether the magistrate judge erred in finding that the Plaintiff failed to state a plausible claim for retaliation in violation of her right to freedom of expression under the Louisiana Constitution;
4. Whether the Louisiana Constitution provides broader freedom of expression rights than the United States Constitution
5. Whether the magistrate judge erred in finding that the Plaintiff failed to state a valid claim for retaliation under Title VII

III. STATEMENT OF THE CASE

The crux of the series of events which gave rise to this litigation is as follows. The Plaintiff was an employee of the Defendant, Industrial Service Solutions, Inc. ("ISS"). The Plaintiff alleges in her complaint that she performed her job very well.[3]

On April 22, 2016, Mrs. O'Daniel made a Facebook post that led to the termination of her employment. [4] The post included a photo of a man wearing a dress in the dressing room of a Target store.[5] The post expressed the Plaintiff's views on an ongoing public debate, specifically her concern with the possibility of a man being permitted to use a women's bathroom and/or dressing room at the same time as the Plaintiff's young daughters were in the same room.[6]

Nevertheless, Ms. Cynthia Huber, the President of ISS, obtained a copy of the plaintiff's Facebook post. Unbeknownst to the plaintiff at that time, Ms. Huber was an active member of the LGBT community and had taken serious offense to the plaintiff's post.

The plaintiff's Facebook post addressed issues of significant public concern because it effectively expressed a heterosexual parent's concern about her daughters using the same bathroom and/or dressing room with men at the same

[3] (ROA.11-12).
[4] (ROA.106).
[5] *Id.*
[6] *Id.*

time. The Plaintiff alleges that Ms. Huber quickly embarked on an extensive campaign to discriminate on the basis of the Plaintiff's sexual orientation and retaliate against the Plaintiff for the Facebook post.

The Plaintiff further alleges that her employment was terminated at the instigation and direction of Ms. Huber because of the Facebook post, causing the plaintiff substantial damages.

IV. SUMMARY OF THE ARGUMENT

The Plaintiff respectfully submits that, considering the policy of liberally construing *pro se* complaints and Rule 15's highly permissive standard, the magistrate judge abused his discretion by denying her leave to file a Second Amended Complaint drafted by an attorney, leaving this court with only the Plaintiff's *pro se* Complaint and First Amended Complaint to review.

The Plaintiff respectfully submits that Title VII prohibits discrimination on the basis of sexual orientation. There is currently a circuit split on this issue, and the Plaintiff respectfully requests that this Honorable Court grant an *en banc* hearing to decide the matter, as have the Second and Seventh Circuits.

The Plaintiff respectfully submits that the magistrate judge erred in finding that the Plaintiff failed to state a plausible claim for retaliation in violation of her right to freedom of expression under the Louisiana Constitution. The Plaintiff respectfully submits that the Louisiana Constitution provides broader freedom of

expression rights than the United States Constitution. Several decisions of the Louisiana Supreme Court have suggested that this is the case, but the matter has yet to be definitively decided by the Louisiana Supreme Court. Thus, the Plaintiff respectfully requests that this question be certified to the Louisiana Supreme Court.

The Plaintiff respectfully submits that the magistrate judge erred in finding that the Plaintiff failed to state a valid claim for retaliation under Title VII. The magistrate judge improperly applied the *McDonnell Douglas* formula to a Rule 12(b)(6) motion, thereby utilizing an impermissible heightened pleading standard.

V. ARGUMENT

A. STANDARD FOR MOTIONS TO DISMISS UNDER RULE 12(b)(6)

Rule 12(b)(6) allows for the dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). As the United States Court of Appeals for the Fifth Circuit has explained:

> We generally disfavor such motions and grant them "only if the complaint fails to plead 'enough facts to state a claim to relief that is plausible on its face.' " *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *see also Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir.2011) ("[A] motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted." (citation and internal quotation marks omitted)). In deciding a Rule 12(b)(6) motion, we cannot look outside the pleadings and must accept all well-pleaded facts as true, considering them, and the inferences to be drawn therefrom, in the light most favorable to the plaintiff. *Leal*, 731 F.3d at 413 (observing that under *Bell Atlantic* a well-pleaded complaint must proceed even when actual proof of the facts is improbable and recovery is unlikely).

LeBeouf v. Manning, 575 Fed.Appx. 374, 375–76 (5th Cir.2014). Dismissal is appropriate under Rule 12(b)(6) "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556. "To satisfy this standard, the complaint must provide more than conclusions, but it 'need not contain detailed factual allegations.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir.2011), *as revised* (Dec. 16, 2011), quoting *Colony Ins. Co. v. Peachtree Const., Ltd.*, 647 F.3d 248, 252 (5th Cir. 2011).

The United States Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, *supra.* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) did not establish a heightened pleading standard in Title VII cases. In fact, the Court has since held that "imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2).'" *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 346–47, 190 L.Ed.2d 309 (2014), quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Rather, *Twombly* and *Iqbal* established that "a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative

reader, *might* suggest that something has happened to her that *might* be redressed by the law." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir.2010) (emphasis in original).

"Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), quoting *Bell Atlantic Corp.*, 550 U.S. at 555. As this court has held, "it was enough in *Swierkiewicz* for the plaintiff to allege that he was terminated in violation of Title VII on the account of his national origin, providing relevant details of events leading up to his termination, relevant dates, and the nationalities of at least some of the relevant individuals." *Thompson v. City of Waco, Texas*, 764 F.3d 500, 507–08 (5th Cir.2014), quoting *Swierkiewicz*, 534 U.S. at 514.

B. The Magistrate Judge Abused His Discretion in Denying the Plaintiff's Motion for Leave to File a Second Amended Complaint.

According to the Federal Rules of Civil Procedure, amending a pleading for a second time requires consent of the opposing party or leave of court. Fed. R. Civ. P. 15. Further, Rule 15 provides that "[t]he court should freely give leave when justice so requires." *Id.* As the magistrate judge recognized in the case *sub judice:*

> The rule "evinces a bias in favor of granting leave to amend." *Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S.A. Co.*, 195 F.3d 765, 770 (5th Cir. 1999) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981)). Although leave to amend should not be automatically granted, "[a] district court must possess a substantial reason to

> deny a request for leave to amend[.]" *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005) (quotations omitted).

Nonetheless, and despite the fact that the magistrate judge ruled on the Defendant's motion while using the Plaintiff's Proposed Second Amended Complaint as the operative pleading, he denied the Plaintiff's motion for leave.[7] The magistrate judge offered no reason for his denial of the Plaintiff's motion for leave other than that it was "futile" since the Defendant's motion was granted.[8] The effect of this denial was, apparently, that the Plaintiff's Second Amended Complaint does not appear in the Record on Appeal before this Honorable Court.

In support of her motion for leave to file her second amended complaint, the Plaintiff directed that "justice required" that she be granted leave to file a second amended complaint, given that her Complaint and First Amended Complaint were filed *pro se*; (ii) she since engaged the services of undersigned counsel; (iii) the Plaintiff's motion for leave was filed within the deadline to amend her complaint as set by the district court; and (iv) the United States Supreme Court requires that a *pro se* complaint be "held to less stringent standards than formal pleadings drafted by lawyers." See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).[9]

In addressing a similar situation, the United States District Court for the Central District of Illinois found that, given the permissive standard for leave in

[7] (ROA.205).
[8] (ROA.205).
[9] (ROA.174-75).

Rule 15, it would be "manifestly unfair" to prevent a party from amending a pleading, after retaining the services of an attorney, where the plaintiff originally filed the pleading pro se. *Haynes v. United States*, 237 F.Supp.3d 816, 820 (C.D. Ill.2017).

The Plaintiff respectfully submits that, considering the policy of liberally construing pro se complaints and Rule 15's highly permissive standard, the magistrate judge abused his discretion by denying her leave to file a Second Amended Complaint drafted by an attorney.

The Plaintiff's Second Amended Complaint would have alleged, *inter alia*:

1. "The Defendants retaliated against Plaintiff by terminating her for exercising her constitutionally protected right to freedom of expression, in violation of La. Const. Art. 1 § 7";[10]

2. "The Defendants retaliated against Plaintiff by terminating her in part due to her opposition to the Defendants' practice of sex discrimination (*i.e.*, informing Defendants that she intended to file a formal complaint of sex discrimination), in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a)"; [11]

3. That she was terminated on the basis of the Facebook post in question;[12]

4. That she sent a text to Mr. Simoneaux expressing that Mrs. Huber's actions had risen to the level of sex-based harassment;

5. That she informed the Defendants that she intended to file a formal complaint and an EEOC charge alleging that she was discriminated on the basis of her sex;[13]

[10] (ROA.235).
[11] (ROA.235).
[12] (ROA.181).
[13] (ROA.183).

6. That Mr. Simoneaux ordered her ***not*** to file a formal complaint alleging sex discrimination, offered to discuss the matter with Human Resources himself instead, and then did not do so;

7. That no investigations of the harassment and discrimination to which Mrs. O'Daniel was subjected were ever conducted;

8. That she was terminated on the basis of her filing of the formal complaint and intent to file an EEOC charge;[14] and

9. That she had never received any criticism of her work prior to her statement of her intention to file a complaint with Human Resources and a charge with the EEOC.

The Plaintiff respectfully submits that these allegations are pertinent to any analysis of whether she has stated a claim on which relief can be granted. Yet, Mrs. O'Daniel, while aware of these facts, is not an attorney, and thus did not have the legal knowledge necessary to determine which allegations should and should not be included in her complaint. Thus, the Plaintiff respectfully submits that justice requires that she should have at least be given the benefit of the court having access to a complaint drafted by an attorney.

The magistrate judge held that the Plaintiff asserts a retaliation claim rather than a discrimination claim.[15]However, the Plaintiffs respectfully submits that there is not bright line between sexual orientation discrimination and retaliation

[14] (ROA.184).
[15] (ROA.245).

based on the termination of employment by a gay supervisor because of her negative feelings about a heterosexual woman and her pro-heterosexual post.

In *Christian Legal Society Chapter of the University of California, Hasting College v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971, 177 L.Ed.2d 838 (2010). the United States Supreme held:

> …… "CLS contends that it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong."
> ……Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.");
>
> 561 U.S at 689.

As the Title IX Supreme Court case *of Jackson v. Birmingham Board of Education*, 544 U.S. 167,125 S.Ct.1497, 161L.Ed.2d 361(2015), held:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment.
>
> Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

Compare the texts of 42 U.S.C §2000- 2(a) and 42 U.S.C §2000- 3(a), which overlap in important respects.

As the forgoing recent decisions reason, interpretations of Title VII such as those which allow claims for sexual harassment and hostile work environments are mere applications of the base prohibition of discrimination "because of sex." The same analysis should apply to sexual orientation discrimination. Such discrimination is simply a sub-set of sex discrimination.

In any event, such a determination as the magistrate judge in this case should not be made, as least for purposes the dismissal with prejudice, on the bases of a pro-se complaint, without the opportunity for amendment of the complaint, or discovery.

For these reasons, the Plaintiff most respectfully submits that the magistrate judge abused his discretion in denying her motion for leave.

C. There is a Circuit Split as to whether Title VII Prohibits Discrimination on the Basis of Sexual Orientation

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to subject to the Act to discriminate on the basis of a person's "race, color, religion, sex, or national origin. . ." *Hively v. Ivy Tech Cmt. Coll. Of Indiana,* 853 F.3d 339, 339-341 (7th Cir. 2017) *citing* 42 U.S.C. § 2000e-2(a).

In 2015, the EEOC asserted in a federal sector case that sexual orientation discrimination violated Title VII's prohibition of sex discrimination. *Baldwin v.*

Foxx, Appeal No. 0120133080, EEOC DOC 0120133080 (E.E.O.C.), 2015 WL 4397641 (July 15, 2015). In 2016, the EEOC took the next step and filed its first two lawsuits taking that position. *See* https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm. In both cases, the EEOC argued that gay male employees were subjected to hostile work environments based on sexual orientation. One of those lawsuits, against IFCO Systems, was settled for $202,200 and equitable relief. *See* Press Release (June 28, 2016), at https://www.eeoc.gov/eeoc/newsroom/release/6-28-16.cfm.

In *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) *rev'g* 830 F.3d 698 (7th Cir. 2016), the Plaintiff, who was openly lesbian, was a part-time adjunct professor at Ivy Tech Community College. She applied for a full-time position at least six (6) times over a period of years and was not hired. She filed a charge with the EEOC alleging that she was not hired because of her sexual orientation.

The panel lamented that it was bound by Seventh Circuit precedent to reject the argument that sexual orientation discrimination is covered sex discrimination:

> Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, ...; many of the federal courts to consider the matter have stated that they do not condone it . . . ;

> and this court undoubtedly does not condone it . . . . But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent . . . .

Hively, 830 F.3d at 718.

On rehearing *en banc*, the Seventh Circuit was asked to review its position due to developments from the Supreme Court over the past two (2) decades. *Hively*, 853 F.3d at 339-341. The panel had recognized that the Court had issued several relevant opinions to the issue at hand. Specifically, the Court considered *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Oncale v. Sundwoner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). *Price Waterhouse* was deemed relevant due to its holding that "gender stereotyping falls within Title VII's prohibition against sex discrimination", while *Oncale* "clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim." *Hively v. Ivy Tech Cmt. Coll. Of Indiana*, 853 F.3d 339, at 342. Third, the Seventh Circuit relied upon the EEOC's new position as annunciated in *Baldwin*, *supra. Id.* at 344.

On rehearing, the *Hively* court synthesized these decisions, and first concluded:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was

> concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] ... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Hively, 853 F.3d at 344.

The Seventh Circuit continued: "Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex." Accordingly, the court held that it falls . . . "it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways." *Hively*, 853 F.3d at 347. The court then provided the context in which the decision was to be viewed: employment discrimination, and in sexual orientation discrimination decisions from the Supreme Court. Namely, the *Hively* court relied upon: *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect 'homosexual, lesbian, or bisexual' persons violated the Equal Protection Clause"); and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), ("a Texas statute criminalizing homosexual intimacy between

consenting adults violated the liberty provision of the Due Process Clause"). Also relied upon by the *Hively* court on rehearing were: *United States v. Windsor*, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), (holding that part of DOMA violated basic due process and equal protection principles by excluding same-sex partners from the definition of "spouse" in other federal statutes); and *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (holding "the right to marry is a fundamental liberty right, protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. . . [and that] the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.") *Hively*, 853 F.3d at 349-50.

See also this court's *en banc* decision in *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir.2013).

The Seventh Circuit summarized that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively*, 853 F.3d at 350. The court then noted that such efforts had led to confusing and contradictory results, as also illustrated by the EEOC's decision in *Baldwin, supra.*, and the decisions of many other district court decisions. *Id.* The court overruled its precedent in light of the logic of Supreme Court decisions on sexual orientation from the past decade and the common-sense reality that it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis

of sex. *Id*. at 351. See also *Whitmer v. Phillips 66 Company*, 2018 WL 1626366 (S.D. Tex. 4/4/18).

An Eleventh Circuit panel ruled that it was bound by Eleventh Circuit precedent to hold that sexual orientation discrimination is not actionable under Title VII in *Evans v. Georgia Regional Hosp*., 850 F.3d 1248, 1255 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 557, 199 L.Ed.2d 446 (2017), citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979). The Eleventh Circuit denied rehearing en banc in *Evans*, and the Supreme Court denied certiorari.

A Second Circuit panel ruled that it was bound by Second Circuit precedent holding that sexual orientation discrimination is not actionable as sex discrimination in *Christiansen v. Omnicom Group, Inc*., 852 F.3d 195 (2d Cir. 2017). However, the panel held that the plaintiff had plausibly pled a claim of gender stereotyping pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Second Circuit denied rehearing en banc on June 28, 2017.

However, on May 25, 2017, the Second Circuit granted rehearing en banc in another case raising the issue, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017).[16]

[16] The Department of Justice filed an amicus brief on July 26, 2017 in the *Zarda* rehearing in which the DOJ took the position that sexual orientation is not covered as sex discrimination by Title VII. See Jon Steingart & Patrick Dorrian, J*ustice Dept. Bucks EEOC, Says Sexual Orientation Not Protected,* Daily Lab. Rep. (BNA) No. 143, at 6 (July 27, 2017). This position puts the Department of Justice at odds with the EEOC. However, the Department of Justice brief does argue that sexual orientation is covered under the sex stereotyping theory of sex discrimination. *Id*.

On February 26, 2018, the Second Circuit followed the lead of the Seventh Circuit in the *Hively* matter. The Second Circuit granted rehearing *en banc* and reversed the panel's decision. The Second Circuit noted that While certain of Zarda's claims were pending, the EEOC decided *Baldwin, supra.*, holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." Title VII of the Civil Rights Act of 1964, as codified in 42 U.S.C. § 2000e-2(a)(1), provides:

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

Examining that text, and prior jurisprudence, the Second Circuit held that "the broad rule of workplace equality strike[s] at the entire spectrum of disparate treatment' based on protected characteristics. . . [a]s a result, we have stated that Title VII should be interpreted broadly to achieve equal employment opportunity." (internal citation omitted). *Id.* at 111. The court further held: ". . . [a]s defined by Title VII, an employer has engaged in 'impermissible consideration of ... sex ... in employment practices' when 'sex ... was a motivating factor for any employment practice,' irrespective of whether the employer was also motivated by 'other factors.' *Id.* at 111-112 (*citing* 42 U.S.C. § 2000e-2(m)).

Acknowledging that the Supreme Court had previously held that Title VII prohibits not just sex discrimination, but also ". . . discrimination based on traits that are a function of sex, such as life expectancy," thus framing the issue before the court as ". . . whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation." *Zarda*, 883 F.3d at 112. The *Zarda* court answered that question affirmatively, at least in part – and held that sexual orientation discrimination is a subset of sex discrimination. *Id.* Continuing, the court held that:

> because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected. *See id.* ("[D]iscriminating against [an] employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex*.")

Zarda v. Altitude Express, Inc., 883 F.3d at 113. Finally, the Seventh Circuit interpreted the protections of Title VII as providing broader protection to ". . . any practice in which sex is a motivating factor. . . . making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account." *Id.* at 131.

The Plaintiff respectfully suggests that, in light of this court's rule of orderliness, it would be appropriate for this court to refer the federal law issues in

this case for *en banc* consideration, as the Second and Seventh Circuits have decided to do when faced with the same legal issue.

D. Plaintiff States a Valid Claim for Retaliation in Violation of her Right to Freedom of Expression

The second sentence of La. Const. Art I § 7 provides that "***[e]very person*** may speak, write and publish his sentiments on any subject, but is responsible for abuse of that freedom" [Emphasis added]. By its terms, the text is not limited to the deprivation of the freedom of expression by state action. It should apply as well to retaliation by private persons or corporations.

Under the United States Constitution, First Amendment retaliation claims require a showing that the *government* or its agent retaliated against the plaintiff for exercising her right to freedom of expression. See *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9th Cir.2004); *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). However, in Louisiana, an employee (even if private and at-will) "cannot be terminated because of race, sex, or religious beliefs or because he/she exercised constitutionally protected rights such as free speech." *Wusthoff v. Bally's Casino Lakeshore Resort, Inc.*, 97-1386 (La.App. 4 Cir. 2/25/98), 709 So.2d 913, 914, *writ denied*, 98-0722 (La. 5/1/98), 718 So.2d 413. Thus, the Louisiana Constitution provides a remedy for retaliation by ***private*** employers, whereas the United States Constitution does not. The Plaintiff can therefore properly bring a retaliation claim under La. Const. Art. 1 § 7.

In *Mashburn v. Collin*, 355 So.2d 879 (1977), the Louisiana Supreme Court observed that:

> Since the Supreme Court decisions from New York Times through Gertz and Firestone establish only minimum safeguards for the freedom of speech and the freedom of press under the First Amendment, it is permissible and perhaps appropriate for a state to grant broader protection of these important rights under its own constitution or laws.

Id. at 891.

In *Guidry v.Roberts*, 335 So.2d 438 (1976), the Louisiana Supreme Court observed that:

> As the plaintiff contends, the individual rights guaranteed by our state constitution's declaration of individual rights (Article I) represent more specific protections of the individual against governmental power than those found in the federal constitution's bill of rights, and they may represent broader protection of the individual.

Id. at 448.

See also *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386 (1979) at 1389.

In *Ieyoub v. Ben Bagert for Attorney General Committee, Inc.*, 590 So. 2d 572 (1991), Judge (then Justice) Dennis wrote a concurring opinion in which he observed:

> I agree with the court of appeal that the injunction of the publication of the campaign advertisement was an impermissible prior restraint of speech protected by the First Amendment as this court held in *Guste v. Connick,* 515 So.2d 436 (La. 1987). Further, I believe that Article 1, § 7 of the Louisiana Constitution of 1974 affords an even more complete safeguard against such "a prior restraint of protected speech in a political campaign. . . ."

Id. at 572-573. See also Judge Dennis' concurrence in *State v. Schirmer*, 646 So.2d 890 (1994), at 905.

In *Moresi v. Department of Wildlife & Fisheries,* 567 So.2d 1081 (La. 1990), the Louisiana Supreme Court interpreted La. Const. art. I § 5.[17] The Louisiana Supreme Court held that the fact that the phrase "no law shall" was not used in art. I § 5 "indicat[es] that the protection goes beyond limiting state action." *Moresi*, 567 So.2d at 1092. The *Moresi* decision was discussed in detail in Mindy L. McNew, *Moresi: Protecting Individual Rights Through the Louisiana Constitution*, 53 La. L. Rev. 1641 (1993). In this note, the author states:

> In *Moresi v. Department of Wildlife & Fisheries,* […] the court indicated its support for this emerging emphasis on state constitutional protection of individual rights by holding for the first time that a violation of article I, section 5 of the Louisiana State Constitution[7] gives rise to a private cause of action. The court also indicated for the first time that those protections go beyond limiting "state action" and apply directly to prohibit such invasions of privacy by private, non-government parties.
>
> […]
>
> The Louisiana Supreme Court's showing of support for the "constitutional tort" and the elimination of the "state actor" requirement with regard to certain provisions of the state's constitution is by far not a first on the state court level.
>
> […]

Id. at 1642-43. The note continues:

> Article I, section 5 […] is worded such that it is an **affirmative** grant of a right to an individual rather than a limit on state authority. It can be argued that the language "no law shall" indicates restrictions on the state. If such language is violated, the state is the focus of corrective measures, i.e., exclusion of evidence or injunction. On the other hand, "every person shall," which is used in article I, section 5, indicates a mandatory, **affirmative** right

[17] Article I, § 5 provides: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."

> for the individual to be secure in his "person, property, communications, houses, papers and effects." Rather than stating the right as a promise to limit what the state "shall" have the power to do, the wording of article I, section 5 implies that the rights are promises to the individual. If that provision is violated, the person whose right was abridged is the focus of the remedy.

Id. at 1650. The note continues:

> [T]he Louisiana Supreme Court in *Moresi* also stated in dicta that the state right to privacy provision provided protection against private actors. This was a definite departure from the traditional limitation of both the federal and state constitutional prohibitions to "state actors."

Id. at 1660.

The Plaintiff respectfully submits that the courts should give meaning to the protections of the Louisiana constitution in order to comply with the will of the people of Louisiana in approving the Louisiana Constitution. Indeed, La. Const. art. I § 1 provides:

> All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.

Under both state and federal law, "[s]peech on matters of public concern enjoys enhanced constitutional protection." *Romero v. Thomson Newspapers (Wisconsin), Inc.*, 94-1105 (La. 1/17/95, 6), 648 So.2d 866, 869, citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). This court has held that "speech made against the backdrop of ongoing commentary and debate in the press involves the public concern" even if the speech is not made *to* the public. *Kennedy v. Tangipahoa Par. Library Bd. of Control*, 224 F.3d 359, 372-73 (5th Cir.2000).

Here, everyone is surely aware of the widespread and vigorous debate regarding the rights of transgender individuals to use bathrooms of the gender with which they identify, and that Target's decision to allow these individuals to do so served as a catalyst for this debate. The Plaintiff's Facebook post was made against this "backdrop" of public commentary, and was merely an expression of her beliefs, personal and political, regarding the matter. Clearly, Plaintiff's speech touched upon a matter of public concern, and is thus afforded the highest degree of protection under the constitution of Louisiana. Thus, the Defendant's termination of Plaintiff due to her decision to exercise her right to free speech was in violation of the Louisiana Constitution.

The Plaintiff respectfully submits that this case presents an important and unsettled issue of state law as to the art. I, § 7 claims. Therefore, the Plaintiff respectfully submits that it would be appropriate to certify this issue of state law to the Louisiana Supreme Court.

E. Plaintiff States a Valid Claim under Title VII

Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or

> participated in any manner in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C. § 2000e-3(a).

1. The Magistrate Judge Erred in Applying the McDonnell Douglas Formula to a Rule 12(b)(6) Motion

In Title VII cases, a plaintiff "need not plead the *prima facie* elements of the *McDonnell Douglas* framework in order to withstand a Rule 12(b)(6) motion to dismiss." *Id.* However, the magistrate judge's ruling in the case *sub judice* make it clear that this is exactly what the court required. The magistrate judge held:

> To establish a prima facie case of retaliation, "a plaintiff must first show that (1) she participated in an activity protected under the statute; (2) her employer took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse action." *Feist v. Louisiana*, 730 F.3d 450, 454 (5th Cir. 2013).[18]

The court went on to analyze Mrs. O'Daniel's complaint under the McDonnell Douglas formula, concluding that "Plaintiff has not met the first prong for establishing a prima facie case of retaliation under Title VII."[19] Under the Supreme Court's holding in *Swierkiewicz v. Sorema N. A., supra.,* which was cited with approval by the Supreme Court in the post-*Twombly* case of *Johnson v. City of Shelby, Miss., supra.*, applying such a standard to a Rule 12(b)(6) motion constitutes reversible error. Thus, the Plaintiff respectfully submits that the district court erred in requiring her to establish a prima facie case under the *McDonnell*

[18] (ROA.243).
[19] (ROA.245).

Douglas formula in order to survive a motion to dismiss, thereby applying an impermissible "heightened pleading standard."

2. Even if the Plaintiff Were Required to Satisfy the McDonnell Douglas Framework, the Magistrate Judge's Ruling Would Still Be Erroneous

Even if this court were to find for any reason that the magistrate judge did not err in applying the *McDonnell Douglas* framework in deciding the Defendant's motion to dismiss, the Plaintiff nonetheless respectfully submits that the magistrate judge erred in finding that she did ***not*** make allegations of discrimination sufficient to satisfy the *McDonnell Douglas* framework.

For instance, the magistrate judge dismissed the Plaintiff's claims with prejudice, partly because, "even if Title VII did offer protection regarding sexual orientation discrimination, Plaintiff does not allege, or propose any allegations, indicating that Defendants terminated her because of her sexual orientation."[20] However, as the Plaintiff is not asserting a discrimination claim under Title VII, but rather a retaliation claim, it is not necessary for her to allege that she was terminated due to her sexual orientation. Rather, the *McDonnell Douglas* formula would only require her to allege that she was terminated in retaliation for engaging in protected activity (i.e. opposing sexual orientation discrimination).

[20] (ROA.245).

Further, the district court found that Mrs. O'Daniel did ***not*** in fact engage in "protected activity" for purposes of Title VII because Title VII does not in fact outlaw discrimination on the basis of sexual orientation and therefore Mrs. O'Daniel could not have had a reasonable belief that the Defendants' actions were unlawful. The Plaintiff respectfully submits that this conclusion is also erroneous because: (i) she ***participated*** in protected activity by filing an EEOC charge and informing her employer of her intention to do so, which does not require a reasonable, good-faith belief that there has been unlawful conduct; and (ii) regardless of whether Title VII prohibits discrimination on the basis of sexual orientation, Mrs. O'Daniel nonetheless had a reasonable belief that it did at the time she ***opposed*** her employer's practices.

The Fifth Circuit Pattern Jury Instructions provide valuable guidance in defining the elements of a Title VII retaliation claim. Those instructions provide:

> Title VII's anti-retaliation provision contains two clauses: the "opposition clause" and the "participation clause." 42 U.S.C. § 2000e-3(a). The opposition clause prohibits retaliation against an employee for opposing any practice made unlawful by Title VII. The participation clause protects activities that occur in conjunction with or after the filing of an EEOC charge. This jury charge addresses each type of claim. "Protected activity" includes opposing an employment practice that is unlawful under Title VII by making a charge of discrimination, or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII. If the claim is for opposing an employment practice, the plaintiff must prove that he or she had a reasonable good-faith belief that the practice was unlawful under Title VII.
>
> […]

> When the employee has opposed an employment practice that is not unlawful under Title VII, the court should instruct the jury that the employee's actions must be based on a reasonable, good-faith belief that the practice opposed actually violated Title VII, even if that belief was ultimately mistaken. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). A reasonable, goodfaith belief that discrimination occurred requires a subjective belief that the employer's behavior was discriminatory. In addition, the belief must be objectively reasonable in light of the circumstances. If the plaintiff employee engaged in participation-clause activity, that activity is protected under Title VII, and no good-faith inquiry is necessary.

Fifth Circuit 2014 Pattern Jury Instruction No. 11.5 (Title VII – Retaliation), at 152-153.

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140 (5th Cir.1981) (emphasis supplied); see also *Trent v. Valley Elec. Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir.1994) (collecting cases holding same).

The Plaintiff has alleged that she informed her employer that she was being discriminated against and intended to file an internal complaint and an EEOC charge on the basis of sexual orientation discrimination.[21] The Plaintiff respectfully submits that such notifications were made "in conjunction with" the filing of an EEOC charge, and thus constitute protected activity under the participation clause.

Further, the Plaintiff respectfully submits that she also engaged in "protected activity" under the opposition clause. The above pattern instruction clarifies that the mere fact that a plaintiff is ***mistaken*** in her belief that her employer's conduct

[21] (ROA.16, 111, 112, 225).

is made unlawful by Title VII does not prevent this belief from being reasonable. The Plaintiff's allegations that she informed her employer of discrimination, when viewed in the light most favorable to her, demonstrate that she had a belief that her employer was engaged in activity prohibited by Title VII. There is no basis for the magistrate judge's rejection of this factual allegation on a Rule 12(b)(6) motion. Further, the Plaintiff respectfully submits that the fact that there are numerous decisions from other courts of appeal holding that sexual orientation discrimination ***is*** prohibited by Title VII, as well as EEOC guidance to the same effect,[22] make her belief, correct or not, objectively reasonable. Thus, the Plaintiff respectfully submits that she engaged in protected activity under the opposition clause as well.

As for the second element, it is undisputed that Mrs. O'Daniel was terminated, which constitutes an "adverse employment action." *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 385 (5th Cir.2003). As for the third element, the Plaintiff alleges that she expressed to the Defendants that she believed she was the victim of prohibited discrimination [23] and that she was terminated shortly thereafter.[24] The Plaintiff respectfully submits that these allegations, viewed in the light most favorable to her, make it plausible that she was terminated in retaliation

[22] U.S. Equal Employment Opportunity Commission, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers* (visited Oct. 23, 2017 at 1:38 PM), available at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm ("EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation").
[23] (ROA.16, 111, 112, 225).
[24] (ROA.112).

for engaging in protected activity, even under the *McDonnell Douglas* formula, which does not apply in the adjudication of a Rule 12(b)(6) motion to dismiss.

CONCLUSION

The Plaintiff, Bonnie O'Daniel, respectfully concludes that the judgment below should be reversed and this matter remanded to the magistrate judge, at the Defendant's cost.

Respectfully Submitted,

SMITH LAW FIRM

/s/J. Arthur Smith, III
J. Arthur Smith, III (# 07730)
830 North Street
Baton Rouge, LA 70802
Telephone: (225) 383-7716
Facsimile: (225) 383-7773
Email: jasmith@jarthursmith.com
Counsel for Plaintiff-Appellant
Bonnie O'Daniel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing appeal brief has this date been electronically filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit, and that an electronic copy is being provided to counsel for the Defendants-Appellees, Timothy H. Scott, as a standard function of that electronic filing system.

I FURTHER CERTIFY that a hard copy of the above and foregoing has this date been mailed via the U.S. Postal Service, postage pre-paid and/or electronic mail to the following:

Mr. Timothy H. Scott
Mr. Lawrence Sorohan
FISHER & PHILLIPS LLP
201 St. Charles Avenue, Suite 3710
New Orleans, Louisiana 70170
tscott@fisherphillips.com
lsorohan@fisherphillips.com

Baton Rouge, Louisiana, this 27th day of April, 2018.

/s/ J. Arthur Smith, III
J. ARTHUR SMITH, III

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED.R. APP. P. 32(a)(7)(B) because:

   [x] this brief contains 8954 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

   [x] this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point font, or

   [ ] this brief has been prepared in a monospaced typeface.

Baton Rouge, Louisiana, this 27th day of April, 2018.

/s/ J. Arthur Smith, III
J. ARTHUR SMITH, III