The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Edward H. Trent

Office Address: 550 Main Street, Suite 900
(including county) Knoxville, TN 37902
Knox County

Office Phone: 865-546-1000 Facsimile: 865-546-1001

Email Address: [redacted]

Home Address: [redacted]
(including county) Knoxville, TN 37922
Knox County

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Wimberly Lawson Wright Daves & Jones, PLLC
550 Main Street, Suite 900
Knoxville, TN 37902

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2011, BPR No. 30045

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Florida, Fla. Bar No. 0957186, October 7, 1992. My license is currently active and I am Board Certified in Labor and Employment Law by the Florida Bar.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

The following consists of my employment since completion of law school:

a. Akerman Senterfitt (Shareholder), 50 N. Laura St., Suite 3100, Jacksonville, FL 32202, March 2001 to June 2011.

b. Fisher & Phillips, LLP (Associate), 450 E. Las Olas Blvd., Suite 800, Ft. Lauderdale, FL 33301, February 2000 to March 2001.

c. Coffman, Coleman, Andrews & Grogan (Associate), 800 W. Monroe St., Jacksonville, FL 32204, September 1996 to January 2000.

d. State Attorney's Office, Fourth Judicial Circuit of Florida (Assistant State Attorney), 330 E. Bay Street, Jacksonville, FL 32202, August 1994 to July 1996.

e. Hon. John H. Moore, II, then Chief United States District Court Judge, Middle District of Florida (deceased) (Law Clerk), 300 N. Hogan St., Suite 11-400, Jacksonville, FL 32202, August 1992 to July 1994.

f. Adjunct Professor at Florida Coastal School of Law teaching course in Pre-Trial Litigation, Jacksonville, FL, Spring Term 2006.

g. Program Director for Youth and Young Adult Ministry, Diocese of St. Augustine, Florida, July 1994, to May 2002, responsible for organizing and leading young adult retreats and supporting local young adult ministry.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

N/A

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Since September 1996, I have practiced in the area of labor and employment law representing and advising Fortune 500 companies, small businesses, state and local governmental agencies, churches, and non-profit, charitable organizations. I represent my clients in federal and state court, before the Equal Employment Opportunity Commission, the United States Department of Labor, the Tennessee Human Rights Commission, the Florida Commission on Human Relations, and other state and federal agencies. I represent clients in litigation related to claims of discrimination, unpaid wages under state and federal law, wrongful/retaliatory discharge, violations of federal regulations, negligent hiring and supervision, and other common law torts. I serve as lead counsel in my litigation cases, which includes explaining and guiding my clients through the process, preparing pleadings, conducting discovery, drafting and arguing motions, performing all pre-trial activities, participating in all phases of any trial, and briefing and arguing all appeals. I work closely with opposing counsel to avoid unnecessary discovery disputes and determine both the issues in dispute and whether the matter is one that can be resolved short of trial. I counsel clients on employment related matters, the importance of developing sound personnel policies, and any changes in laws or regulations that affect the management of their workplace. I am a frequent presenter at seminars and meetings of human resource professional organizations.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I have tried 24 jury trials to their conclusion in my career, 21 of which were criminal trials while serving as an Assistant State Attorney from 1994 to 1996. Between 2001 and 2004, I tried three (3) civil jury trials, all involving claims of employment discrimination; two in the United States District Court for the Middle District of Florida, and a two-week age discrimination trial in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida. I was co-counsel in the two federal court cases and lead counsel in the state court case.

I have briefed and argued two cases before the United States Court of Appeals for the Eleventh Circuit and two cases before the Tennessee Court of Appeals, Eastern Division. I have briefed several other cases before both the United States Court of Appeals for the Sixth and Eleventh Circuits and one other case before the Tennessee Court of Appeals, Eastern Division.

Since moving to Knoxville in 2011, I have tried two non-jury trials, one in the Chancery Court for Rhea County (enforcement of a non-compete agreement) and the other in the Chancery Court for Knox County (a claim of breach of contract with defenses based on federal TARP and FDIC golden parachute regulations applicable to "troubled institutions").

I have been lead counsel in a state administrative evidentiary hearing under the Individuals with Disabilities Education Act and a federal administrative proceeding under the Occupational Safety & Health Act.

I have been lead and co-counsel in labor arbitrations under collective bargaining agreements and assisted in appellate brief writing in matters under the National Labor Relations Act.

I spent two years as a criminal prosecutor responsible for cases involving crimes of driving while intoxicated, drug offenses, burglary, and murder.

I was lead counsel in a federal lawsuit involving anti-trust allegations by a group of trucking companies against a large continent of independent owner-operators in South Florida.

I have counseled churches and other non-profits in the area of child protection policies and investigating allegations of child sexual abuse, including serving as lead counsel in a series of seven lawsuits filed against a church based on allegations more than 25 years old against the church's former pastor.

I represented one of two 50/50 partners in a business dissolution dispute involving claims of breach of fiduciary duty and issues around distribution of assets and clients from their joint business.

I have litigated a number of cases involving breach of contract, primarily focused on the enforcement of non-competition and non-solicitation provisions.

I have counseled clients in compliance with writs of garnishment, including litigation of one matter over whether the client should be responsible for the debtor's obligation under a claim of head-of-household.

I have counseled clients and litigated over 100 cases involving claims of discrimination based on race, sex, religion, national origin, disability, and age under both state and federal law as well as claims associated with employee leave under the Family Medical Leave Act and accommodations under the Americans with Disabilities Act.

I have handled cases under the Fair Labor Standards Act, including several collective action cases alleging a variety of claims to support allegations of failure to pay overtime, minimum wage, and misclassification of employees as well as representing clients in responding to and working with the United States Department of Labor investigating possible violations of federal wage and hour laws.

I have written or consulted on five *amicus curiae* briefs filed before the United States Supreme Court concerning issues of religious liberty under the First Amendment as well as statutory interpretation issues that affect religious free exercise.

As a law clerk to a United States District Court Judge, I worked on a variety of cases on many different areas of civil and criminal law, including two petitions for habeas corpus filed by inmates on Florida' death row.

Finally, I have counseled clients on matters of compliance with state and federal employment law, written articles on legal topics in this area, and spoken to numerous groups on various employment law issues.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Jane Doe, et. al v. Trinity Baptist Church of Jacksonville – I was lead counsel representing Trinity Baptist Church of Jacksonville, Florida in a series of seven lawsuits filed against the church in 2007 based on allegations that the former pastor had abused each of the plaintiffs in the late 1960s to early 1970s. The former pastor, who was in his 80s at the time, was also charged with criminal sexual battery on a minor based on the allegations from some, but not all of the plaintiffs. He died before the criminal case went to trial. Four of the cases were dismissed early based on the statute of limitations. While the plaintiffs claimed that the statute should have been tolled based on claims of fraudulent concealment, the trial courts disagreed and each was affirmed on appeal. Two other cases were later dismissed on the same grounds, but no appeal was taken. The final case, filed by Jane Doe No. 2, Case No. 16-2007-CA-1846, was ultimately resolved prior to trial in 2012. Her case involved a claim of repressed memory as a basis for the tolling of the statute of limitations. Pending at the time the case was resolved was a motion to exclude expert testimony in support of the theory of repressed memory based on the *Frye* standard, which was the prevailing standard in Florida at the time. Both parties had psychiatrists from Harvard University as retained experts in addition to several other experts who were scheduled to testify at the hearing. This would have been a matter of first impression in Florida. The case involved depositions of dozens of witnesses, several of the victims, family members, church members, and expert witnesses. There was also extensive media coverage of the cases. As a result of the allegations, I was required to conduct an extensive investigation involving witnesses who had not worked for the church in decades, a review and revision of policy for the church and the implementation of protocols for the protection of children, interacting with the State Attorney's Office to facilitate the provision of documents and interview of witnesses related to the criminal prosecution of the former pastor, and addressing media inquiries on the case. There was even an interlocutory appeal in the case based on a motion to recuse plaintiff's counsel after he was inadvertently provided with an attorney-client privileged memorandum by a former attorney for the church. I was lead counsel, conducting all meetings with the church and its governing board, performed all research, briefed and argued all motions, briefed all appeals (no oral arguments were held), interviewed virtually all witnesses, and participated in all depositions and mediation conferences.

Consolidated DUI Cases – I was appointed to serve as the lead prosecutor on behalf of the State Attorney's Office for the Fourth Judicial Circuit of Florida to argue before an *en banc* panel of all Duval County Court judges addressing motions seeking to declare invalid all breathalyzer tests performed on DUI suspects by the Duval County Sheriff's Office. The criminal defense bar filed motions to suppress the results of all breathalyzer tests in the vast majority of the DUI cases then pending before the Duval County Court judges, the court that had jurisdiction over misdemeanor criminal offenses, including DUI. I was asked to serve as the lead prosecutor of a three-prosecutor team to present evidence of the administration and validity of the breathalyzer tests administered by the Duval County Sheriff's Office. We prepared our expert and representatives of the Sheriff's Office for their testimony and I cross-examined the defense expert. I also made

the arguments to the court in favor of the admissibility of the breathalyzer test results. Had we lost the motions, all breathalyzer test results in DUI cases would have been excluded and the prospect of future breathalyzer test results being admitted would have been more difficult. To address this issue, approximately 10 of the County Court judges sat *en banc* to hear argument and render a joint ruling. In the end, the State prevailed and the motions to exclude the breathalyzer test results were denied.

Amicus Curiae Briefs before United States Supreme Court. I have drafted and filed three different amicus curiae briefs before the United States Supreme Court related to issues of religious liberty in the cases of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 US ___, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) (concerning the application of the "ministerial exception" under the First Amendment to church decisions on hiring and firing of ministers and the scope of that exception, especially in light of federal employment law), *Burwell v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp. v. Burwell,* 523 US ___, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014) (concerning whether the federal government could force closely held companies to violate the owner's religious beliefs by forcing them to include various methods of contraception as part of a company provided health care plan), and *Bostock v. Clayton County, GA, Altitude Express, Inc. v. Zarda,* and *R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC,* Case Nos. 17-1618, 17-1623, 18-107 (concerning the interpretation and application of Title VII's prohibition on discrimination because of sex and whether the statute's provision covers discrimination on the basis of sexual orientation and/or gender identity). I reviewed and filed briefs written by others in two other cases before the United States Supreme Court. I also wrote an *amicus curiae* brief for local counsel in the case of *State of Washington v. Arlene's Flowers*, Case No. 91615-2, pending before the Washington State Supreme Court (concerning whether a florist, who served all customers, could be compelled to make a custom floral arrangement for a same-sex wedding in violation of her religious beliefs regarding marriage).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not served as a mediator, arbitrator, or judicial officer, but I have represented clients in mediation, arbitration, and before judicial officers at the trial and appellate court levels in both state and federal court.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I am a trustee of my sister-in-law's special needs trust.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I believe my extensive trial and appellate court experience would be a benefit to the Tennessee Court of Appeals, Eastern Grand Division.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I have not previously submitted an application for a judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Duke University School of Law, Juris Doctor, May 1992, conferred with Honors.

- President, Duke Bar Association 1991-1992 (student government bar association)
- Moot Court Board
  - Finalist Duke Law School Dean's Cup (panelists – Associate Justice Anthony Kennedy, United States Supreme Court, Judge A. Raymond Randolph, United States Court of Appeals for the District of Columbia, and Judge Dorothy W. Nelson, United States Court of Appeals for the Ninth Circuit)
  - Finalist, Jessup Cup Moot Court, William & Mary School of Law (panelists – member of the Virginia State Supreme Court)

University of Florida, Bachelor of Science in Accounting, May 1989, conferred with High Honors

- President, University of Florida Speech and Debate Team (competed in over 30 debate tournaments across the country over four years)
- Passed Uniform Certified Public Accountant's Examination, May 1989.

PERSONAL INFORMATION

15. State your age and date of birth.

[redacted]1967, 52-years-old.

16. How long have you lived continuously in the State of Tennessee?

I have lived continuously in the State of Tennessee since July 2011.

17. How long have you lived continuously in the county where you are now living?

I have lived continuously in Knox County, Tennessee since July 2011.

18. State the county in which you are registered to vote.

I am registered to vote in Knox County, Tennessee

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have no prior military service.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Member of Board of Directors, Catholic Charities of East Tennessee, July 2018 to Present.

Member, Building Committee for Cathedral of the Most Sacred Heart of Jesus, Knoxville, TN, August 2013 to March 2018.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation..

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

The Florida Bar, Labor and Employment Law Section (1997 to Present).

The Florida Bar Grievance Committee for the Fourth Judicial Circuit (2010-2011).

American Bar Association, Section of Labor and Employment Law, Committee on Equal Employment Opportunity (2008 – 2017) and coordinator for EEOC Regional Liaison Program (2008-2010); Section of Individual Rights and Responsibilities (2008-2010).

Knox Bar Association (2012 – Present)

Jacksonville Bar Association

Jacksonville Chapter of the Federal Bar Association

Chester Bedell Inn of Court (2002-2005)

Catholic Lawyer's Guild

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

I am Board Certified in Labor and Employment Law by the Florida Bar (2011 – Present).

I have been recognized in Best Lawyers® by U.S. News & World Reports since 2011, and as "Lawyer of the Year" for 2016 in Knoxville for Labor and Employment Law – Management

I am AV Preeminent Rated by Martindale Hubbell

30. List the citations of any legal articles or books you have published.

DICTA, "The Bible, a Law Firm, and Title VII," April 2012.

HR Professionals Magazine, "Getting to Know You – Background Checks and Pre-Employment Testing," June 2015.

HR Professionals Magazine, "Department of Justice Reaffirms Fundamental Importance of Religious Liberty," January 2018.

HR Professionals Magazine, "Summertime Safety – Policies and Procedures for Child Protection," June 2018.

HR Professionals Magazine, "Supreme Court to Tackle Scope of Title VII's Prohibition on Sex Discrimination," June 2019. https://hrprofessionalsmagazine.com/2019/05/30/supreme-court-to-tackle-scope-of-title-viis-prohibition-on-sex-discrimination/

HR Professionals Magazine, "Department of Labor Seeks to Clarify Religious Exemption for Federal Contractors," November 2019. https://hrprofessionalsmagazine.com/2019/11/02/dol-seeks-to-clarify-religious-exemption-for-federal-contractors/

The Metropolitan Corporate Counsel, "Employment Protections for Victims of Domestic Violence and Sexual Assault," November 2007.

Jacksonville Business Journal, "Learning About a Job Applicant Before You Hire," October 17, 2005.
http://jacksonville.bizjournals.com/jacksonville/stories/2005/10/17/editorial3.html

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Target Out of Range (November 5-6, 2015)

- *Out of Bounds: Bullying versus Harassment – How to Prevent and Respond to Both*
- *Impact of Social Media in the Workplace*
- *Saving the Bacon (Employment Contracts and Severance Agreements)*
- *ADA, Including the Pregnancy Discrimination Act: Why is it so Difficult?*

Target Out of Range (November 3-4, 2016)

- *LBGT, Religious Freedom, and Government Oversight*
- *The Need for Employment Contracts: Confidentiality, Non-Competition, Jury Waivers and Other Risks*
- *Heightened Scrutiny for Religious Accommodations*

Target Out of Range (November 2-3, 2017)

- *Perils of the Gig, or Sharing Economy, and Lessons From UBER*
- *The ADEA: A Guided Tour Through the Complex World of Age Discrimination*
- *Cyber Security and Technology Issues*
- *LGBT, Religious Freedom, and New Implications for Title VII*

Target Out of Range (November 1-2, 2018)

- *Ripped from the Headlines – Tips for Reviewing Your HR Policies and Handbooks*
- *Bridging the Gap – Managing Multi-Generational Diversity*
- *LGBT & Religious Freedom – New Challenges for the Road Ahead*
- *Religion in the Workplace*

Target Out of Range (November 21-22, 2019)

- *Navigating Complicated Disability Issues and the ADA*
- *Employment Contracts, Severance Agreements, and Class Action Waivers, Including Non-Compete and ADEA*
- *LGBTQ+, Religious Liberty, and Title VII*
- *LGBTQ+, Religious Liberty, and Title VII – An In-Depth Discussion*

Knoxville Bar Association—Employment Law Section (March 27, 2019), *Sexual Orientation and Transgender Issues in the Workplace.*

Knoxville Bar Association—Corporate Counsel Section (August 20, 2015), *Ethical Issues with Bring Your Own Device.*

Tennessee Bar Association—Heath Care Section (October 11, 2018), *#metoo/Sexual Harassment* panel at Health Law Forum.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Brief of Appellee in *Jodi Cheshire v. Union County Board of Education*, Case No. E2017-01300-COA-R3-CV, Tenn. Ct. Appeals, Eastern Grand Division, September 22, 2017. The brief is entirely my own effort.

Amicus Curiae Brief in case of *Bostock v. Clayton County, GA, Altitude Express, Inc. v. Zarda,* and *R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC,* Case Nos. 17-1618, 17-1623, 18-107. August 20, 2019. The brief is entirely my own effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I began my legal career as a law clerk for a United States District Court Judge who embodied the importance of an independent judiciary dedicated to upholding the rule of law. The importance of an impartial evaluation of the facts under the law was role of the judge, not the identity of a party or a lawyer. That did not mean the judge was to be blind to the circumstances of the parties or ambivalent to the effects of a ruling on the parties and the community as a whole, but the judge was to decide a dispute within the context of the law as written by the legislature, upholding constitutional principles, and guided by binding precedent. After counseling and advocating for clients for over 25 years, I believe I can be of service by upholding these principles as a judge. That is why I am seeking this position.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I served on the Board of Directors of the Northeast Florida Exchange Club Center for the Prevention of Child Abuse for eight years. The Center's mission was to strengthen

families to prevent child abuse and neglect by providing services to any family at risk for child abuse and neglect, providing services free of charge regardless of race, gender, creed, or financial status. I worked with Center staff in working with the Florida Legislature, the Department of Children and Families, and local agencies to promote and encourage partnership for the betterment of all families and the effective use of the limited public resources.

I have written several *amicus curiae* briefs on a pro bono basis in cases for clients who wanted their voices heard on particular issues pending before the United States Supreme Court. Absent pro bono representation, these organizations would have been unable to be heard on such significant issues.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking a judgeship position on the Tennessee Court of Appeals for the Eastern Tennessee Grand Division. There are currently four judges on the court hearing civil appeals from trial courts and certain state boards and commissions. My work ethic and experience would assist the court in carrying out its responsibilities of timely and thoroughly reviewing the wide variety of cases heard by the court and upholding the constitution and laws of the State of Tennessee.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

Over the years, I have been involved in community service organizations working with families in need to keep families together and protect children and caring for the most vulnerable in the community. I have worked with civic organizations honoring high school students for their accomplishments and community service. As a member of the Board of Directors of Catholic Charities of East Tennessee, I have learned a great deal of the needs that exist in our community and the importance of all people coming together to serve those in need. I intend to remain involved in supporting particular projects and causes as an appointed judge within the limits of the ethics rules. I believe it is important for judges who serve the whole of society to remain connected to and involved in the communities in which they live and I would intend to do so. This could take many forms including the contribution of personal time and financial support. By doing so, the judge learns of the needs and accomplishments of the community and helps to break down barriers, either real or perceived, to access to the justice system.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

In 2006, my wife and I adopted our two children from Russia, experiencing a judicial system not as different from our own as I expected and I did so as a party, not as a lawyer. I had to follow very specific instructions in completing forms when providing information to the court. At the hearing, the judge, child advocate, and social worker all spoke Russian, so I had to completely rely on our interpreter to help me understand the proceedings and answer questions from the judge. Even with all the support we received throughout the process and court staff who were very friendly and encouraging, it was still a bit overwhelming because we did not know the language or what to expect.

Lawyers do not often get the opportunity to see our judicial system from the perspective of a party or the public. My experience in adopting my children provided me with a new perspective of how our legal system can be foreign and intimidating to parties. As a result, I have greater empathy for not just my client when dealing with a matter before the courts, but the adverse party and third party witnesses and how I, as counsel, can help explain the system and make it less daunting. I also came to have a renewed appreciation for the role of the judge in not only upholding and enforcing the law, but in making the judicial system accessible and understandable to all who participate in its proceedings.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Over the last 23 years of practice, I have had to help clients comply with the specific provisions of various employment laws even when doing so may create challenging situations for the employer. The circumstances were not that I necessarily disagreed with the dictates of the law, but if the law provides certain requirements or limitations on employment decisions, it was necessary for the client to comply or risk potentially significant liability. Examples would include helping clients understand the requirements of complying with the Family Medical Leave Act and not using an employee's planned absence due to pregnancy (for example) as a reason to pass over an employee for a promotion or to take other action not permitted by the statute, even if providing the protected leave created a challenging situation for the particular employer. I spend significant amounts of time working with employers navigating employment situations to ensure any action the employer takes complies with the law. One other challenging issue is when it comes to the classification of an employee as either exempt or non-exempt from overtime pay under the Fair Labor Standards Act or as either an employee or independent contractor. The statute and applicable regulations were designed for an economy very different from many industries and businesses today, but employers still must find a way to comply with the law even if the law is not very accommodating for their business.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. G. Gerard Jabaley, Esq., [redacted] Knoxville, TN 37902, [redacted]
B. Mark C. Travis, Esq., Mediator, [redacted] Cookeville, TN 38502 [redacted]
C. Cathy E. Shuck, Esq., General Counsel, East Tennessee Children's Hospital, [redacted] Ave, Knoxville, TN 37916, [redacted]
D. Lisa Healy, Executive Director, Catholic Charities of East Tennessee, [redacted] Knoxville, TN 37917, [redacted]
E. David L. Perry, M.D. [redacted] Knoxville, TN 37919, [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Tennessee Court of Appeals, Eastern Tennessee Grand Division of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 3, 2020.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Edward H. Trent
Type or Print Name

Signature

February 3, 2020
Date

30045
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Florida Bar, Fla. Bar No. 0957186

Nos. 17-1618, 17-1623, 18-107

In The Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

ALTITUDE EXPRESS, INC., et al.,

Petitioners,

v.

MELISSA ZARDA, et al.,

Respondents.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eleventh, Second, And Sixth Circuits

BRIEF OF THE H.T. HACKNEY CO. AS *AMICUS CURIAE* IN SUPPORT OF EMPLOYERS

EDWARD H. TRENT, ESQ.
(*Counsel of Record*)
G. GERARD JABALEY, ESQ.
WIMBERLY LAWSON WRIGHT
DAVES & JONES, PLLC
550 Main Ave., Suite 900
Knoxville, TN 37902
(865) 546-1000
etrent@wimberlylawson.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus, The H.T. Hackney Co. ("Hackney") is one of the largest wholesale distributors in the United States, servicing over 20,000 retail locations and stocking over 30,000 products. Through strategically located distribution centers, Hackney provides products to retail locations throughout 22 states.

Hackney's interest in the outcome of this case is directly related to litigation pending against Hackney in the United States District Court for the Western District of North Carolina that has been stayed awaiting this Court's decision in these cases. That litigation concerns a pre-2016 health insurance plan that for purposes of eligibility for spousal health insurance benefits defined spouse as "a person of the opposite sex to whom you are legally married." The policy was amended effective January 1, 2016, to cover all lawfully married persons. The plaintiff in Hackney's case claims that the pre-2016 policy violated Title VII by discriminating against employees based on sexual orientation. The trial court has declined to rule on the merits of a motion to dismiss filed in 2017 and motion for summary judgment filed in 2018 in spite of controlling Fourth Circuit case law and the uniform court

[1] Parties to these cases have consented to the filing of this brief, and letters indicating their consent are on file with the Clerk. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

decisions from around the country that Title VII does not cover a claim of discrimination based on sexual orientation.

This Court's ability to effectively change the law more than 55 years after its passage would severely prejudice businesses such as Hackney who reasonably relied on consistent court interpretation and application of Title VII's provision prohibiting discrimination "because of . . . sex" in establishing policies for their businesses. Should the Court hold that Title VII's prohibition of discrimination "because of . . . sex" includes claims based on sexual orientation and gender identity, policies established years ago and consistent with unanimous court interpretations of Title VII will now be deemed unlawful and subject companies, and Hackney in particular, to liability. Such a fundamental change in the law should be the responsibility of Congress and not the courts. Accordingly, Hackney files this brief in support of Respondent, Clayton County, Georgia, and Petitions, Altitude Express, Inc. and R.G. & G.R. Harris Funeral Homes, Inc. (collectively "Employers") and in opposition to the relief requested by Petitioner Gerald Lynn Bostock and Respondents Melissa Zarda, Aimee Stephens, and the United States Equal Employment Opportunity Commission (collectively "Employees").

SUMMARY OF ARGUMENT

This Court has made it clear that Title VII's prohibition on discrimination "because of . . . sex" concerns

whether employees are subject to materially adverse terms and conditions of employment to which members of the opposite sex have not been subjected. As such, the employee's sex as either male or female must be a motivating factor in the adverse employment decision. An inference of discrimination is almost always demonstrated by showing that a similarly situated person of the opposite sex was treated more favorably than the complaining employee. Absent such proof, there is insufficient evidence to infer that sex as opposed to some other factor motivated the employer in a particular situation. Here, sexual orientation and gender identity are not dependent on an employee being male or female and decisions based on sexual orientation and gender identity do not disadvantage one sex over the other or an individual because that individual is male or female. Rather, sexual orientation and gender identity are characteristics other than sex and fall outside the purview of Title VII.

The United States Courts of Appeals for the Second Circuit and Sixth Circuit both relied on the notion of sex stereotyping to find a violation of Title VII when an employee's sexual orientation or gender identity were potentially factors in an employment decision. Yet, this Court has never held that the application of a sex stereotype created an independent claim under Title VII. Further, the entire notion of sex stereotyping is vague and impossible to apply. While this Court has made it clear that Title VII does not eliminate all differences between men and women in the workplace or require employers to consider the workplace asexual

or androgynous, the Second and Sixth Circuits' views of Title VII would mandate just such a result. Any employment decision based on behavior could be deemed a sex stereotype, whether it concerned sexual activity, confidence, dress, restroom access, or the firmness of a handshake. The better course of action is to uphold the current state of the law which requires a plaintiff to prove in virtually all cases that there was a similarly situated employee of the opposite sex who received more favorable treatment.

Finally, should the Court hold that sexual orientation and gender identity discrimination are forms of sex discrimination under Title VII, then Hackney and any number of other businesses who established policies (such as Hackney's pre-2016 health care plan) or practices such as sex specific dress codes, not to mention sex designated restroom and changing room facilities, would face liability for such policies. Yet, Hackney and every other business should have been permitted to justifiably rely on the consistent interpretation of federal courts across the country that Title VII does not cover claims of sexual orientation or gender identity when establishing such policies. For this Court to now hold that over 50 years of consistent application and interpretation of Title VII was wrong and any company that relied on those holdings is now subject to liability would rightfully undermine confidence in the judicial system, creating a system where a court can change its mind on what the law means at any time to the detriment of all parties involved.

ARGUMENT

Prior to January 1, 2016, the first open enrollment period following this Court's decision in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015), Hackney maintained a policy providing spousal health insurance benefits defining spouse as "a member of the opposite sex to whom you are legally married."[2] Based on consistent interpretations of Title VII by federal courts across the country, Hackney's policy was legal at the time it was in place and consistent with the laws on marriage throughout the country. In spite of this, Hackney was sued for alleged violations of Title VII and the Equal Pay Act in a lawsuit filed on February 17, 2017,[3] where the plaintiff asserts that Hackney's pre-2016 policy discriminated against her on the basis of sexual orientation because her same-sex spouse did not qualify for spousal health insurance benefits. Although the controlling authority in the United States Court of Appeals in the Fourth Circuit is that claims of discrimination on the basis of sexual orientation are not actionable under Title VII, the District Court has delayed ruling on Hackney's motions for over 30 months and has now *sua sponte* stayed the case pending the outcome of these cases.

Here, as in Hackney's case, Employees assert that Title VII's prohibition on discrimination "because of

---

[2] Hackney modified its policy effective January 1, 2016, to provide that a spouse was "anyone to whom you are lawfully married."

[3] The legal dispute began with a charge of discrimination filed with the EEOC in July 2015.

. . . sex" should be read to include sexual orientation and gender identity as forms of sex discrimination. Should the Court rule in favor of Employees, it would represent a fundamental and material change in the interpretation and application of Title VII. Such a fundamental change in the law after 50 years of consistent contrary holdings by courts across the country would prejudice Hackney in its pending lawsuit and undermine the trust any litigant can place in clear judicial precedent. Any such change should come from Congress and not the courts. Furthermore, such a holding would be inconsistent with this Court's prior precedent that the issue under Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Accordingly, the Court should find that Title VII's prohibition on discrimination "because of . . . sex" does not cover discrimination based on sexual orientation or gender identity because neither status is a proxy for the sex of an individual as male or female. Further, a broad application of "sex stereotyping" as suggested by the Employees would render Title VII impossible to interpret as there is no clear criteria on what constitutes a "sex stereotype," thus turning Title VII into a general civility code, and the courts into super personnel departments questioning every adverse employment decision, seeking to find invidious discrimination when there is none.

I. TITLE VII CONCERNS DISCRIMINATORY TREATMENT BETWEEN MEN AND WOMEN.

Title VII's prohibition on discrimination "because of . . . sex" should be viewed consistent with its clear terms, specifically, whether a person is discriminated against because the individual is male or female. Sexual orientation and gender identity, including transgender status, are not equivalent to or proxies for sex discrimination and, therefore, have properly been found to be insufficient to support a claim under Title VII.

A. This Court's Jurisprudence is Clear that Title VII's Prohibition on Discrimination Because of Sex Refers to the Biological Reality of Male or Female.

"The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)). As this Court has consistently held, claims under Title VII asserting sex discrimination must show the alleged discrimination was because of the person's sex, i.e., because the plaintiff is either male or female. Absent such a showing, there is no violation of Title VII's prohibition on discrimination because of sex.

In *Oncale*, this Court cautioned that while the sex of an alleged harasser, whether the same or opposite of

the complaining employee, was not determinative of whether the plaintiff can make out a claim under Title VII, the complaining employee "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination* . . . because of . . . sex.'" *Oncale*, 523 U.S. at 81 (emphasis in original). Indeed, the Court made it clear that not all differences between men and women are actionable under Title VII, but only discriminatory terms and conditions of employment that are based on the individual's sex as male or female. *Id.* at 80-81. Even the plurality decision in *Price Waterhouse v. Hopkins*, 4901 U.S. 228 (1989) made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Id.* at 251.

B. The Elements of a Claim of Discrimination Require an Employee to Prove Discriminatory Treatment Between Men and Women.

Under this Court's *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden shifting paradigm for evaluating claims of discrimination under Title VII, a complaining employee must demonstrate that similarly situated employees of the opposite sex were treated more favorably.

1. A *Prima Facie* Case of Discrimination Under Title VII Requires A Complaining Employee To Demonstrate that the Employee's Sex was a Motivating Factor in the Employment Decision by Showing that Similarly Situated Members of the Opposite Sex were Treated More Favorably.

Depending on the nature of the claim, e.g., failure to hire, failure to promote, unlawful termination, etc., the basic elements of a plaintiff's *prima facie* case of sex discrimination under Title VII where there is not "direct evidence" of discriminatory intent are: "(1) that [the plaintiff] is within the protected class; (2) that she [or he] was qualified to perform her [or his] job; (3) that she [or he] suffered an adverse employment action; and (4) that ***nonmembers of her [or his] class (persons . . . of the opposite gender in the Title VII sex discrimination context) were not treated the same***." *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (emphasis added); *see also Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 405-06 (5th Cir. 2005). To establish even an inference of discrimination, a Title VII plaintiff in a sex discrimination claim must be able to show that his or her sex was a motivating factor in the employment decision, an inference that generally must consist of evidence that a person of the opposite sex was awarded the position in question or was treated more favorably than the plaintiff. *Miles v. Dell,*

Inc., 429 F.3d 480, 488 (4th Cir. 2005).[4] Indeed, this basic threshold requirement has resulted in numerous courts granting summary judgment when there is no such evidence, rulings typically affirmed without comment. *Id.* at 486; *see also e.g.*, *Jackson v. Richards Medical Co.*, 961 F.2d 575, 587 (6th Cir. 1992); *Willingham v. Mabus*, 2018 U.S. Dist. LEXIS 85211 at *9 (E.D.N.C. May 22, 2018); *Wilber v. Tharaldson Emp. Mgmt. Co.*, 2005 U.S. Dist. LEXIS 27435 at *47-49 (N.D. Tex. Nov. 10, 2005) (granting summary judgment because female plaintiff was not replaced by a male or "treated differently than similarly situated male employees"); *Powell v. Bank of Am., N.A.*, 2005 U.S. Dist. LEXIS 44511 at *20 (W.D.N.C. Sept. 23, 2005) (granting summary judgment when plaintiff unable to produce any evidence that members of other races were treated more favorably); *Hill v. Wal-Mart Stores*, 2000 U.S. Dist. LEXIS 20559 at *13-14 (E.D.N.C. Sept. 26, 2000) (holding "Where, as here, a male plaintiff is replaced by another man, a defendant's motion for summary

[4] Exceptions to the fourth element of a *prima facie* case include (1) an age discrimination case where the plaintiff is replaced by a significantly younger employee who is not outside the protected class; (2) a significant lapse of time between the adverse employment action and a replacement being hired; (3) "the employer's hiring of another person within the protected class is calculated to disguise its act of discrimination toward the plaintiff," *Johnson v. Merchs. Terminal Corp.*, 2017 U.S. Dist. LEXIS 64603 at * 28-29 (D. Md. April 27, 2017) (quoting *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998)); and (4) the "firing and replacement hiring decisions were made by different decisionmakers." *Jenkins v. MV Transp., Inc.*, 2018 U.S. Dist. LEXIS 11971 at *8 (D. Md. Jan. 25, 2018) (quoting *Miles*, 429 F.3d at 485). None of these criteria are applicable to the cases before the Court.

judgment should be allowed in a gender discrimination case").

2. To Establish a *Prima Facie* Case, the Employee Must Generally Identify a Similarly Situated Comparator of the Opposite Sex to Create an Inference of Discrimination.

When it comes to identifying a comparator of the opposite sex, the fourth element of the *prima facie* case "necessarily implies that the nonmembers of the plaintiff's class who 'were not treated the same' were 'similarly situated,' or the *prima facie* case would not serve its purpose." *Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130, 1158 (N.D. Iowa 2000). When a female plaintiff compares herself to a male "who never engaged in the same or comparable conduct, [it] simply would not give rise to an inference of discrimination, because any of the differences between [the plaintiff] and those [comparators], besides her gender, could be the cause of the disparate treatment. Rather, an inference of discrimination on the basis of a protected characteristic only arises when similarly situated persons, lacking the plaintiff's protected characteristic (in this case persons of the opposite gender), are treated differently." *Id.* When the comparable employee is "not similarly situated, either in fact or in contemplation of law," then the comparison is not evidence of discriminatory treatment. *Post v. Harper*, 980 F.2d 491, 495 (8th Cir. 1993).

To be comparable, the "similarly situated employees must be 'directly comparable' to the plaintiff 'in all material respects.' " *Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708, 723 (7th Cir. 2018) (quoting *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012)); *see also Mercer*, 104 F. Supp. 2d at 1143. That means the comparator "was treated more favorably under nearly identical circumstances." *Davis v. Ampco Sys. Parking*, 748 F. Supp. 2d 683, 694 (S.D. Tex. 2010) (finding other employees who may have engaged in similar conduct but had not been previously warned and were in lower positions were not similarly situated); *see also David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 225-27 (7th Cir. 2017) (finding that comparators who performed different job duties were not similarly situated). The purpose is "because the similarly situated inquiry is meant to establish whether all things are in fact equal. The purpose of the inquiry is to eliminate other possible explanatory variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable – discriminatory animus." *Skiba*, 884 F.3d at 723 (citations and internal quotation marks omitted). Accordingly, to determine if an employee is discriminated against because of sex, a male employee must be compared to a similarly situated female employee and vice versa.

C. Sexual Orientation and Gender Identity are not Proxies for Discrimination Because of Sex.

When evaluating claims of discrimination based on sexual orientation or gender identity, men and women are treated the same because sexual orientation and gender identity are not equivalent with a person's sex or a proxy to treat women adversely in comparison to men or vice versa.

1. Men and Women are treated the same when sexual orientation and/or gender identity, including transgender status, is considered.

Like the Employers before the Court, Hackney denies that it discriminated against any employee due to that employee's sexual orientation. However, even if an employee suffers an adverse employment action due to sexual orientation or gender identity, such action does not equate with men and women being subjected to materially different terms and conditions of employment. For example, under Hackney's pre-2016 health insurance plan, both men and women were able to add a spouse to their policy so long as their spouse was someone of the opposite sex. This criterion applied equally to men as well as women. Both men and women qualified for spousal health insurance benefits under the same standard, specifically that they were lawfully married to a person of the opposite sex. In short, male and female co-workers are treated the same, which is all Title VII requires. *See Harris v.*

Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

In evaluating claims of sexual orientation and/or gender identity discrimination it is critical to ensure the comparators are similarly situated in all material respects, particularly in sexual orientation. The comparators are not similarly situated when a homosexual female is compared to a heterosexual male, for example. In his concurring opinion in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), Judge Pryor explained: "The dissent compares gay females to heterosexual males . . . but it does not follow that an employer who treats one differently from the other does so 'because of . . . sex' instead of 'because of sexual orientation.'" *Id.* at 1258-59 (Pryor, J., concurring). The issue is whether "males and females [are held] to different standards of behavior." *Id.* at 1260 (Pryor, J., concurring); *see also Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring). When men and women are treated the same, there is no violation of Title VII's prohibition on discrimination because of sex.

Because sexual orientation and gender identity are "qualities and characteristics" other than sex, they are not prohibited under Title VII. *See Price Waterhouse*, 490 U.S. at 239 ("the statute does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions") and *id.* at 244 ("To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment

or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. *Any* other criterion or qualification for employment is not affected by this title") (quoting 110 Cong. Rec. 7213 (1964) (emphasis in original)). Title VII's prohibition on discrimination because of sex simply does not reach claims based on sexual orientation and/or gender identity.

2. The United States Court of Appeals for the Second Circuit Applied the Wrong Comparison.

The Court of Appeals in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc) relied heavily on *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc), which "compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion)." *Zarda*, 883 F.3d at 116. Such a comparison is misplaced as it does not compare two similarly situated individuals who are identical in all relevant respects.

The *Zarda* court began to frame the comparison somewhat correctly before going "astray and getting off on the wrong foot." *Zarda*, 883 F.3d at 123 fn. 23. The court notes, "we understand that its [the comparison test] purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To

determine whether a trait is such a proxy, the test compares a female and a male employee who both exhibit the trait at issue." *Id.* at 116-17. Had the court stopped here, it would be clear that the trait at issue, same-sex attraction, when shared by both men and women does not result in discriminatory treatment. The court, however, then proceeded to compare two people that did not both exhibit same-sex attraction.

The *Zarda* court's error is highlighted with its misapplication of this Court's holding in *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart*, the City required women to contribute a larger sum to the pension plan because women have a longer life expectancy than men, a policy this Court found to be in violation of Title VII.[5] The *Zarda* court notes, "because life expectancy is a ***sex-dependent trait***, changing the sex of the employee (the independent variable) necessarily affected the employee's life expectancy and thereby changed how they were impacted by the pension policy (the dependent variable)." 883 F.3d at 117 (emphasis added). Sexual orientation, however, is not "a sex-dependent trait." Both men and women may experience same-sex attraction and the treatment of that characteristic (sexual orientation) is

[5] This Court did not have the advantage of the disparate impact analysis added to Title VII by the Civil Rights Act of 1991. Pub. L. No. 102-166, Title I, § 105(a), 105 Stat. 1074-1076 (1991); 42 U.S.C. § 2000e-2(k). While the *Manhart* policy disadvantaged women in comparison to men, such a situation is not present in Hackney's case because men and women were both held to the same standard under Hackney's pre-2016 health insurance plan's definition of spouse.

independent of the individual's sex as either male or female. By comparing a homosexual male to a heterosexual female, the *Zarda* court made the wrong comparison and thereby reached the wrong conclusion under Title VII.[6]

When men and women are treated equally there is no violation of Title VII. In Hackney's case, the controlling criteria under Hackney's pre-2016 plan is whether the spouse is of the opposite sex in order to qualify for health insurance benefits. This criterion applied equally to both male and female employees and did not disadvantage the plaintiff when compared to similarly situated male employees. That is all Title VII requires under the clear text of the statute.

While the legal landscape with regard to gay rights may have changed over the last several years, Title VII has not. The issue here is the scope of Title VII, not the legal definition of marriage or societal views on same-sex relationships or the concept of gender in the abstract. Under the plain reading of the statute and as consistently interpreted by courts for the first 53 years after its passage, Employees are unable to prove a claim of sex discrimination by claiming they

---

[6] While the United States Court of Appeals for the Sixth Circuit did not explicitly identify a comparator for Stephens, it nonetheless based its holding on the fact that women were permitted to wear skirts and, therefore, Title VII must allow Stephens, a biological male, to wear skirts as well. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 573 (6th Cir. 2018). The fallacy of this holding and the implication for employers such as Hackney is addressed in Section II, *infra.*

were discriminated against because of their sexual orientation and/or gender identity.

II. SEXUAL STEREOTYPING SHOULD NOT BE AN INDEPENDENT BASIS FOR A CLAIM UNDER TITLE VII ABSENT EVIDENCE OF DISCRIMINATORY TREATMENT OF WOMEN COMPARED TO MEN.

Claims of sexual stereotyping were never intended to create an independent cause of action under Title VII. Although the *Zarda* court asserts that *Price Waterhouse* and *Oncale* support "the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms," 883 F.3d at 123, this Court did not so hold in either case. *Price Waterhouse*, 490 U.S. at 251 (plurality) and 294 (Kennedy, J., dissenting). The *Price Waterhouse* Court did not set out to establish the parameters of what constitutes a sex stereotype or that any stereotypical notions on appropriate behaviors of men and women ran afoul of Title VII. Further, *Oncale* does not even reference *Price Waterhouse* and is very clear that to establish a claim under Title VII for sex discrimination, the plaintiff must prove that the discriminatory conduct was "because of sex" and not some other reason. 510 U.S. at 81. Rather, "[t]he doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support [a plaintiff's] argument that an employer discriminated on the basis of the enumerated sex category by holding

males and females to different standards of behavior." *Evans*, 850 F.3d at 1260 (Prior, J., concurring).

The comments in question in *Price Waterhouse* demonstrated that the decision-makers were influenced by the fact Hopkins was a woman when making their decision to put her promotion on hold. *Price Waterhouse*, 490 U.S. at 251 (noting that the comments in question "did not simply consist of stray remarks"). Such statements would today be evaluated as to whether they constitute "direct evidence" of discriminatory intent. *See*, *e.g.*, *Willingham*, 2018 U.S. Dist. LEXIS 85211 at *7-8. If there is "direct evidence" of discrimination, the case would be evaluated under the mixed-motive analysis established in *Price Waterhouse* and adopted in part in the Civil Rights Act of 1991 (42 U.S.C. § 2000e-2(m)), and if the case only has circumstantial evidence (as is often the case), the matter would proceed under the burden-shifting analysis of *McDonnell Douglas*. *Davis*, 748 F. Supp. 2d at 692; *Wilber*, 2005 U.S. Dist. LEXIS 27435 at 19-20.[7] Of course,

[7] "Direct evidence must be 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.' " *Johnson*, 2017 U.S. Dist. LEXIS 64603 at *24 (quoting *Warch v. Ohio Casualty Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006)). " 'Direct evidence' is 'evidence which, if believed, proves the fact [in question] without inference or presumption.' " *Wilber*, 2005 U.S. Dist. LEXIS 27435 at *19 (quoting *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 415 (5th Cir. 2003)). Such evidence may include "any statement [from someone with decision-making authority in the adverse decision in question] or document which shows on its face that an improper criterion served as a basis, though not

because statements or actions based on sexual orientation or gender identity are based on characteristics other than sex, they would not constitute direct evidence of discrimination under Title VII.

Creating an independent claim based on sex stereotypes (a term not defined in *Price Waterhouse, Zarda*, or *R.G. & G.R. Harris Funeral Homes*) to avoid the responsibility of proving that the employee's sex was a motivating factor in the challenged employment decision would undermine Title VII's balanced scheme. There is no clear definition of what constitutes a sex stereotype. Turning sexual behavior or self-identification of one's sex into a substitute for the statutory prohibition on sex discrimination eviscerates the limitation set out in the statute itself. To adopt a sex stereotype standard would be impossible to implement and would result in this Court turning Title VII into a "general civility code" and the courts reexamining every adverse employment decision to determine if some conscious, unconscious, or implicit bias influenced the decision. The Court should reject such a standard.

A. The Notion of Sex Stereotyping is a Vague Standard that should be Rejected.

Title VII should be clear for employers and employees alike. Title VII was not meant to create "asexuality [or] androgyny in the workplace," or to "reach

---

necessarily *the* basis for the adverse employment action." *Id.* at *19-20.

genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Oncale*, 523 U.S. at 81. It was designed to eliminate discrimination because of sex, which this Court has clearly stated is to prevent members of one sex from being "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)). The notion of sex stereotyping as an independent basis for establishing a Title VII violation would create a vague and impossible standard of compliance.

There is no definition or criteria for determining what constitutes a sex stereotype. For example, one court opined: "The concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999). Another court applying *Price Waterhouse* has observed, "Title VII barred not only discrimination because [a plaintiff] was a woman, but also for 'sex stereotyping' because she failed to act according to the gender stereotype of a woman." *M.A.B. v. Bd. of Educ.*, 2018 U.S. Dist. LEXIS 40346 at *15 (D. Md. Mar. 12, 2018). In *Zarda*, the court concluded that "generalizations about members of their sex, or 'as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII.'" 883 F.3d at

120 (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)). Yet, such circular and vague concepts are impossible to administer and leave to each individual, court, or jury the ability to decide for himself, herself, or itself whether any characteristic that may have been considered by an employer is a mere stereotype and thus evidence of discriminatory intent. In spite of many courts commenting on sex stereotypes, no court has given any guidance on what would constitute an impermissible sex stereotype under Title VII, which leaves open the question of whether any conduct disapproved of by a supervisor or co-worker will be deemed nothing more than a stereotype.[8]

---

[8] Indeed, Congress's efforts have been equally futile when proposing legislation to add sexual orientation and gender identity to the scope of Title VII. For example, in H.R. 5 (the Equality Act) introduced and passed by the House of Representatives in 2019, Congress does not provide a definition of what constitutes a sex stereotype and defines gender identity as "the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual regardless of the individual's designated sex at birth." H.R. 5, 116th Cong. § 9 (2019) (proposing to amend 42 U.S.C. § 11101(a)(2) & (4)). Such vague terms are themselves dependent on stereotypes to give them any meaning whatsoever, leaving employers, managers, and co-workers in fear that any comment about another would be considered evidence of discriminatory animus. Indeed, such legislation only makes matters worse. It is no wonder so many spoke against the proposed legislation, including numerous individuals and groups representing the interests of women. H. Rept. No. 116-56 at 100-149 (May 10, 2019); *see also* Natasha Chart & Penny Nance, *Feminists, Conservatives Join Forces to Oppose "Equality Act*," Real Clear Politics (May 6, 2019), https://www.realclearpolitics.com/articles/

This Court's references to sex stereotypes have been no clearer when it comes to defining just what constitutes a sex stereotype. In *Manhart*, the Court observed, "It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." 435 U.S. at 707. Attributes and beliefs about sexual behavior, dress, or behavior in general are not assumptions about whether men or women are unable "to perform certain kinds of work" and do not disadvantage women in comparison to men and vice versa.

Consistent with *Price Waterhouse* and *Oncale*, an allegation of sex stereotyping would be relevant only if it tended to show that the plaintiff was treated differently than a similarly situated person of the opposite sex. The courts already engage in that analysis under the *McDonnell Douglas* framework as addressed *supra*. Accordingly, there is no need to articulate some special consideration for alleged sex stereotypes. To hold otherwise would only create confusion as to what constitutes an impermissible stereotype in violation of Title VII.

2019/05/06/feminists_conservatives_join_forces_to_oppose_equality_act_140261.html.

B. Sexual Orientation and Gender Identity are not Sex Stereotypes that Create Discriminatory Treatment between Men and Women.

As noted above, sexual orientation is not a characteristic unique to one sex and the same is true for transgender status or questions of gender identity. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 578; *Witter*, 915 F.3d at 334 (Ho., J., concurring). Yet, even though actions that were allegedly taken based on sexual orientation and/or gender identity necessarily constitute factors other than sex, the Second and Sixth Circuits both held that what they termed as stereotypical attitudes about sexual behavior or the "notion of [someone's] sex" still created an independent cause of action under Title VII. The Court should reject such a contention for in doing so, any disagreement with a person's behavior, even when the behavior is disapproved in both men and women, now creates the basis of a claim of sex discrimination, from sexual behavior to dress to attitudes to the firmness of a handshake, as all of it could be classified as nothing more than a sex based stereotype.

Zarda flippantly relegates all views that do not embrace homosexual behavior as the application of outdated stereotypes. In following *Hively*, the *Zarda* court concluded that "same-sex orientation 'represents the ultimate case of failure to conform' to gender stereotypes and aligns with numerous district courts' observation that 'stereotypes about homosexuality are directly related to our stereotypes about the proper

roles of men and women. . . . The gender stereotype at work here is that "real" men should date women, and not other men.'" 883 F.3d at 121 (citations omitted). In finding this sufficient to support a claim under Title VII, the court concluded, "For purposes of Title VII, any belief that depends even in part, on sex, is an impermissible basis for employment decisions. This is true irrespective of whether the belief is grounded in fact or lacks a 'malevolent motive.'" *Id.* at 122 (citations omitted).

The Sixth Circuit took a similarly broad view of impermissible sex stereotyping by holding that any "gender non-conforming" behavior is necessarily protected under Title VII. Such a holding makes a person's actual sex irrelevant, substituting behavior when viewed in light of an undefined "stereotypical notion" on how people should behave. As the court held, "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity." *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 576-77.

Such a holding means any cultural expectations on behavior are now unlawful under Title VII, from dress codes, appropriate use of language, or even basic politeness. This Court's recognition in *Price Waterhouse* that interpersonal skills and treatment of coworkers are legitimate criteria for an employer to consider would be obliterated. *See* 490 U.S. at 234-37.

The critical question under Title VII's text of whether men and women were subjected to materially adverse terms and conditions of employment would no longer be relevant, but only whether an employer had a vague notion that an individual did not comply with some unspecified "stereotype" of how men and women should behave. Indeed, an employer may not have any behavioral expectations, even for both men and women for if those expectations in any way resemble an employee's or a court's idea of what a sex stereotype may be, then the employer unwittingly has violated Title VII. Surely Title VII does not go so far.

C. Applying a Standard Based on Sex Stereotyping would Require a Court to Second Guess Every Employment Decision to Determine if it was Tainted by a Sex Stereotype.

Title VII was never meant to be a "general civility code." *Oncale*, 523 U.S. at 81; *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The issue is whether the employee can prove he or she was discriminated against based on his or her sex. *Oncale*, 523 U.S. at 81. As such, courts have properly held that sexual behavior, including sexual orientation, are not covered under Title VII.

In *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996), the Fourth Circuit looked at the scope of Title VII in a post-*Price Waterhouse* world. In his concurring opinion, Judge Niemeyer noted that

Title VII does not cover every difference based on sex. "It follows that in prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman, Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability. Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual. Such conduct is aimed at the employee's sexual orientation and not at the fact that the employee is a man or a woman." *Id.* at 751 (Niemeyer, J., concurring) (citations omitted); *see also Zarda*, 883 F.3d at 107 and cases cited therein; *Bystry v. Verizon Servs. Corp.*, 2005 U.S. Dist. LEXIS 5634 *30 (D. Md. Mar. 31, 2005) (sexual behavior not protected by Title VII). Indeed, *Price Waterhouse* held that decisions that are adverse to a female employee are permissible so long as they are not because she is female, but rather are "for other reasons." *Price Waterhouse*, 490 U.S. at 239 & 244.

The logical conclusion of the Second and Sixth Circuit approaches becomes that an employer must create "asexuality [or] androgyny in the workplace" contrary to this Court's admonition. *Oncale*, 523 U.S. at 81. Indeed, the Sixth Circuit determined that Stephens's actual sex was "immaterial" for purposes of Title VII and a matter the court need not decide. The court's reasoning: Stephens's sex cannot be irrelevant to the employment decision "if an employee's attempt or desire to change his or her sex leads to an adverse employment decision." *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 576.

Employers have the right to operate their workplaces so long as they do not make discriminatory employment decisions motivated by the specific characteristics outlined in Title VII. *Price Waterhouse*, 490 U.S. at 239. Sexual orientation and gender identity are not characteristics that create a situation where men and women are subject to adverse terms and conditions of employment with respect to the opposite sex. They are not assumptions to exclude one sex from performing certain work. Accordingly, sex stereotyping, and specifically notions of sexual orientation and gender identity, should not form the basis of determining whether an individual was the victim of discrimination because of sex.

Relying on a vague notion of sex stereotypes as an independent basis for claims under Title VII would mean every employer loses the right to establish a culture or certain expectations for its workforce. Courts would be forced to question every adverse employment decision to determine if some characteristic of the plaintiff motivated the employer's decision, and if so, if that characteristic constitutes a sex stereotype, all without any guiding principle to apply. Employers would be at the whim of any employee who suffered an adverse employment action. Proof that the employee's sex was a motivating factor in the decision would not be required; instead the only proof required would be that the employer took notice of an action, attitude or attribute the employee claims is a mere stereotype of human behavior. The use of gender specific language, gender specific restrooms, dress codes, or any

acknowledgement of a person's actual sex would lend itself to liability under Title VII based on the holdings of *Zarda* and *R.G. & G.R. Harris Funeral Homes*, a conclusion at odds with the clear text of Title VII and this Court's prior holdings. *Wittmer*, 915 F3d at 337-38 (Ho, J., concurring).

III. ANY CHANGE TO THE SCOPE OF TITLE VII TO INCLUDE SEXUAL ORIENTATION AND/OR GENDER IDENTITY SHOULD COME FROM CONGRESS AND NOT THE COURTS.

Prior to January 1, 2016, Hackney provided spousal health insurance benefits to any spouse of the opposite sex from the employee. After this Court's June 2015 decision in *Obergefell*, Hackney amended its plan to include all legally married individuals. There is no question that consistent with the universal interpretation of Title VII, Hackney's pre-2016 plan complied with Title VII. Should this Court decide that Title VII as written prohibits discrimination on the basis of sexual orientation and/or gender identity as part of its prohibition on discrimination because of sex, Hackney would likely be liable to judgment for acting consistent with the law as announced by every circuit court in the country at the time. *See Zarda*, 883 F.3d at 107 (and cases cited therein); *Wittmer*, 915 F.3d at 333 (Ho, J., concurring). It was not until *Hively* in 2017, well over a year after Hackney amended its policy that any circuit court of appeals chose to reverse prior consistent precedent regarding the scope of Title VII. *Hively*, 853

F.3d at 340-41. To subject Hackney and companies like it to liability for policies or actions universally found to be consistent with Title VII would do a grave injustice. Such a fundamental change to Title VII should come from Congress, not the courts.

A. The Courts have Consistently Held that Title VII does not Prohibit Discrimination on the Basis of Sexual Orientation and Companies such as Hackney Properly Relied on Those Holdings When Establishing Policies, Including Policies Regarding Spousal Health Benefits.

In Hackney's case, the plaintiff's claim is that she was being discriminated against based on her sexual orientation because her same-sex spouse was not eligible for spousal health insurance coverage prior to January 1, 2016. Yet, as previously noted, prior to 2017, every circuit court of appeals to have considered the issue, both before and after *Price Waterhouse*, held that sexual orientation was not covered under Title VII. This Court's decision in *Obergefell* did not alter the scope of Title VII when it declared that state marriage laws must grant marriage rights to couples of the same sex. Indeed, many courts continue to hold that Title VII does not prohibit discrimination on the basis of sexual orientation even after *Obergefell*.

The United States Court of Appeals for the Fourth Circuit, where Hackney's case is pending, has consistently held that Title VII does not create a cause of action for discrimination based on sexual orientation.

Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); *see also Hopkins*, 77 F.3d at 751-52 (Neimer, J., concurring). Six weeks *after Obergefell*, the Fourth Circuit reaffirmed the holding in *Wrightson*. *Murray v. N. Carolina Dep't of Public Safety*, 611 F. App'x 166, fn. * (4th Cir. 2015). Following suit, several United States District Courts within the Fourth Circuit have recently reaffirmed this holding. *Snyder v. Ohio Elec. Motors, Inc.*, 2018 U.S. Dist. LEXIS 42719 (W.D.N.C. Mar. 15, 2018) (granting the defendant's motion to dismiss on a claim of sexual orientation discrimination); *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807 (E.D. Va. 2016) (granting a motion to dismiss claim of discrimination based on sexual orientation). Other district courts have held the same. *See Jones v. District of Columbia*, 2018 U.S. Dist. LEXIS 93189, *62-63, 2018 WL 2538992 (D.D.C. June 4, 2018). To now hold that Hackney's policy, which was consistent with clear case precedent, is now and always was illegal[9] would unfairly subject Hackney and potentially countless other large and small businesses to liability for policies clearly lawful at the time they were implemented.

---

[9] Although Hackney voluntarily chose to amend its health insurance policy to cover all lawfully married individuals beginning January 1, 2016, Hackney does not concede that its prior policy would be illegal today. While not protected by Title VII, nothing prohibits an employer from establishing policies and practices to protect employees based on sexual orientation and gender identity. Indeed, Hackney has always hired employees without regard to such classifications, focusing exclusively on the applicant and employee's abilities with respect to the job.

B. The Court Should Hold that Title VII's Limitations on Discrimination Because of Sex Do Not Extend to Sexual Orientation or Gender Identity Because to Change the Application of the Statute by Judicial Fiat More than 55 Years After the Statute was Enacted Would Unfairly Prejudice Companies such as Hackney and Deprive Them of Due Process.

Hackney reasonably relied on clear and unanimous decisions both within and outside the Fourth Circuit that sexual orientation was not a protected class under Title VII and that its health insurance plan that defined spouse consistent with the universal definition of marriage as between a male and a female was lawful during the time period the policy was in place prior to January 1, 2016. For this Court to change the law now, four years after the policy changed and over 30 months after Hackney first requested the District Court to dismiss the case based on clear and binding precedent would be an injustice to Hackney and a windfall to the plaintiff.

Prior to 1993, this Court and the Fourth Circuit Court of Appeals both recognized that certain judicial interpretations of statutes should not be applied retroactively due to an "overriding equitable consideration." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *Lester v. McFaddon*, 415 F.2d 1101, 1106-07 (4th Cir. 1969); *Sargent v. Sullivan*, 1991 U.S. App. LEXIS 19457 at *12 (4th Cir. Aug. 22, 1991).

> The law does change, and man relies upon it at the time of action, as he must. The law need not, it should not leave him naked and defenseless against the biting winds of new discovery which, after his action, removes what had been the clear basis of his reliance. When necessary to avoid such harm, judicial decisions introducing new rules may be given prospective application as new statutory rules usually are.

Lester, 415 F.2d at 1107.

Such a rule of equity was necessary to protect the integrity of court decisions and the citizens and companies who justifiably rely on those decisions, especially when there is such consistency over so long a period of time, as is the case here. "When parties have substantially relied on prior legal interpretations, it may be manifestly unjust to apply the current interpretation retroactively even if that interpretation does represent the 'correct' statement of law." *Cash v. Califano*, 621 F.2d 626, 628-29 (4th Cir. 1980).

In 1993, the Supreme Court abandoned these equitable considerations holding: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517-18 (1993). Accordingly, should the Court reverse over 50 years of

consistent interpretation of Title VII, Hackney and every other employer facing pending claims of discrimination on the basis for sexual orientation and/or gender identity would face liability even when the circumstances at issue in the pending actions are years or decades old.

In Hackney's case, even with clear case law dispositive of the issues, the trial court imposed a stay two years after Hackney originally moved for dismissal of the plaintiff's claims and a year after Hackney renewed its arguments on summary judgment. Should this Court announce a new principle of law reversing 55 years of consistent interpretation of Title VII, Hackney and companies like it will be severely prejudiced. It would be particularly unjust and deprive Hackney of due process if its health insurance plan's definition of spouse, which was consistent with the universally accepted definition of marriage and reach of Title VII, would be declared unlawful, thus subjecting Hackney to liability. In such a case, no employer can rely on courts fashioning the outer limits of legislation, but must assume what may be beyond the imagination in fashioning policies for its workplace, hoping that at some point years or decades or, as here, half a century later a court does not change the standard for what is or was ever permissible.

Such a fundamental change in the law should come from Congress, not the courts. Indeed, Congress knows how to amend a statute when it is dissatisfied with the Court's interpretation of the law as written.

> Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment.

Hinton, 185 F. Supp. 3d at 817.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Eleventh Circuit in *Bostock v. Clayton County, Ga.*, Case No. 17-1618 and reverse the decisions of the United States Court of Appeals for the Second Circuit in *Allied Express, Inc. v. Zarda*, Case No. 17-1623, and the United States Court of Appeals for the Sixth Circuit in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, Case No. 18-107.

Respectfully submitted,

EDWARD H. TRENT, ESQ.
(*Counsel of Record*)
G. GERARD JABALEY, ESQ.
WIMBERLY LAWSON WRIGHT
DAVES & JONES, PLLC
550 W. Main Ave., Suite 900
Knoxville, TN 37902
(865) 546-1000
etrent@wimberlylawson.com

Counsel for Amicus Curiae

August 2019

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION, AT KNOXVILLE

JODI CHESHIRE, as next friend of V.C., her minor daughter	)	
Plaintiff/Appellant,	)	
v.	)	**Court of Appeals No. E2017-01300-COA-R3 -CV**
RAY LINCOLN HEAD II and UNION COUNTY BOARD OF EDUCATION, et al.,	)	
Defendants/Appellees	)	

BRIEF OF APPELLEE UNION COUNTY BOARD OF EDUCATION

APPEAL OF FINAL JUDGMENT UNDER RULE 54.02, TENN. R. CIV. P. OF CIRCUIT COURT FOR UNION COUNTY, TENNESSEE
Case No. 3406

ORAL ARGUMENT REQUESTED

Edward H. Trent, Esq. (BPR#030045)
G. Gerard Jabaley, Esq. (BPR#012677)
WIMBERLY LAWSON WRIGHT DAVES & JONES, P.L.L.C.
550 W. Main Street, 9th Floor
Knoxville, Tennessee 37901
(865) 546-1000

Counsel for Defendant/Appellee
Union County Board of Education

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

A. Tennessee Cases

B. Federal Cases and Cases from Other Jurisdictions

STATUTES AND RULES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Circuit Court err in finding that because the Appellant has alleged in her federal court complaint that the same facts and circumstances as alleged in the present case support a claim for violation of her civil rights, her claims against the Union County Board of Education and the other Defendants in their Official Capacities are barred by sovereign immunity under the civil rights exception to the waiver of sovereign immunity under the Tennessee Governmental Tort Liability Act?

STATEMENT OF THE CASE

On October 17, 2016, Plaintiff, Jodi Cheshire (hereinafter "Plaintiff"), filed an Amended Complaint[1] on behalf of V.C., her minor daughter, asserting that V.C. was subject to sexually harassing behavior including sexual comments and unwanted touching by Defendant Ray Lincoln Head II, V.C.'s geometry teacher at Union County High School in the fall of 2015. (R. 27-28 ¶ 10-16)[2]. She further claims that the touching by Defendant Head constituted sexual battery for which he was formally charged in May 2016. (R. 32 ¶ 29). She filed suit against Defendant Head and Union County Board of Education ("the Board") and four administrators in their individual and official capacities, Dr. James Carter, Director of Schools, Linda Harrell, then Principal of Union County High School, Carmen Murphy, then Assistant Principal of Union County High School, and Nathan Wade, also then Assistant Principal of Union County High School.[3] Plaintiff alleges that the Board and its administrators were negligent in their hiring and supervision of Head, negligence that facilitated his tortious conduct toward V.C.

---

[1] The Amended Complaint added Defendants Dr. James Carter, Director of Schools, and Nathan Wade, then Assistant Principal of Union County High School and properly named the Union County Board of Education as the governmental defendant. In all other respects, the allegations in the Amended Complaint mirrored those raised in the original Complaint filed on September 6, 2017. The Amended Complaint is at issue in this appeal.

[2] References to the Record shall be made as "R. ___." References to the Supplemental Record consisting of the federal court complaint and the transcript of the hearing before the Circuit Court will be made as "S.R. __" and "S.T. ___", respectively. On September 13, 2017, the Board filed its Unopposed Motion to Modify or Correct Record on Appeal to add to the court record a copy of Plaintiff's federal court complaint (the Amended Complaint filed October 17, 2016) and the transcript of the June 12, 2017, hearing before the Circuit Court on the Board's Motion for Judgment on the Pleadings.

[3] Plaintiff's claims against Carter, Harrell, Murphy, Wade, and even Head in their official capacities are nothing more than suit against the Union County Board of Education. *Brooks v. Sevier County*, 279 F. Supp. 2d 954, 960 (E.D. Tenn 2003) ("To the extent that [plaintiff] seeks to bring a negligence claim against [government official] in his official capacity, such a claim is really a claim against [the governmental agency]"). Accordingly, all references to "the Board" necessarily includes each of the individual defendants in their official capacity because a claim against Carter, for example, in his official capacity is "nothing more than suit against" the Board.

In her Amended Complaint, Plaintiff brought claims of Battery (Count I), False Imprisonment (Count II) and Assault (Count III) against Defendant Head in his individual capacity. Those claims are not the subject of this Appeal. Plaintiff also filed claims against the Board and its administrators/employees in their official and individual capacities for Negligent Supervision (Count IV), Negligent Hiring (Count V), "Negligence *Per Se*, Criminal Violation of T.C.A. §37-1-605" for alleged failure to timely report suspected child abuse (Count VI), and "Civil Liability Pursuant to T.C.A. §49-6-4006" for an intentional assault during school hours by school personnel (i.e., Head) (Count VII). Plaintiff also asserted that the Board was liable for battery for allegedly being aware of the battery being committed by Defendant Head and failing to act (Count I). Plaintiff's claims against the Board and its administrators/employees in their official capacity are governed by the Tennessee Governmental Torts Liability Act; Tenn. Code Ann. § 29-20-101-407 ("TGTLA"). On February 13, 2017, Plaintiff voluntarily dismissed her claims against Carter, Harrell, Murphy, and Wade in their individual capacities. [R. 101-102.]

Simultaneous with the filing of her Complaint in the Circuit Court for Union County, Tennessee, Plaintiff filed an identical complaint in the United States District Court for the Eastern District of Tennessee, Case No. 3:16-cv-356-JRG-CCS against the same defendants, but this time alleging violations of Title IX of the Civil Rights Act of 1972 and of 42 U.S.C. § 1983, alleging that Defendant Head's conduct and the Board and its administrator's negligence violated her civil rights. The factual allegations in the two lawsuits are identical. The only differences are the causes of action and some general language related to the burden of proof with respect to the various causes of action. [S.R. 1-16.]

On February 17, 2017, the Board, on behalf of itself and all defendants in their official capacity, filed a Motion for Judgment on the Pleadings based on sovereign immunity. On

June 12, 2017, the Circuit Court heard oral argument on the Motion and on June 21, 2017, granted the Board's motion in all respects. [R. 114-122.] Because the Circuit Court certified its order as a final judgment pursuant to Tenn. R. Civ. P. 54.02, this appeal followed. Defendant Head is not participating in this appeal as the Circuit Court's judgment did not affect the remaining claims pending against him in his individual capacity.

STATEMENT OF FACTS

V.C. began her sophomore year at Union County High School on August 8, 2015. Her first period class was geometry and Defendant Ray Lincoln Head II was V.C.'s teacher. [R. 27-28 ¶ 10-16.] Plaintiff claims that Defendant Head made inappropriate sexual comments to V.C. and touched her in an inappropriate manner. [R. 27-28, 30 ¶ 12-17, 21-23.] Plaintiff asserts that an unnamed teacher spoke with Harrell, Wade, and/or Murphy about the alleged abuse in late September or early October 2015, yet nothing was done to address the situation. [R. 28-29 ¶ 18-19.] Plaintiff also claims that Harrell, Wade, and/or Murphy spoke with other students during this time period regarding Defendant Head [R. 29 ¶ 19] but that when Harrell spoke with V.C., she declined to discuss the situation [R. 30 ¶ 22.] Plaintiff claims that she continued to suffer harassment and abuse at the hands of Defendant Head until late October 2015. [R. 30 ¶ 21-23.] Beginning November 9, 2015, Plaintiff alleges Harrell, Wade, and Murphy investigated the allegations and Head was removed from the classroom, never returning to Union County High School. [R. 31-32 ¶ 27.] There are no allegations of any abuse by Defendant Head following November 9, 2015. In May 2016, Defendant Head was charged with sexual battery based on V.C.'s allegations. [R. 32 ¶ 29.] The criminal case against Defendant Head remains pending.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY FOUND THAT THE UNION COUNTY BOARD OF EDUCATION MAINTAINED SOVEREIGN IMMUNITY FROM SUIT BECAUSE PLAINTIFF'S CLAIMS ARE NECESSARILY CLAIMS FOR VIOLATION OF HER CIVIL RIGHTS, EXEMPTED FROM SUIT UNDER THE TENNESSEE GOVERNMENTAL TORTS LIABILITY ACT.

All of Plaintiff's injuries and all of her claims in both state and federal court are necessarily based on her allegation that Defendant Head sexually harassed and assaulted her while she was a student in his geometry class in the fall of 2015. Plaintiff's claims against the Board are that the Board is responsible for Defendant Head's behavior, whether in negligence or under 42 U.S.C. § 1983 for violation of V.C.'s civil rights. Because Plaintiff's negligence claims against the Board are based directly on Defendant Head's intentional torts, which Plaintiff claims violated V.C.'s civil rights, this is in essence a civil rights case for which sovereign immunity has not been waived. Tenn. Code Ann. § 29-20-205(2).

A. Standard for a Motion for Judgment on the Pleadings.

Pursuant to Tenn. R. Civ. P. 12.03, a motion for judgment on the pleadings is filed after the pleadings have closed and tests the legal sufficiency of a complaint.

> When a motion for judgment on the pleadings is made by defendants, as is the case here, "it is in effect a motion to dismiss for failure to state a claim upon which relief can be granted." *Timmins v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009) (citing *Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998)). Such a motion tests the legal sufficiency of a complaint. It "admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." *Id.* (citation omitted).

Sakaan v. FedEx Corp., No. W2016-00648-COA-R3-CV, 2016 Tenn. App. LEXIS 975, *17-18 (Tenn. Ct. App. Dec. 21, 2016). "A motion for judgment on the pleadings tests only the validity of the legal theories pled by the party opposing the motion, and not the strength of the proof." *Brewer v. Piggee*, No. W2006-01788-COA-R3-CV, 2007 Tenn. App. LEXIS 406 *, 2007 WL 1946632 (Tenn. Ct. App. July 3, 2007). A complaint should be dismissed if the allegations fail

to state a claim upon which relief may be granted. *Winchester v. Little*, 996 S.W.2d 818, 821 (Tenn. Ct. App. 1998). While all factual allegations in a Complaint must be accepted as true, a court is not required to accept as true the inferences to be drawn from the facts or the legal conclusions set forth in the Complaint. *Riggs v. Burton*, 941 S.W.2d 44, 47 (Tenn. 1997).

B. The Tennessee Governmental Tort Liability Act Governs Plaintiff's Claims Against the Union County Board of Education and the Individual Defendants Sued in their Official Capacity.

Because it is a governmental agency, claims against the Board are governed by the TGTLA, Tenn. Code Ann. § 29-20-101-407. "[T]he State is immune from suit in a state court unless the legislature specifically provides to the contrary." *Shell v. State*, 893 S.W.2d 416, 420 (Tenn. 1995) (citing. Tenn. Const. Art. I, § 17; Tenn. Code Ann. § 20-13-102). Accordingly, the Board has sovereign immunity from suit unless that immunity is specifically waived under the TGTLA. *Campbell v. Anderson County*, 695 F. Supp. 2d 764, 776 (E.D. Tenn 2010); *Autry v. Hooker*, 304 S.W.3d 356, 362 (Tenn. Ct. App.), *appeal denied*, 2009 Tenn. LEXIS 762 (Tenn. Nov. 28, 2009).

"The limited waiver of sovereign immunity in the TGTLA is in derogation of Tennessee common law and must be strictly construed." *Campbell*, 695 F. Supp. 2d at 777. In other words, "Tennessee courts will not find a waiver of sovereign immunity 'unless there is a statute clearly and unmistakably disclosing an intent upon the part of the Legislature to permit such litigation.'" *Johnson v. City of Memphis*, 617 F.3d 864, 872 (6th Cir. 2010) (quoting *Davidson v. Lewis Bros. Bakery*, 227 S.W.3d 17, 19 (Tenn. 2007)).

"There is no cause of action set forth in the GTLA to hold the [Board] directly liable for [Head's] alleged intentional conduct." *Partee v. City of Memphis*, 449 Fed. Appx. 444, 447 (6th Cir. 2011). Rather, under the TGTLA, the Board can only be held liable in negligence for the negligent act or omission of its employee acting within the course and scope of his or her

employment, provided that the underlying injury is not the result of an intentional tort specifically outlined in the statute. Tenn. Code Ann. § 29-20-205(2); *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 84 (Tenn. 2001). "[I]t is fair to interpret [Tenn. Code Ann. § 29-20-205(2)] as intending civil rights claims to be considered a type of intentional tort" for which sovereign immunity has not been waived. *Brooks*, 279 F. Supp. 2d at 960.

"The TGTLA removes immunity for 'injury proximately caused by a negligent act or omission of any employee within the scope of his employment,' but provides a list of exceptions to this removal of immunity. Tenn. Code Ann. § 29-20-205(2). Injuries that 'arise[] out of . . . civil rights' are one such exception, that is, sovereign immunity continues to apply in those circumstances." *Johnson,* 617 F.3d at 872. Here, Plaintiff filed two separate lawsuits based on the same facts and circumstances, one in federal court alleging violation of V.C.'s civil rights under 42 U.S.C. § 1983 [S.R. 1-16] (see also, Appendix Tab A), and the Amended Complaint dismissed by the Circuit Court asserting claims in negligence subject to the provisions of the TGTLA. [R. 24-37.] Because "these torts [filed against the Board] are alleged to have been committed solely in the context of the violation of [Plaintiff's] civil rights – this is in essence a civil rights suit." *Campbell*, 695 F. Supp. 2d at 778; *see also Johnson*, 617 F.3d at 872 (Plaintiff's claim regarding the dispatcher's negligence arises out of the same circumstances giving rise to her civil rights claim under § 1983. It therefore falls within the exception listed in § 29-20-205, and the City retains its immunity"). Courts in Tennessee have consistently held that such civil rights claims are not subject to suit under the TGTLA. *Johnson,* 617 F.3d at 872 ("TGTLA's 'civil rights' exception has been construed to include claims arising under 42 U.S.C. § 1983"); *Campbell*, 695 F. Supp. 2d at 778 (same).

Plaintiff's claims against Carter, Harrell, Murphy, Wade, and even Head in their official capacities are nothing more than suit against the Board. "'Official-capacity' suits are in essence another way of pleading an action against the entity represented by the individual defendant. Therefore, insofar as the School District is immune from suit, the individual Defendants in their official capacities share that immunity." *Autry*, 304 S.W.3d at 364; *see also, Campbell*, 695 F. Supp. 2d at 770 ("an action against a city official in his official capacity is treated as an action against the city itself"); *Dillingham v. Millsaps*, 809 F. Supp. 2d 820, 835 (E.D. Tenn 2011) ("To the extent that Plaintiffs have sued [various officials], in their official capacities, that is nothing more than a suit against Monroe County"). Accordingly, Plaintiff's claims against the individual defendants in their official capacity are evaluated the same as her claims against the Board.

C. The Circuit Court Properly Took Judicial Notice of Plaintiff's Federal Court Complaint.

On page 8 of her Brief, Plaintiff claims "the trial court considered a document that is outside of the pleadings and of the record." This assertion relates to Plaintiff's federal court complaint referenced in the Board's Motion for Judgment on the Pleadings and was to be attached as an Exhibit to that Motion. Apparently, and just discovered by Plaintiff, the Board inadvertently neglected to attach a copy of the federal court complaint to that original motion. Yet, Plaintiff acknowledges that she "has filed a federal civil rights action based on the same circumstances of the present action," Brief of Appellant p. 8; *see also,* [R. 106-107 Plaintiff's Response to the Board's Motion for Judgment on the Pleadings states: "Plaintiff . . . admits that it [sic] filed a suit in state court (the instant case) and a suit in federal court based on essentially the same facts"); S.T. 24-25.] Nevertheless, Plaintiff seems to suggest that the Circuit Court considering her federal court complaint was somehow improper.

With Plaintiff's consent, the Board filed its Unopposed Motion to Modify or Correct Record on Appeal on September 13, 2017. Attached to that motion is a copy of Plaintiff's Amended Complaint filed in federal court on October 17, 2016. [S.R. 1-16]. A copy of the hearing transcript related to the Circuit Court's judgment at issue was also provided. Given that there was never an issue as to the operative fact, namely that Plaintiff alleges that the same facts and circumstances that support her claims filed in the Circuit Court below are the same facts and circumstances that support her claims for violation of her civil rights in her federal court suit, such an issue is moot or waived. Nevertheless, the Circuit Court properly took judicial notice of Plaintiff's federal court complaint and her admission as to its contents in determining that the Board was entitled to entry of judgment on the pleadings based on the civil rights exception to the waiver of sovereign immunity.

Tenn. R. Evid. 201 provides that a court may take "judicial notice of adjudicative facts." Such facts are those "not subject to reasonable dispute [because they are] . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(b). Plaintiff was given the opportunity to be heard on the matter for which judicial notice was requested and admitted the accuracy of the particular fact, namely the existence and content of her federal court complaint.

Court records are of the type accepted for purposes of judicial notice. *Counts v. Bryan*, 182 S.W.3d 288, 293 (Tenn. Ct. App. 2005); *Mandela v. Reynolds*, C.A. No. 92-3288-II, 1993 Tenn. App. LEXIS 452 *6 (Tenn. Ct. App. June 30, 1993). It was certainly proper for the Circuit Court to take judicial notice of Plaintiff's federal court complaint in deciding the Board's Motion for Judgment on the Pleadings. "A motion for judgment on the pleadings must be sustained by the undisputed facts appearing in all the pleadings, ***supplemented by any facts of***

which the court will take judicial notice." *Sea Ray Boats, Inc. v. Pleasure Marine, Inc.*, C.A. No. 1199, 1988 Tenn. App. LEXIS 853 *6 (Tenn. Ct. App. Dec. 27, 1988) (emphasis added); *see also, Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 Tenn. App. LEXIS 269 *23-25 (Tenn. Ct. App. Feb. 19, 2009). The fact of Plaintiff's federal court complaint and the contents of that complaint were the proper subject of judicial notice and consideration by the Circuit Court in ruling on the Board's Motion. Indeed, the federal court complaint, the substance of which Plaintiff admits (see Brief of Appellant, p. 8), establishes that Plaintiff's claims in the Circuit Court "arose out of" an alleged violation of her "civil rights," meaning they are barred by sovereign immunity.

D. The Tennessee Supreme Court's Decision in *Limbaugh v. Coffee Med. Ctr.* does not Save Plaintiff's TGTLA Claims Because her Alleged Injuries "Arose Out of . . . Civil Rights."

Plaintiff relies on the Tennessee Supreme Court's decision in *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73 (Tenn. 2001) to argue that a negligence claim based on assault and battery is permissible under the TGTLA. While in a general sense, that is correct, *Limbaugh* did not address the civil rights issues raised in this case. Indeed, no claim for violation of civil rights was alleged in *Limbaugh*. Here, however, by filing her federal court complaint, Plaintiff announced to the Board and to the world that her allegations arose out of Defendant Head's alleged conduct and that such conduct was a violation of her civil rights. The TGTLA's civil rights exemption prohibits Plaintiff from bringing a negligence claim based on the same underlying circumstances that support her civil rights action. Because the essence of both the state court complaint and federal court complaint are that the actions of Defendant Head and the associated culpability of the Board constitute a violation of her civil rights, Plaintiff's claims in her Amended Complaint against the Board and the individual defendants in their official capacity are barred based on sovereign immunity.

In *Limbaugh*, the Tennessee Supreme Court was asked to review its prior holding in *Potter v. City of Chattanooga*, 556 S.W.2d 543 (Tenn. 1977) and determine whether a claim against a governmental agency that "arose out of" the intentional torts of assault and battery were barred under the TGTLA. The *Limbaugh* court overruled *Potter* "to the extent that it retains immunity from liability for those torts *not specifically enumerated in the intentional tort exception."* *Limbaugh*, 59 S.W.3d at 81 (emphasis in original). While the torts of assault and battery are not listed in the statute, the intentional tort of "civil rights" is listed. *Brooks*, 279 F. Supp. 2d at 960.

In *Limbaugh,* the court was faced with a claim that the medical center failed to take appropriate action with regards to "a staff member known to be physically aggressive." 59 S.W.3d at 81. The medical center was not liable based on the staff member's assault, but for its negligence. *Id.* at 80. Nevertheless, this raised the question with respect to the intentional tort exceptions to the waiver of sovereign immunity of "the true bases of the injuries for which recovery of damages is sought." *Id.* at 81. The fact that the claim against the medical center was for negligence (as required by the TGTLA) "it is clear that Ms. Limbaugh's injuries "arose out of" the intentional torts of assault and battery committed by" the staff member. *Id.* at 84. While overruling *Potter* in holding that if the injuries "arose out of" a battery, they were not subject to the intentional tort exception of the TGTLA, the *Limbaugh* court upheld the analysis that requires courts to determine the basis for the injuries upon which the suit is based. *Id.* at 82 and 84.

> [T]he General Assembly enacted Tennessee's GTLA to codify the general common law rule that "all governmental entities shall be immune from suit," Tenn. Code Ann. § 29-20-201(a), subject to the specific exceptions contained within the Act. One such exception is provided in section 29-20-205, which waives immunity for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment." . . . ***[T]he provision goes on***

> ***to exempt from liability those injuries "arising out of" one of several enumerated exceptions to this section, including the intentional tort exception.*** As this Act was created in derogation of the common law, it must be strictly construed. *Roberts [v. Blount Mem'l Hosp.],* 963 S.W.2d 744 at 746 [(Tenn. Ct. App. 1997)}. Therefore, we decline to impose blanket liability on a governmental entity for its negligent employment practices when one of the exceptions immunizing the entity is applicable.

Id. at 82 fn. 7 (emphasis added).

Here, V.C.'s injuries are based exclusively on the alleged violation of V.C.'s civil rights, an exception specifically listed in Tenn. Code Ann. § 29-20-205(2). Plaintiff's alleged injuries do not include physical injuries as in *Limbaugh*, but rather are exclusively psychological injuries associated with Defendant Head's alleged actions. [R. 32 ¶ 28; S.R. 15 ¶ 50.] Additionally, Plaintiff's claims of negligence in her Amended Complaint are what support her claim for violation of her civil rights. [S.R. 14-15 ¶ 46-52.] Specifically, in her federal court complaint, Plaintiff alleges that the Board "knew of the excessive risk of sexual harassment, abuse, or discrimination of Plaintiff V.C., yet disregarded that risk by failing to take reasonable measures to abate it" [S.R. 14 ¶ 46] and therefore is liable for the violation of Plaintiff's civil rights. [S.R. 14-15 ¶ 47-49.] The question for the court is whether her claims "arose out of" a civil rights violation, which is specifically exempted from the waiver of sovereign immunity under the TGTLA, or whether they "arose out of" some other tort not exempted. As the *Limbaugh* court held, if the claims "arose out of" a tort listed in the statute, then sovereign immunity applies. 59 S.W.3d at 82 fn. 7. Accordingly, "[t]he question one must ask is whether the essence of the suit remains a civil rights violation." *Peatross v. City of Memphis*, 2015 U.S. Dist. LEXIS 189393 *22 (W.D. Tenn. March 12, 2015). In this case, the answer to that question is "yes."

As is evident in the argument below, civil rights violations can result from an assault or battery by a governmental official, but not every assault and battery gives rise to a civil rights violation. *See, e.g., Gregory v. City of Memphis,* 2013 U.S. Dist. LEXIS 67341 *33-35 (W.D.

Tenn May 10, 2013). Because the TGTLA is in derogation of the common law and must be strictly construed and because Plaintiff's negligence claims associated with Defendant Head's alleged sexual harassment and improper touching are admittedly claims that "arise out of" a violation of Plaintiff's civil rights, her Circuit Court claims are barred by sovereign immunity.

E. The Circuit Court Properly Held that Plaintiff's Amended Complaint is Essentially a Civil Rights Case and Sovereign Immunity Bars Plaintiff's Claims of Negligence Against the Union County Board of Education.

Plaintiff claims the Circuit Court erred in its Order because it relied on three federal court opinions. In making her argument, Plaintiff suggests the Circuit Court was wrong to rely on those opinions because (1) they were issued by federal courts and not Tennessee state courts; (2) the negligence claims and the civil rights claims were filed in the same lawsuit, not two different lawsuits filed in two different courts; and (3) the cases are distinguishable. Plaintiff's arguments have no merit and she does nothing to undermine the clear and persuasive reasoning in these cases. Further, she offers no contrary authority.

The three federal court cases the Circuit Court relied on were *Johnson v. City of Memphis*, 617 F.3d 864 (6th Cir. 2010); *Dillingham v. Millsaps*, 809 F. Supp. 2d 820 (E.D. Tenn. 2011); and *Campbell v. Anderson County*, 695 F. Supp. 2d 764 (E.D. Tenn. 2010). All three of these cases are on point and support the conclusion that Plaintiff's Amended Complaint is barred based on sovereign immunity. The fact these opinions are from federal courts, where the vast majority of federal civil rights claims are adjudicated, does not make them any less persuasive. Indeed, Plaintiff fails to cite a single Tennessee court opinion from any level that disagrees with the holdings in these opinions.

Further, Plaintiff's claim that the cases are distinguishable because the issues of negligence subject to the TGTLA were filed in the same lawsuit as the federal civil rights claims (brought under 42 U.S.C. § 1983) is without merit. Initially, nothing prohibited Plaintiff from

filing her claims together in a single lawsuit; she chose to file two separate actions in two separate courts based on identical factual allegations. To suggest that her separating her claims into two separate lawsuits should result in a different legal conclusion on the application of the TGTLA is without any legal precedent. This is not simply an alternative theories of recovery argument, but a clear assertion that her injuries, which are the same in both suits, "arose out of" a civil rights violation. Whether plead in the same complaint as her TGTLA claims or not, the nature of her claims is the same; this is a civil rights action barred based on sovereign immunity.

Under Plaintiff's argument, the court would undermine the TGTLA and create a system whereby governmental agencies could be sued in federal court for civil rights violations and simultaneously sued in state court for negligence even though the injuries claimed are the same in both suits. It is clear, as noted above and in the cases cited below, that if Plaintiff's injuries "arose out of" a violation of her civil rights, then her claim is barred under the TGTLA. Tenn. Code Ann. § 29-20-205(2). Plaintiff wants to avoid this clear limitation by claiming that because she filed her civil rights claims in federal court, those claims have no effect on her pursuing her identical claims in state court. The *Limbaugh* court's analysis as discussed *infra* shows the fallacy of that argument. The Board is exempt from suit under the TGTLA for claims that "arose out of" a violation of civil rights and no matter how Plaintiff tries to describe her Circuit Court claims, they remain at their heart a civil right action as her federal court complaint clearly demonstrates. The duplicative litigation Plaintiff proposes is certainly not the intent of the TGTLA and runs contrary to any possible concept of judicial economy that provides that related issues should be resolved together, not in dueling litigations. *See Peatross*, 2015 U.S. Dist. LEXIS 189393 * 10-12.

As noted above, the Tennessee Supreme Court in *Limbaugh* reaffirmed the notion that if the plaintiff's injuries "arose out of" an intentional tort listed under Section 205 of the TGTLA, then the claim was barred. Here, based on Plaintiff's own admission, her allegations are that the injuries she suffered violated her civil rights. In her federal court complaint, Plaintiff alleges:

> All individually-named Defendants are individually liable for the violation of Plaintiff V.C.'s civil rights due to their actual knowledge of the sexual abuse, harassment, and/or discrimination of Plaintiff V.C., or their knowledge of the risk of such sexual abuse, harassment, and/or discrimination, and their failure to take reasonable measures to abate such sexual abuse, harassment, and/or discrimination. Thus all Defendants are equally liable for Defendant Head's sexual abuse, harassment, and/or discrimination of Plaintiff V.C.

S.R. 14 ¶ 47. Plaintiff goes on to allege that the Board is responsible for the negligent action of its "lower-tier employees" that resulted in the violation of her civil rights. S.R. 14 ¶ 48-49. These are the same allegations Plaintiff asserts support her claims of negligence in her Amended Complaint. [*See e.g.,* R. 32-35 ¶ 32, 38, 40, 42, 44.] Accordingly, Plaintiff admits that her injuries, which are psychological in nature with no physical injuries (R. 32 ¶ 28; S.R. 15 ¶ 50) "arose out of . . . civil rights" violations.

Because her claims against the Board necessarily sound in negligence, Plaintiff must establish (1) duty, (2) breach, (3) causation in fact, (4) proximate causation, and (5) harm. *Partee*, 449 Fed. Appx. at 448. The only "harm" Plaintiff alleges resulted from Defendant Head's alleged conduct, the same conduct upon which she bases her civil rights claims in her federal court complaint. There is no question that all of Plaintiff's claim necessarily arise out of the same facts and circumstances, facts and circumstances that she claims violated V.C.'s civil rights. As a result, the civil rights exception to the waiver of sovereign immunity applies and the Circuit Court properly granted the Board's Motion for Judgment on the Pleadings.

In *Autry, supra,* the court had before it a student who claimed she was sexually harassed by one of her high school teachers and the school failed to properly address her complaints. In

dismissing her claim against the school district and various officials in their official capacity, the court noted that her claims were in essence a civil rights claim for which immunity had not been waived.

> In the case at bar, [plaintiff's] injuries arise from her claims of intentional inflicting [sic] of emotional distress or her claims of sexual harassment, i.e., a violation of [plaintiff's] civil rights. Both are specifically enumerated in subsection 2 of Section 29-20-205. Therefore, even if it were established that [the teacher's] actions against [plaintiff] were foreseeable, immunity against these Defendants is not removed by the statute.

Autry, 304 S.W.3d at 364. Plaintiff's claim is no different. She seeks to hold the Board liable under the TGTLA for the actions of Defendant Head, acts she claims violated her constitutional right to be free from sexually harassing behavior. Because her claims in the Amended Complaint are in essence a repackaging of her Section 1983 claim pending in federal court, it falls within the civil rights exception to the TGTLA and the Board is immune from such claims. The fact that Plaintiff alleges that she suffered from an assault, battery, and false imprisonment in addition to sexually harassing comments does not change the analysis. All such injuries are necessarily related to her claim that the Board violated her civil rights by not sufficiently protecting her from Defendant Head.

The three federal court cases relied on by the Circuit Court clearly explain that adding a claim of negligence based on a battery does not avoid the sovereign immunity bar. In *Campbell, supra,* the court addressed whether the plaintiff could bring suit against Anderson County and its Sheriff under the TGTLA when a deputy raped the plaintiff after transporting her away from the scene of a domestic dispute. The plaintiff sued the County and the Sheriff individually and in his official capacity for failing to have better policies regarding the transportation of females and for failing to train its officers. She also filed suit under 42 U.S.C. § 1983 for violation of her Fourth

Amendment rights to be free from such physical assault. In dismissing the plaintiff's claims under the TGTLA for negligence and the officer's tortious conduct, the court noted:

> Tenn. Code Ann. § 29-20-205(2) provides that immunity from suit of all governmental entities is removed or waived for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of 'civil rights.' It is fair and reasonable to interpret the plain language in § 29-20-205(2) as meaning that civil rights claims are a type of intentional tort. This court construes the term 'civil rights' in § 29-20-205(2) as meaning and including claims arising under the federal civil rights laws, e.g., 42 U.S.C. § 1983 and the United States Constitution.

Campbell, 695 F. Supp. 2d at 778 (citations omitted). Finding that plaintiff's "tort claims of false imprisonment, assault and battery, intentional infliction of emotional distress, and negligence brought against the County under Tennessee law are predicated on the alleged violation of her civil rights by" the deputy, her claims were barred under the TGTLA because "the County is entitled to immunity from suit on these claims pursuant to the 'civil rights' exception in Tenn. Code Ann. § 29-20-205(2)." *Id.* As the Circuit Court found, the *Campbell* court specifically rejected Plaintiff's argument here that her claim is one based on assault, battery and false imprisonment, torts not listed under the TGTLA exceptions. Indeed, the torts of assault, battery and false imprisonment are what gave rise to the claim of civil rights as Plaintiff readily admits and argues in her federal court complaint. She cannot have it both ways and the TGTLA does not permit her to do so.

Likewise, the court in *Dillingham, supra*, relied on this same "civil rights" exception to dismiss a claim against the Sheriff and County for the alleged use of excessive force by two deputies. The court noted, "the TGTLA's 'civil rights' exception has been construed to include claims arising under 42 U.S.C. § 1983." 809 F. supp. 2d at 851 (citing *Johnson*, 617 F.3d at 872). The court then explained why the claim of negligent training and claims of assault and battery did not change the result, namely, because they all arose out of the same facts giving rise

to the civil rights action. *Id.* at 852 ("in the present case, Plaintiffs' negligence claim against Monroe County is nothing more than a civil rights claim: it is still based on an underlying claim of 'excessive force'") and at 854 ("Like their negligence claim, their intentional tort claims fall under the 'civil rights' exception of the TGTLA . . . because they arise from the same circumstances as their civil rights claims under 42 U.S.C. § 1983"). *See also, Partee,* 449 Fed. Appx. at 448 ("we affirm the district court's decision to dismiss the negligence claims against the City that were based directly on Callahan's conduct while arresting Partee [because] these claims arise out of exactly the same circumstances as the Partees' civil rights claims, thus falling within the exception to the waiver of immunity set forth in the GTLA")[4]; *Peatross*, 2015 U.S. Dist. LEXIS 189393 *23; *Gregory*, 2013 U.S. Dist. LEXIS 67341 *33 ("The Court found that [plaintiff's] state tort claims arose from the same circumstances giving rise to his civil rights claims under § 1983 and were therefore barred by the civil rights exception to the TGTLA's waiver of immunity" even though the civil rights claim failed as a matter of law under the facts of the case).

The same is true here. Plaintiff's claims of battery, negligent hiring and supervision, failure to report suspected child abuse, and intentional assault during school hours are all based on the same underlying allegations that Defendant Head, as a teacher at Union County High School, violated V.C.'s civil rights by subjecting her to sexually harassing and abusive behavior. The law in Tennessee is clear that such civil rights claims are not sustainable against the Board or its employees in their official capacity due to sovereign immunity. As a result, the Circuit

[4] The *Partee* court also noted the possible ambiguity on the scope of the civil rights exemption when the underlying harm is clearly identical to those that support the civil rights allegations, but the supporting facts for a negligence claim may be different. Accordingly, the *Partee* court did not address the application of the civil rights exception to all of the plaintiff's state tort claims against the City, instead finding alternate grounds that resolved those other claims. *Partee*, 449 Fed. Appx. at 449.

Court properly granted the Board's Motion for Judgment on the Pleadings based on sovereign immunity.

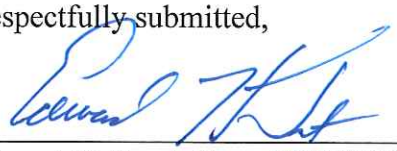
Finally, in *Johnson, supra,* the court held that "the plain language of the TGTLA preserves immunity for suits claiming negligent injuries arising from civil rights violations." The issue before the court was whether the plaintiff should have been permitted to assert a claim against the city based on the dispatcher's alleged negligence, negligence that allegedly led to officers at the location shooting the plaintiff. The court held that such an amendment would have been futile because "Plaintiff's claim regarding the dispatcher's negligence arises out of the same circumstances giving rise to her civil rights claim under § 1983. It therefore falls within the exception listed in § 29-20-205, and the City retains its immunity." *Johnson,* 617 F.3d at 872. Because Plaintiff's claims in her Amended Complaint admittedly arise out of the same circumstances that give rise to her federal civil rights action, the Board retains its immunity under the TGTLA and judgment on the pleadings was required.

Indeed, Plaintiff admits as much in her Initial Brief when she concedes that the Board "will retain its immunity from liability for injuries proximately caused by negligent acts or omissions of its employees within the scope of their employment, if the injuries arise out of civil rights, pursuant to T.C.A. § 29-20-205(2), so the only issue in question is whether or not [Plaintiff's] injuries arise out of the violation of her civil rights." Brief of Appellant, p. 8. As noted herein there is no question at all, all of Plaintiff's alleged injuries arose out of what she claims is a violation of her civil rights. Accordingly, her claims against the Board and all individual defendants in their official capacity are barred based on sovereign immunity as the Circuit Court properly found.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Circuit Court. Costs should be assessed against Plaintiff/Appellant, Jodi Cheshire.

Respectfully submitted,



Edward H. Trent, Esq. (BPR#030045)
G. Gerard Jabaley, Esq. (BPR#012677)
WIMBERLY LAWSON WRIGHT DAVES & JONES, PLLC
550 W. Main Street, 9th Floor
Knoxville, Tennessee 37901
(865) 546-1000

Counsel for Defendant/Appellee
Union County Board of Education

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Brief of Appellee Union County Board of Education, was furnished via United States Mail and e-mail on the 22nd day of September, 2017, to:

R. Deno Cole, Esq.
Sherif Guindi, Esq.
McGehee & Cole, P.C.
709 Market Street
Post Office Box 57
Knoxville, TN 37901

Counsel for Plaintiff/Appellant

Ray Lincoln Head, II
164 Brush Hill Court
Gallatin, TN 37066

Defendant, *pro se*

Edward H. Trent