IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Jacqueline Gill, *Plaintiff*, v. Eric W. Devlin, et al., *Defendants*.	§ § § § § § § § § §	ACTION NO. 4:11-CV-623-Y

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Introduction

Jacqueline Gill filed this employment discrimination action under 42 U.S.C. § 1983, after the Defendants denied her the opportunity to interview for a permanent teaching position at Tarrant County College District. They did this because they perceived her to be a lesbian—even though she was equally or more qualified than those ultimately hired. This action violated Gill's Fourteenth Amendment equal protection rights. The Defendants counter by attempting to invoke the qualified-immunity doctrine, taking the untenable position that they are invulnerable to Gill's claims against them in their personal capacities. But the Defendants are not immune: Gill's constitutional right to equal protection under the law, grounded in deep-rooted principles of jurisprudence, was and has been, clearly established under Supreme Court precedent, the precedent of this circuit, and that of our sister circuits. A reasonable official would have known—and the Defendants should have known—that denying Gill a permanent position because of her sexual orientation violates her equal-protection rights. Qualified immunity does not stretch to protect officials in these circumstances. And in any case, Gill's factual allegations—as set out in her Complaint (Dkt. No. 1) and Reply (Dkt. No. 14)—unequivocally establish that her pleadings are sufficient: She has pleaded ample factual allegations demonstrating that Devlin's conduct, sanctioned by Howell, violated her equal-protection rights. Taking Gill's factual allegations as true, and drawing reasonable inferences in her favor, Gill has sufficiently pleaded her claim, establishing that the Defendants lie well beyond qualified immunity's reach. Plaintiff respectfully asks this Court to therefore deny Defendants' motion for judgment on the pleadings.

Statement of the Facts

In 2009, Gill had approximately ten years of teaching experience at the high-school level, most recently as English Instructor and Department Chair at Fort Worth I.S.D., when she learned that Tarrant County College District was hiring new English professors at its Northeast Campus. (Compl. ¶ 8.) Gill completed three rounds of interviews during which she was told how impressive she was, that she had done a better job than the other applicants they had seen, and that all students could benefit from the way she taught. (*Id.* ¶ 9.) She was hired as a full-time, temporary professor at Tarrant County College, where she regularly received high praise from her colleagues and superiors, a fact Defendant Devlin himself acknowledged. (*Id.* ¶¶ 12–13.) Gill was one of only two of the new hires who volunteered to participate in a 200-hour distance learning training to develop and teach an online course—unpaid training she completed on her own time. (*Id.* ¶ 14.) She completed the course a few weeks later. (*Id.*) Gill also attended both diversity training and customer-care training, neither of which any of the other new hires attended. (*Id.* ¶ 15.)

In October 2009, Gill administered an exam in her composition course. A student stole the exam and tried to pass it to other students. Several other students reported the problem student's theft to Gill, who in turn reported the theft to Devlin's office. The same student who compromised the exam also skipped Gill's class during presentations. Gill reported this to Devlin's office, too. Gill later met with the student's counselor and learned that the student had a history of disruptive behavior and attacks on teachers. The student ultimately withdrew from class and Gill was informed the situation was closed. (*Id.* ¶ 16.)

The next month, Devlin met with Gill and informed her that the problem student made a complaint against Gill, claiming that Gill had flirted with girls during class.

Gill assured Devlin that the girl's allegations were false, noting that she was rarely the only instructor in the classroom. No other students accused Gill of such conduct, and no one corroborated the problem student's fanciful accusations. But during this meeting, when Devlin and Gill discussed the allegations, Devlin launched into a lengthy diatribe about "homosexuals" and how the Texas public views them. During his rant, Devlin stated that Texas was a conservative state and that Tarrant County College was a conservative institution. He concluded that, because of this, "Texas and Tarrant County College do not like homosexuals." (*Id.* ¶ 17.)

After this meeting, Devlin conducted three different observations of Gill's classroom teaching. At the first observation, he took notes and, after class, told Gill he enjoyed it very much and that she did a good job. (*Id.* ¶ 18.) He said they would have a formal meeting after the Thanksgiving break to discuss everything. That meeting never occurred. (*Id.*) Gill later learned that she had been the only one of her new-hire classmates whom Devlin had observed. (*Id.* ¶ 21.) Throughout the spring semester, Gill continued to get positive feedback from colleagues, students, and parents. Yet Devlin still avoided meeting with her to provide feedback from his earlier observation of her class. (*Id.* ¶ 22.) Devlin observed Gill's class two more times, in April 2010, but left saying only that she did a good job and that he had enjoyed the class and that they would discuss it more specifically later. (*Id.* ¶¶ 23–24.) Gill learned from a colleague that a third observation was highly unusual and something Devlin would normally do only if he was trying to gather information to get rid of someone. (*Id.* ¶ 24.)

When Tarrant County College posted seven position, Gill applied for all seven. All seven were filled. (*Id.* ¶ 26.) Even though the other members of Gill's hire group who applied had been permitted to interview (a fact Devlin's secretary confirmed to Gill), Gill was inexplicably refused. (*Id.*) All of the people in Gill's hire group who worked as contract teachers and who applied for their positions were hired *except* Gill, even though

her experience, credentials, and job-performance feedback met or exceeded that of those who were hired. (*Id.* ¶ 27.) Gill's colleagues uniformly expressed confusion and shock when they learned she had not been allowed to interview for her position. (*Id.* ¶ 29.)

Devlin is the gatekeeper who forwards applications to the hiring committee. (*Id.* ¶ 28.) All applications must first be approved by him before they are submitted to the committee, which then determines who will be interviewed. (*Id.*) Gill met with Howell, Devlin's immediate supervisor, who indicated he never heard anything negative about Gill's work and that he wished Gill had been allowed to interview. (*Id.* ¶ 30.) When, Gill told Howell about the conversation in which Devlin relayed the College's dislike for homosexuals, Howell said that we would immediately discuss the situation with Devlin and went to Devlin's office to do so. Howell did not communicate with Gill after that. (*Id.*)

Gill is similarly situated in all relevant respects to other applicants for full-time, permanent faculty positions at Tarrant County College. Her experience, background, and qualifications matched or exceeded those of other applicants who were permitted to interview for and obtained teaching positions at the time that Gill applied. Defendants refused to interview Gill—despite her impressive credentials and job performance—because of their perception that she is gay. (*Id.* ¶ 46.)

Gill's pleadings meet the standard required at this stage of the litigation. Although Defendants dismiss Devlin's negative commentary about homosexuals as "one stray remark," the Complaint paints a much different picture, which taken as a whole, forms a plausible claim of right to relief. Gill has pleaded that Devlin's basis for refusing to let her interview was his belief Gill is a lesbian, and that Howell sanctioned that unlawful action. The facts as pleaded—that Devlin engaged in a diatribe about the College's disapproval of homosexuals; that he seemed unduly focused on Gill to the exclusion of the others in her hiring class thereafter; that at least one colleague characterized Devlin's conduct as being that of someone intent on firing her; and that

when she complained about Devlin's actions, no one responded with any other reasons why she was passed over for the permanent position—all lead to the unmistakable inference that Devlin, and his supervisor Howell, refused to hire her because they believed her to be lesbian, based on the false accusation of a student who was caught cheating. Despite Gill's impressive qualifications and performance, and even though she never received any negative performance reviews, she was passed over, even though others in her class who were no more qualified (and some less so) received jobs.

Arguments and Authorities

In considering a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the standards a court applies are the same as those governing a motion to dismiss under Rule 12(b)(6). *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). The non-movant's factual allegations must be accepted as true. *Id.* (citing *Hughes v. The Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001)); *see also Jones v. Compass Bancshares Inc.*, 339 F. App'x 410, 411 (5th Cir. 2009) (per curiam). The court determines "whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Hughes*, 278 F.3d at 420. Importantly, not only the facts but also the inferences to be drawn from them "must be viewed by the Court in light most favorable to the nonmoving party." *United States v. Gen. Motors Corp.*, 702 F. Supp. 133, 136 (N.D. Tex. 1988) (citing Wright & Miller, Federal Practice and Procedure: Civil, § 1368 (1969) (collecting cases)); *accord Wilson v. Birnberg*, --- F.3d ---, 2012 WL 88605, at *1 (5th Cir. 2012) ("We make all inferences in a manner favorable to the plaintiff . . . .")

Judgment on the pleadings is appropriate only in rare circumstances—namely where "the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir.

2002). "Pleadings should be construed liberally, and judgment on the pleadings is appropriate only if there are no disputed issues of fact and only questions of law remain." *Id.* A defendant should not succeed on its motion for judgment on the pleadings if the allegations in the plaintiff's complaint, if proved, would permit recovery on those claims. *See Inst. for Scientific Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc.*, 931 F.2d 1002, 1005 (3d Cir.), *cert. denied*, 502 U.S. 909 (1991).[1]

A. Plaintiff's pleadings aptly demonstrate that qualified immunity does not protect the Defendants.

The general rule undergirding qualified immunity provides officials with the ability "reasonably to anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (internal quotation and brackets omitted); *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) ("The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal."). But the immunity will not protect those whose conduct violates well-established constitutional rights of which a reasonable person should be aware. Rather, officials are shielded from liability for civil damages only where their conduct does not violate a clearly established statutory or constitutional right that a reasonable person would have known about. *Ashcroft v. al-Kidd*, --- U.S. ---, 131 S. Ct. 2074, 2083 (2011); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Morgan*, 659 F.3d at 371 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Determining whether qualified immunity exists necessitates a two-part analysis required by the Supreme Court. The Court must determine (1) whether the plaintiff has alleged the deprivation of an actual constitutional right, and (2) whether that right was "clearly established" at the time of the alleged violation. *Pearson*, 555 U.S. at 232. A court need not tackle the analy-

[1] "[T]he Rule 12(c) motion is little more than a relic of the common law and code era and it only has utility when all the material allegations of fact are admitted in the pleadings and only questions of law remain. *Inst. for Scientific Info.*, 931 F.2d at 1005.

sis in any particular order; it may first examine whether the right was clearly established at the time of the alleged violation. *Pearson*, 555 U.S. at 236; *see also Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009).

To determine whether the right was "clearly established" at the time a defendant violated it, courts ask whether "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft*, 131 S. Ct. at 2083 (quoting *Anderson*, 483 U.S. at 640) (internal quotations and brackets omitted). A case directly on point is not required; rather, precedent must exist so that the statutory or constitutional question is beyond debate. *Id.* Courts must examine controlling authority, or if none exists, a consensus of persuasive authority, to determine whether the right is clearly established. *Id.* The Fifth Circuit has expressed that, where no direct controlling authority prohibits the defendants' conduct, it will "look to the law of other jurisdictions in assessing whether a reasonable official would have known . . . that his conduct was unlawful." *Morgan*, 659 F.3d at 372 n.26 (quoting *McClendon v. City of Columbia*, 205 F.3d 314, 329 (5th Cir. 2002) (en banc) (internal quotation and brackets omitted).

1. The complaint alleges conduct that constitutes a deprivation of Gill's constitutional rights.

Turning to the first prong of the qualified immunity analysis, the Complaint clearly alleges conduct by the Defendants that constitutes a violation of Gill's constitutional right to equal protection, for two independent reasons—both of which apply with equal force here.

a. The U.S. Constitution forbids public employers from making class-based decisions that treat distinct groups of similarly situated employees categorically differently.

Plaintiff alleges the Defendants denied her the opportunity to interview for a permanent position because they perceived her to belong to a discrete, disfavored class (i.e., homosexuals), notwithstanding the fact she was as qualified or more qualified than the other candidates who were permitted to interview and who were not perceived to be gay or lesbian. Just recently, the Supreme Court reaffirmed that a public employer violates the Constitution when it makes class-based employment decisions, treating distinct groups of individuals categorically differently without a legitimate and sufficient justification for doing so. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 605 (2008). In *Engquist*, the Court rejected the viability of a "class-of-one" theory in the context of an equal-protection claim brought against a public employer, but not before making clear that the Court was not straying from the *long-established rule* that the Equal Protection Clause, like other constitutional provisions, applies to public employers. *Id.* at 605 ("Indeed, our cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently.").

The Court referred to prior Supreme Court cases dating back more than thirty years showing the law is "*well settled* that States do not escape the strictures of the Equal Protection Clause in their role as employers." *Engquist*, 553 U.S. at 597–98 (emphasis added) (citing *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (per curiam); *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). Thus, it has been clearly established for decades that public employers violate the Constitution's equal-protection guarantee when they make class-based employment decisions that treat similarly situated employees differently,

without some independent and sufficient legitimate governmental interest for doing so. This point is, by now, beyond dispute.

b. Classifications based on sexual orientation are among those prohibited unless justified by a sufficient legitimate governmental interest.

For more than a decade, the question whether the government's differential treatment based on sexual orientation will trigger equal protection scrutiny, irrespective of the context, has likewise been well settled. In 1996, the Supreme Court held that the Equal Protection Clause is implicated when the government engages in class-based discrimination that rests upon sexual orientation. *See Romer v. Evans*, 517 U.S. 620, 633–35 (1996). In *Romer*, the Court examined a state constitutional amendment that prohibited all legislative, executive, or judicial action at any level of state or local government that was designed to protect lesbians, gay men, or bisexuals. *Id.* at 624. Colorado adopted the law in response to a growing number of municipalities that enacted ordinances banning discrimination against gay people. *Id.* at 623–24. The Supreme Court concluded that the amendment "classifie[d] homosexuals not to further a proper legislative end but to make them *unequal* to everyone else." *Id.* at 635 (emphasis added). It therefore held that statute violated the Equal Protection Clause. *Id.* at 635–36. *Romer* clearly established—more than fifteen years ago—that discrimination based on sexual orientation cannot be sustained unless the differential treatment, at a minimum, bears some rational relationship to an independent and legitimate governmental interest. Adverse government action engaged in for its own sake, and that is based on moral disapproval or animus toward homosexuals, can never constitute a legitimate governmental interest. *Romer*, 517 U.S. at 633–35.

Thus, it is well settled that gay and lesbian people constitute a distinct class for the purpose of constitutional analysis. *Christian Legal Soc'y Chapter of the Univ. of Cal.,*

Hastings College of the Law v. Martinez, --- U.S. ---, 130 S. Ct. 2971, 2990 (2010) (quoting *Lawrence v. Texas,* 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.") (italics in original). As Justice O'Connor aptly explained in her concurrence in *Lawrence*, which relied on an equal-protection analysis, "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward *gay persons as a class*." *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (emphasis added). *See also Romer*, 517 U.S. at 633 (striking down a law that identified persons by a single trait [sexual orientation] and then denied them, *as a class of persons*, protection across the board). The Fifth Circuit likewise recognizes that gay and lesbian people constitute a distinct class that can trigger equal-protection concerns. *See Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (noting that class-based distinctions based on sexual orientation violate equal protection where they fail, at a minimum, rationally to advance a legitimate governmental interest).

Since *Romer*, numerous cases have recognized that unjustified government sexual-orientation discrimination is clearly established as unconstitutional. *See, e.g.*, *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134–35 (2003) (noting that plaintiff students "are members of an identifiable class for equal protection purposes because they allege discrimination on the basis of sexual orientation"); *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997) ("Since governmental action 'must bear a rational relationship to a legitimate governmental purpose,' [citing *Romer*] and the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause."); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 325 (E.D.N.Y. 2002)

(denying qualified immunity to principal for teacher's employment discrimination claims based on sexual orientation because "since the Supreme Court's decision in [*Romer*] it has been well-established that governmental discrimination against homosexuals could violate the equal protection clause."); *Quinn v. Nassau County Police Dep't.*, 53 F. Supp. 2d 347, 357–58 (E.D.N.Y. 1999) (police officer alleging employment discrimination based on sexual orientation stated a violation of equal protection, noting that "[t]he *Romer* Court established that government discrimination against homosexuals, in and of itself, violates the Equal Protection Clause."); *Beall v. London City Sch. Dist. Bd. Of Educ.*, No. 2:04-cv-290, 2006 WL 1582447, at *14–15 (S.D. Ohio June 8, 2006) (unreported decision) (noting that anti-gay discrimination is both objectively unreasonable and clearly proscribed so as to defeat qualified immunity).

The Tenth Circuit recently decided a qualified immunity controversy with striking similarities to the challenge Defendants bring here. In *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114–15 (10th Cir. 2008), a lesbian domestic-violence victim brought an equal-protection action against a police officer, after the officer refused to afford the same type of police protection to the lesbian domestic-violence victim as he did to heterosexual victims. 524 F.3d at 1105. The officer raised the qualified-immunity defense. *Id.* The court affirmed the district court's denial of the officer's qualified immunity, noting that the officer was "on notice that providing [the lesbian victim] less police protection than other domestic violence victims because she is a lesbian would deprive her of equal protection of the law . . . ." *Id.* at 1114–15. Citing precedent that predated even *Romer*, the court noted the general rule that equal protection was implicated when officers withhold protection on a discriminatory basis. The court then noted that a policy singling out some citizens based on their sexual orientation, without any rational, legitimate justification, cannot provide an exception to the well-established general rule. Accordingly, the officers had reasonable notice that their conduct was unlawful; qualified

immunity, therefore, would not attach. *Id.* Indeed, even before *Romer*, some courts had held that reasonable government officials should have known that they could not discriminate based on sexual orientation without at least a rational basis for doing so. *See, e.g.*, *Nabozny v. Podelesny*, 92 F.3d 446, 458 (7th Cir. 1996) (holding that even before *Romer*, reasonable school officials should know that failing to protect some students from harm based solely on their sexual orientation would violate the most deferential equal-protection standard).

Defendants contend the law prohibiting public employers from making class-based employment decisions that treat employees differently based on their sexual orientation is somehow not clearly established because there are neither Texas laws nor federal statutes that protect gay and lesbian people from employment discrimination generally. (Def.s' Mot. for J. on the Pleadings ¶ 22.) Defendants confuse Texas and federal statutory laws concerning private employment with the constitutional claims Gill has raised here. As Defendants themselves point out elsewhere in their motion, a right is clearly established "'when its contours are sufficiently clear that a reasonable public official would have realized or understood that his conduct violated the right in issue, not merely that conduct was otherwise improper.'" (Def.s' Mot. for J. on the Pleadings ¶ 22) (citing *Classroom Teachers of Dallas v. Dallas Indep. Sch. Dist.*, 164 F. Supp. 2d 839, 850 (N.D. Tex. 2001)). As explained above, whether a right is clearly established does not turn on whether a statute concerning that right has been codified: rather, "precedent must exist so that the statutory *or constitutional* question is beyond debate." *Ashcroft*, 131 S. Ct. at 2083 (emphasis added). Courts examine controlling authority, or if none exists, a consensus of persuasive authority, to determine whether the right is clearly established. *Id.* As Gill has explained in Section A.1 above, she has met this test.

This much is certain: the prohibition against a public employer's discriminatory, class-based decisions, which lack sufficient, legitimate justification, is no less unjust for

equal-protection purposes just because the classification is based on sexual orientation. Precisely the opposite is true: Under both Supreme Court and Fifth Circuit precedent, it is clearly established that sexual orientation classifications implicate the Equal Protection Clause. This principle, coupled with the equally well-established public employment principles summarized in *Engquist*, are *independently* sufficient to defeat qualified immunity. But taken together, they compel that result.

2. Gill's Constitutional right was clearly established at the time Defendants violated it.

The second prong of the qualified immunity analysis asks whether the law Defendants are accused of violating was clearly established at the time they acted. It was. As the discussion above demonstrates, the cases that prohibit government discrimination based on sexual orientation both generally and in the public-employer context are by no means new to the Supreme Court, our circuit, or other circuits.

Specifically, the cases establishing that the government generally may not discriminate based on sexual orientation, irrespective of the context (be it employment or otherwise), date back to at least the Supreme Court's decision in *Romer*, though some courts recognized the principle even earlier. *See, e.g.*, *Nabozny v. Podelesny*, 92 F.3d 446 (7th Cir. 1996). And as the Supreme Court reminded in *Engquist*, prohibiting the government (*qua* employer) from making class-based decisions treating similarly situated employees categorically differently, reaches back more than thirty years. In short, there can be no genuine dispute that the law was clearly established at the time of the Defendants' unjust conduct.

B. Determining whether sexual orientation constitutes a suspect classification is unnecessary at this stage because it does not affect the qualified immunity analysis.

Defendants puzzlingly argue that a law prohibiting a public employer's class-based discrimination based on sexual orientation could not have been clearly established because neither the Supreme Court nor the Fifth Circuit has found sexual orientation to be a "suspect class" [*sic*]. Whether sexual orientation is a suspect classification is irrelevant here. First, a suspect-classification determination is relevant to the level of scrutiny applied to evaluate the governmental interest that may justify differential treatment of those similarly situated. But *Engquist* leaves no doubt that even cases involving non-suspect classifications nevertheless implicate the Equal Protection Clause. *Engquist,* 553 U.S. at 597–98 (citing *Beazer*, 440 U.S. 568) (exclusion of methadone users from employment); *Martin*, 440 U.S. 194 (classifying based on whether teachers have complied with continuing-education requirements); and *Murgia*, 427 U.S. 307 (classification based on age)). Whether sexual orientation constitutes a suspect classification for equal-protection purposes affects, not whether the law was clearly established, but only (1) the governmental interests that can be used to justify its classification; (2) the relationship between the government's classification and the independent, legitimate interests that will sustain it; and (3) the burden of persuasion in a suit alleging discrimination based on the classification. But one thing is clear: the presence of a suspect classification, or lack of it, is not, in and of itself, determinative of whether an official's conduct can implicate equal protection. *See generally Enquist*, 553 U.S. at 597–98 (discussing equal-protection theory); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435, 436 (1985) (applying rational-basis review to a non-suspect classification, and nevertheless finding an equal-protection violation).

Even assuming for argument's sake that Defendants are correct—that sexual orientation is not entitled to heightened scrutiny as a suspect classification—the Equal

Protection Clause is implicated no less. Neither is Ms. Gill's equal-protection right any less clearly established. Indeed, under the most deferential level of equal-protection scrutiny, no legitimate governmental interest is advanced by the differential treatment of public employees based on their sexual orientation. Defendants have not suggested the contrary.

The gender of one's romantic partner should not have any bearing on the ability to perform the duties of a job, unless perhaps one takes into account that job performance is made more difficult because of the existence of discrimination and prejudice by coworkers and others. Indeed, it is a core principle of equal-protection jurisprudence, that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This principle applies with no less potency toward anti-gay bias, irrespective of whether sexual orientation is considered a suspect classification. *See Romer*, 517 U.S. at 634 (striking down a law imposing a disadvantage "born of animosity toward the class of persons affected" and motivated by the desire to make gays, lesbians, and bisexuals unequal to everyone else); *Cleburne*, 473 U.S. at 440, 448–50 (statutory classifications based on negative attitudes toward disabled persons do not serve a legitimate governmental interest and fail even the most deferential standard of review); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (same principle). *See also Romer*, 517 U.S. 633–35 (classifications based on moral disapproval or animus toward homosexuals can never constitute a legitimate governmental interest).

Second, Defendants have not argued or suggested that *any* interest exists, legitimate or otherwise, for treating employees differently based on their sexual orientation and that would justify denying Gill the chance to interview for a permanent position. Indeed, Defendants affirmatively stated "[s]exual orientation is not a consideration in

employment by the District or in the admission of students," (Def.s' Mot. For J. on the Pleadings ¶ 2), thus disavowing that any interest is served by such discrimination. Instead, and remarkably, Defendants emphasize the *important* interest in serving "the diverse communities of Tarrant County" and how recognizing and respecting gay and lesbian people furthers the mission of the District. (*Id.*) The importance of their position cannot be understated: If a jury believes Gill was prohibited from interviewing for her job because Devlin (with Howell's approval) believed she is a lesbian, the Defendants can claim no governmental interest that could justify their conduct—even under the most deferential level of equal-protection scrutiny. For this reason also, whether sexual orientation is or is not a suspect classification for equal protection purposes is irrelevant to the qualified immunity issue.

C. Gill's complaint is not deficient.

In their attempt to paint Gill's Complaint as deficient, Defendants make several claims that simply are inaccurate. Defendants point out that Gill has not alleged Devlin personally did not like homosexuals or that he did not like Gill. (Def.'s Mot. for J. on the Pleadings ¶ 19.) Neither is a required element of Gill's claim. What *is* at issue is whether Devlin made a class-based employment decision, sanctioned by Howell, on a basis proscribed under equal-protection jurisprudence. Defendants also claim that the Complaint fails to allege Devlin perceived her to be a homosexual or treated her differently because of her sexual orientation. *Id.* They are wrong. The Complaint specifically alleges that Devlin's tirade about homosexuals was triggered when he learned that a student caught cheating had wrongly accused Gill of flirting with girls in class. (Compl. ¶ 17.) The Complaint expressly alleges that Devlin perceived Gill to be a lesbian, that her qualifications met or exceeded the persons who were allowed to interview and were hired, and

that the only reason Devlin treated her differently is because he thought she was a lesbian. (Compl. ¶ 46.)

With respect to Howell, Defendant's allege there is no allegation Howell made any offensive remarks or discriminated against Gill based on her sexual orientation. (Def.'s Mot. for J. on the Pleadings ¶ 20.) But Defendants ignore the allegation that Gill went to Howell, who was Devlin's supervisor, and specifically told him about Devlin's tirade. Howell talked to Devlin (whose conduct thereafter became even more hostile toward Gill), yet apparently did not intervene or take any corrective action. He didn't even speak to Gill after he met with Devlin. (Compl. ¶ 30.) This leads to the reasonable inference that Howell, as Devlin's supervisor, failed to intervene and can be assumed to have ignored, acquiesced, or ratified Devlin's wrongful conduct.

Defendants claim Gill failed to allege that the other employees with whom she was similarly situated were heterosexual. (Def.'s Mot. for J. on the Pleadings ¶ 21.) But that is precisely the point she makes in paragraph 46 of the Complaint, which alleges Gill was similarly situated in every way to the people permitted to interview, but was treated differently only because Devlin perceived her to be a lesbian. If the point is not stated expressly enough for Defendants to understand the nature of Gill's claim, Plaintiff respectfully asks the Court to grant her leave to amend the Complaint.

D. Defendants' "stray remark" argument cannot be reconciled with the Complaint.

Defendants off-handedly dismiss Devlin's comments evincing disdain for homosexuals as "[o]ne stray remark." (Def.'s Mot. for J. on the Pleadings ¶ 19.) But they mischaracterize both the facts as pleaded in Gill's Complaint and the law of "stray remarks." First, Gill pleaded much more than one stray remark. She pleaded that Devlin responded with "a lengthy diatribe about 'homosexuals' and how the Texas public views them" after Devlin learned of a false accusation against Gill about flirting with girls.

(Compl. ¶ 17.) Devlin explained "Texas was a conservative state and that Tarrant County College was a conservative institution." (*Id.*) Devlin then put Gill on notice that "Texas and Tarrant County College do not like homosexuals." (*Id.*). Given this was Devlin's reaction to hearing that Gill is a lesbian, and when coupled with the change in Devlin's conduct before and after the meeting, Devlin's lengthy diatribe can hardly be characterized as one stray remark.

Second, Defendants' cases in support of their "stray remark" argument do not save them; in reality, Defendants' cases undermine their own argument. They demonstrate only that remarks too far removed from the adverse action and standing alone, without more, cannot support a discrimination claim. For example, in *Krystek v. University of Southern Mississippi*, the Fifth Circuit examined—after a full jury trial and verdict, not at the pleading stage—whether the school's interim dean's remark about gender inequality was enough to support the jury's finding of gender discrimination. 164 F.3d 251, 253–54 (5th Cir. 1999). The plaintiff, a male professor who had admittedly not met the requirements for tenure despite repeatedly being told that he must, argued that the university's promotion of a female professor who *had* met tenure requirements, somehow was rooted in bias against men. *Id.* at 254–55. The professor's evidence, after discovery and trial, amounted only to the dean's comment that "[t]here are different standards for males and females." *Id.* at 254. The court considered the evidentiary value of the lone remark "in context of all the testimony at trial . . . ." *Id.* at 254–55 (including testimony that once the individual defendants learned about the professor's discrimination claim, they abstained from participating in any further employment decisions regarding the professor, including the decision two years later to deny him tenure). The court then considered whether the district court's denial of the university's motion after trial for judgment as a matter of law was proper, given the scant evidentiary record supporting the professor. *Id.* at 255. It determined that the evidence failed to support the jury's find-

ing because the comment—made two years before the adverse employment decision by a person who indisputably did not participate in the ultimate decision—was just too far removed to support a discrimination claim. *Id.* at 256. But the *Krystek* court had the benefit of a complete record, fully developed at trial; it is distinguishable on this basis alone. And in any event, *Krystek* does *not* stand for the proposition that a plaintiff who *pleads* only a stray remark as her basis for discrimination should be dismissed on her pleadings. Even if the basis of Gill's complaint was just one stray remark—and it is certainly more than that—*Krystek*'s inaptness is stark.[2]

Defendants' attempt to invoke Ninth Circuit case law likewise falls flat. In *Dyess*, a high-school student accused a teacher of sexual harassment. *Dyess ex rel. Dyess v. Tehachapi Unified Sch. Dist.*, No. 1:10-CV-00166-AWI-JLT, 2010 WL 3154013, at *1, 7–8 (E.D. Cal. Aug. 6, 2010). The student complained that, once she reported the harassment, other teachers violated her equal-protection rights by acting with deliberate indifference to known instances of sexual harassment. *Id.* at *6. To support that claim, the student pleaded only that one teacher remarked that other teachers should not hug their students while the plaintiff was around because the plaintiff would report them for harassment. *Id.* at *3. The student did *not* allege, though, that the remarking teacher had any knowledge of the other teacher's alleged sexual harassment or that the remarking teacher failed to report the other's conduct. In short, the student failed to "allege that [the teacher] made [the offensive "hugging"] comment for purposes of preventing [the

[2] The *Krystek* court undertook an analysis of *all* the evidence—including the stray remark—to determine whether the remark was probative of discrimination. It evaluated whether the comment "1) related to the protected class of persons of which the plaintiff is a member; 2) [was] proximate in time to the terminations; 3) [was] made by an individual with authority over the employment decision at issue; and 4) [was] related to the employment decision at issue." *Id.* at 256 (citing *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655) (5th Cir. 1996) (brackets omitted). The court determined that "despite adequate discovery," the questionable comment—far removed in time from the adverse employment decision—could not constitute "probative evidence that the school's decision . . . was motivated by gender." *Id. Krystek*, therefore, does not help the Defendants here.

student] from reporting the alleged sexual harassment." *Id.* at *7. Like *Krystek*, then, the alleged stray comments were too removed from the adverse incident to form the basis of an equal-protection claim; indeed, the student had already lodged the complaint when the stray remarks were made. *See id.* at *8. Absent more robust allegations linking the comments to the equal-protection violation, the Dyess court granted the student leave to provide additional allegations. *Id.*

Similarly, in *Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir. 1990), an age-discrimination case, the appellate court considered the propriety of the district court's grant of summary judgment to the employer. 892 F.2d at 1436. The plaintiff alleged the employer passed him over for a promotion, favoring a younger candidate instead. Citing Fifth Circuit precedent, the court noted that "[c]omments suggesting that the employer may have considered impermissible factors are clearly relevant to a disparate treatment claim." *Id.* at 1438 (citing *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1466 (5th Cir. 1989)). The court also noted that a stray remark—by itself and with no connection to the decisional process—could not support plaintiff's claim. *Id.* at 1438-39. What was the stray remark at issue? Simply this: a different candidate for the position was "a bright, intelligent, knowledgeable young man." *Id.* at 1438 (internal quotations omitted). Citing authority requiring the discriminatory comment to have a firmer connection to the adverse employment decision, the Ninth Circuit understandably found that such a banal comment could not, by itself, support an age-discrimination claim firmly enough to survive summary judgment. *Id.* at 1439 (citing cases).[3]

[3] Defendants' other out-of-circuit cases equally fail to provide even feeble support for their arguments. In *Walnut Hill Estate Enterprises, LLC v. City of Oroville*, the stray-remark issue was decided at a later stage of the case—at summary judgment. No. 2:08-cv-01142 FCD GGH, 2009 WL 3781038, at *1 (Nov. 10, 2009). At that stage, the *Walnut Hill* court found that plaintiffs' evidence of an offensive statement was "unclear," and did not demonstrate "how [the comment] was related to [the adverse decisional process]." *Id.* at *7. Likewise, in *Edington v. Yavapai County*, the district court found that use of a "*single* word of a dubious derogatory nature" was too little evidence—at the summary judgment stage—to support *pro se* plaintiffs' claim that the county violated their equal-protection rights.

These cases, of course, are inapposite. Gill has pleaded that Devlin: (1) engaged in a "lengthy diatribe" about homosexuals after receiving a complaint suggesting Gill was a lesbian; (2) told her straightforwardly that neither Texas nor the College like homosexuals; (3) became increasingly focused thereafter on singling her out for review to the point that one colleague remarked on the unusualness of Devlin's behavior, concluding that he must be trying to get rid of her; and (4) just a short time later, refused to allow her to interview for a position she was eminently qualified for. (Compl. ¶¶ 17, 19, 22–23, 25–29, 32–33). When Gill raised these issues up the chain of command with Howell, Devlin's immediate supervisor, Howell did not correct the situation; in fact, it only worsened. (Compl. ¶ 30). Defendants' argument that Gill has pleaded no more than a stray remark is a wayward effort to mischaracterize the whole of Gill's complaint, by focusing myopically on one sentence and ignoring the rest. Their stray-remark argument is indefensible and incongruent with the Complaint itself.

E. Defendants are not entitled to attorneys' fees.

Prevailing defendants are not entitled to attorneys' fees unless they establish that the plaintiff's action was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hughes v. Rowe*, 449 U.S. 5, 14 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *see also Fox v. Vice*, ---

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No. CV-05-4227-PHX-FJM, 2008 WL 169719, at *1, 5 (D. Ariz. Jan. 15, 2008) (unreported decision) (emphasis added). We are, of course, not at the summary-judgment stage. And Gill has alleged more than a mere stray remark or an offensive one-word comment: she sufficiently has pleaded facts that, taken as true with inferences drawn in her favor, demonstrate that Defendants violated her equal protection rights by passing her over for a permanent position, even though she was qualified for it, based on their animus toward lesbians and gay men. The connection between the diatribe and the adverse employment decision is no coincidence. In fact, the *only* reasonable inference to be drawn from the dissonance between Gill's first-rate qualifications, exemplary performance reviews, and positive feedback on the one hand, and Devlin's comments, Howell's inaction, and the adverse employment decision on the other, is precisely that Gill was not hired because Devlin and Howell believed her to be a lesbian.

U.S. ---, 131 S. Ct. 2205, 2213 (2011). This high standard – one that is much stricter than the right of a prevailing plaintiff to attorney's fees – is designed to implement Section 1983's goal of vigorous enforcement of federal civil rights statutes. *Christiansburg Garment*, 434 U.S. at 422. Even if a Section 1983 complaint asserts both frivolous and non-frivolous claims, a court may award Section 1988 fees to the prevailing defendant only for the fees that the defendant would not have incurred but for the frivolous claim. *Fox*, 131 S. Ct. at 2218.

As demonstrated above, the law is clearly established that a public employer that discriminates based on sexual orientation without a sufficient, legitimate justification, violates the Constitution's equal-protection guarantee and is not entitled to qualified immunity. This principle serves as the basis for the personal-capacity claims asserted here. Defendants are not entitled to attorneys' fees.[4]

Conclusion

For equal-protection purposes, the law is clearly established that a public employer violates the Constitution when it makes class-based employment decisions, treating distinct groups of individuals categorically differently without a legitimate and sufficient justification for doing so—as Gill's complaint, read liberally with inferences drawn in her favor, aptly alleges. The law is equally clear that, when such discrimination is based upon sexual orientation, it violates equal protection unless the differential treatment, at a minimum, bears some rational relationship to an independent and legitimate governmental interest. These laws are clear now, and they were just as clear when Defendants violated them.

[4] Defendants also ask the Court for "a contingent award for costs and reasonable and necessary attorneys' fees in the event that the judgment of this Court is appealed." (Def.'s Mot. for J. on the Pleadings ¶ 23.) Defendants cite no authority in support of this request and jurisdiction to grant appeal-related fees or costs clearly would lie with the Fifth Circuit.

For these reasons, the Court should deny the Defendants' Motion for Judgment on the Pleadings Regarding Qualified Immunity. In the alternative, Gill should be granted leave to amend her Complaint to have an opportunity to correct any deficiencies the Court identifies.

DATE: January 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

On January 27, 2012, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal rule of Civil Procedure 5 (b)(2).

s/ Benjamin D. Williams
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