NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION

42ND ANNUAL ROBERT F. WAGNER
NATIONAL LABOR & EMPLOYMENT LAW
MOOT COURT COMPETITION

In the

Supreme Court of the United States of America

Spring Term, 2018
Docket No. 20180309

JACLYN SPARROW,

Petitioner,

- against -

BLACK PEARL REPAIR CO.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

THE FACT PATTERN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WAGNER

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JACLYN SPARROW Docket No. 16WG2018

Plaintiff,

-against-

BLACK PEARL REPAIR, CO.

Defendant.

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December 12, 2016

1 RICH, J. U.S. District Judge[1]

Jaclyn Sparrow brings two claims against her employer, Black Pearl Repair Company (hereinafter, "Black Pearl"). The first claim asserts negligence in regards to an accident in which she was injured, under a mixed Jones Act and common law unseaworthiness theory. Sparrow also alleges that Black Pearl has violated her rights under Title VII of the Civil Rights Act of 1964 (hereinafter, "Title VII") by discriminating against her based on her sexual orientation.[2] Sparrow seeks prejudgment interest and compensatory damages as to the negligence claim, with compensatory and punitive damages for the Title VII claim. We have consolidated our written

[1] For purposes of this competition, cite to the District Court opinion in the following format: *Sparrow v. Black Pearl Repair Co.*, 129 F. Supp.3d 1 (S.D. Wg. 2016).

[2] The statute of limitations is not at issue in this case. *See* 42 U.S.C. §§ 2000e-5(e)(1) (1964) (establishing a 180-day statute of limitations for Title VII actions); s*ee also* Jones Act 46 U.S.C. § 30106 (2006) (establishing that a seaman has three years from the date of the accident to bring a civil action for damages).

decisions into one document, though the two issues have reached separate procedural stages. On the matter of Sparrow's negligence claim, this court, following a jury trial, upholds the jury's determination that Sparrow's injuries were a result of Black Pearl's negligence. We therefore award both compensatory damages and prejudgment interest. Prior to the jury trial, we orally granted Black Pearl's motion to dismiss Sparrow's Title VII claim, and we issue our written opinion herein.

BACKGROUND

The following facts are taken from Sparrow's complaint and documents set forth in the Joint Appendix. All factual allegations from the complaint and documents herein are assumed to be true for purposes of this opinion.

Sparrow was born and raised in Jonestown, Wagner, a coastal town where many of the residents work on boats or in maritime-related careers. Jonestown is also the location of the Jonestown Naval Base. In high school, Sparrow was a member of the rowing team, the swimming team, and the sailing club. During this time, Sparrow "came out" as a lesbian and became involved in a variety of lesbian, gay, bisexual, transgender, and queer charities. After high school, Sparrow attended college at Wagner University from 2003 to 2007, studying engineering and maritime history. After graduating from Wagner University, Sparrow joined the United States Navy, working as an engineer for five years. In 2012, after receiving an honorable discharge from the Navy, Sparrow began working as a civilian oil rig engineer for Black Pearl, a company that provides repair services for oil rigs. In this capacity, Sparrow repaired equipment on oil rigs and company boats.

Black Pearl was founded in 2001 and is incorporated in the state of Wagner. Black Pearl has approximately 250 employees, including support and office staff, spread across fifteen

crews. All employees are given a handbook, which contains the company's equal employment opportunity and sexual harassment policies, including instructions on filing complaints for violations of those policies. According to the handbook, a group of Black Pearl executives makes decisions regarding promotions or advancement based on recommendations from individual crewmembers, often a captain or co-captain.

A typical Black Pearl crew consists of a captain, co-captain, navigator, chef, four to five mechanics, and two engineers. ***2*** Most crews also have an on-board administrator who keeps records. In addition to the essential on-board crew, there are usually about five land-based support staff members assigned to each vessel. Crewmembers share gender-specific quarters on their assigned boats for nights when an oil rig requires more extensive repairs, or during choppy sea conditions. The captain generally supervises all members of the crew, but the co-captain also has supervisory responsibilities.

For the first few months that Sparrow worked for Black Pearl, she rotated through different crews for training purposes. Following training, she was permanently assigned to the C-Crew, which staffs a ship named *Anne's Revenge*. The C-Crew included: Captain Jeff Barbosa; Co-Captain Josh Gibbs; Navigator Mackenzie Ragetti; Chef Lee Pintel; Engineer Jeremy Norrington; Mechanics David Jones, Levi Murtogg, Carl Beckett, Ian Mullroy and Eddie Teach; and Administrator Shawn Turner.

When Sparrow began working with Black Pearl, she was one of two women who worked on a crew. Because of her experience in the Navy, Sparrow started with Black Pearl as a Supervising Engineer. Once she was permanently assigned to the C-Crew, she oversaw the crew's engineers and mechanics, even though Engineer Norrington had been with the company for a few years before Sparrow's employment began.

Following her first few weeks with C-Crew, Sparrow developed a friendship with Administrator Shawn Turner, but did not quickly bond with her other colleagues. She especially struggled with Engineer Norrington.

At some point during those initial months, the C-Crew discovered that Sparrow identifies as a lesbian and is married to a woman, Eliza Sparrow-Swan. While some members of the crew seemingly accepted this fact, other members were visibly uncomfortable. During her first year with the company, most of the C-Crew made jokes or comments about Sparrow's sexuality, and as time went on, Sparrow was left out of meetings.[3]

Black Pearl requires a ship's mechanics to run a full diagnostic examination of the ship after each trip to ensure there are no mechanical issues, electrical shortages, gas and fluid depletion, or structural damage. When mechanics run a full diagnostic examination, they must check the levels of all fuel, oil, power-steering fluid, coolant, and any other mechanical fluids that the ship needs to run. If any of these fluids fall below 85%, the mechanics must refill the respective fluid tanks. The mechanics must also monitor the fuel hoses, ensuring that there are no leaks, or degradation.[4] The mechanics also inspect all belts and steering cables for erosion, tears, and tightness.

Additionally, there must be an inspection of the electrical system that powers the ship. The mechanics must confirm that: (1) there is no corrosion to any wires, cables, conduits, or outlets; (2) that all batteries are fully charged; (3) that all navigational systems power on; and (4) that all lights, monitors, and screens power on. The ship's mechanics must inspect the pressure in the valves that control ***3*** the ship's heat, hot water, and steam. It is also required that the

[3] *See* Appendices 4-9.
[4] Upon examination, if any fuel hose is damaged, the mechanics must replace that faulty fuel hose and document the change in the diagnostic report. The mechanics must include photographs of the faulty hose, as well as the serial number of the new hose.

mechanics inspect the propellers for dents, loose bolts, or dings. Lastly, the mechanics must check all the ship's safety measures, such as the life vests, lifeboats, and fire extinguishers, ensuring that there is an adequate supply on board. The diagnostic examination must be documented in a diagnostic report, which is uploaded to the ship's Central Processing Unit ("CPU")[5].

Mechanics are required to produce a diagnostic report after each inspection of the ship, however, there are different processes for the submission of these reports. After the mechanics upload a report to the ship's CPU, one of the engineers must check the report and approve it before sending it to Black Pearl's Central Command Station ("Central Command")[6], the captain, and the co-captain.

When a ship is docked for more than a week, a team of two mechanics from that ship rotate performing weekly diagnostic examinations. These diagnostic examinations focus primarily on the ship's electrical, mechanical, and computer systems. Unless a serious problem[7] is identified, the mechanics only have to send the diagnostic report directly to the captain. The captain must review the report and return it to the mechanics with comments within 24 hours. If the captain suspects a serious problem, the captain must flag the ship for inspection by another crew's mechanical team.

Between September 20, 2015 and October 3, 2015, the C-Crew received no off-site job assignments because the engineers and mechanics were in mandatory bi-annual training on new

[5] The CPU is the ship's computerized memory, where all files are uploaded, and all the ship's navigational history, incoming and outgoing signals, calls, and tracking data is stored. The CPU tracks both equipment depletion and personnel who log on to the ship's computerized systems. The CPU controls the ship's internet and email connection as well.

[6] Black Pearl's Central Command is located at the company's headquarters. This division is responsible for monitoring emergency calls from oil rigs, diagnostic reports and system malfunctions from ships, job reports from captains, distress calls from vessels, and email communications from crewmembers.

[7] Serious problems include criminal activity on a ship, damage by flooding, fire, natural disaster, electrical or CPU malfunction, or any other issue that can inhibit the ship from leaving its docking station.

oil rig technology. Prior to their training sessions on both weeks, the mechanics ran their diagnostic examinations and sent these diagnostic reports to Captain Barbosa for his review and comments. Mechanics Jones and Mullroy were assigned to run the diagnostic examination the first week the ship was docked. Jones wrote, signed, and dated the September 24, 2015 report before sending it to Captain Barbosa. In this report, Jones noted that one of the belts showed some wear and that he and Mullroy replaced it. Jones provided the serial number of the new belt, as well as photographs of the old belt. He also noted that the ship was still making the strange "purring" sound that Mechanic Teach reported in the September 15, 2015 post-assignment report submitted the prior week. During that week, ***4** *Anne's Revenge* steered too close to a shoal[8] on its starboard side during its return to port. Engineer Norrington had signed off on Mechanic Teach's September 15 report before sending it to Central Command, and the C-Crew's captain and co-captain. Mechanic Jones checked the engine, transmission, and the props, which did not prove to be the root of the purring sound. Captain Barbosa signed the September 24 report without reading it.

The second week, on October 1, 2015, C-Crew Mechanics Murtogg and Beckett ran the diagnostic examinations on *Anne's Revenge*. Beckett noted the purring sound in his diagnostic report before sending it to Captain Barbosa. Again, Captain Barbosa signed the report without reading it.

On October 7, 2015, Black Pearl received an emergency request to repair a mechanical malfunction on *The Interceptor*, an oil rig owned by Flying Dutchman Oil Tech (hereinafter, "Flying Dutchman"). Flying Dutchman has a retainer agreement[9] with Black Pearl to service any emergency mechanical issues that occur on its oil rigs within Wagner State. *The Interceptor* was

[8] A "shoal" is a portion of the ocean where the water is shallow.
[9] *See* Appendix 3.

built fourteen years ago and is located about 500 meters from shore in the Robert Ferdinand Ocean. Central Command assigned the C-Crew to respond to this emergency request. At approximately 14:00 hours, on October 7, *Anne's Revenge* arrived at *The Interceptor* without incident. Supervising Engineer Sparrow, Engineer Norrington, Mechanic Murtogg, and Mechanic Beckett went aboard the oil rig.

To board *The Interceptor*, crewmembers had to step off the exit platform at the rear of *Anne's Revenge*, and step onto the oil rig's lower-level ladder. *The Interceptor's* ladder drops just below the surface of the water to allow access to anyone embarking or disembarking the oil rig. During this process, *Anne's Revenge* must remain steady in the choppy currents, with the acceleration turned off, to prevent a crewmember from falling into the water, or being squeezed between the oil rig's ladder and the ship. Once aboard *The Interceptor's* ladder, the four crewmembers climbed the ladder and walked through the boarding level, where a locked gate provided access to the rest of the oil rig.

The Interceptor's Chief of Operations, David Cotton, explained that eight hours prior to *Anne's Revenge* responding to his call, *The Interceptor* had experienced repeated interruptions to its power supply. Cotton reported that, at times, sparks came out of the sockets, outlets and electrical devices. Operations Manager Treva Koehler stated his concern that a fire might start somewhere in the electrical wiring. After running a diagnostic examination of the oil rig's electrical and mechanical equipment, Supervising Engineer Sparrow and Engineer Norrington discovered that salt water had been seeping into the electrical wires through a breach in the electrical conduit. Over time, the salt water had eroded the electrical wires, thus causing sparks and shorts in the oil rig's power supply. Sparrow immediately ordered Chief Operator Cotton to shut off all the oil rig's power. She and Norrington located what they believed to be the source of

the breach, just under the lower deck of the rig. ***5*** *Anne's Revenge* turned on its engine so Mechanics Murtogg and Beckett could use *Anne's Revenge* to power a vacuum to extract the water from *The Interceptor*. While the vacuum was being used, Mechanic Mullroy reported to Captain Barbosa via the crew's communication interface that the "purring" sound was getting louder, and the ship had begun to rattle.

By 18:00 hours, the sun was beginning to set. Both Supervising Engineer Sparrow and Engineer Norrington agreed that the power to the oil rig should remain off, until the C-Crew could return the following morning and run a full assessment of repairs in daylight. Sparrow noted that she was worried that there may have been other breaches that were not as visible because of the poor evening lighting. Norrington advised Operations Manager Koehler to consider sending nonessential personnel back to shore until the problem was fully resolved.

The team returned to *Anne's Revenge* via the lower deck ladder, the same way that they had boarded *The Interceptor* initially. When Captain Barbosa saw the crew returning, he ordered Navigator Ragetti to start the engine and engage the navigational systems. Engineer Norrington descended the ladder first. As Norrington held on to the oil rig's ladder with his left hand and the platform rail at the back of the ship with his right hand, he stepped onto the rear platform of *Anne's Revenge*. Mechanic Beckett followed, repeating Norrington's actions. Sparrow was next.

As Supervising Engineer Sparrow stepped onto *The Interceptor's* ladder, *Anne's Revenge* suddenly jolted forward, pitching Sparrow off its rear platform. She fell backward, hitting the oil rig's ladder, and was knocked unconscious before falling into the water. Mechanic Murtogg screamed, "Man overboard!" before he jumped into the water after her. During his rescue of Sparrow, Murtogg discovered that a loop from Sparrow's jacket was caught onto the oil rig's

ladder, keeping her body near the surface of the water. Had it not been for this loop, Sparrow might have immediately sunk below the waterline from the weight of her utility belt.

Once Mechanic Murtogg pulled an unconscious Sparrow onto *Anne's Revenge*, Captain Barbosa once again ordered Navigator Ragetti to start the engine. This time, the ship's engine did not start. Captain Barbosa immediately radioed the Wagner Coast Guard ("Coast Guard") about the accident and need for emergency services, and then radioed Black Pearl's land support staff requesting a tow back to port. The Coast Guard took an unconscious Sparrow to shore, where she was immediately transported to Tortuga County Hospital. Sparrow sustained a concussion and multiple fractures to her left leg and arm when she hit *The Interceptor's* ladder. She underwent two surgeries to reset the bones in her leg.

At approximately 22:00 hours, Black Pearl towed *Anne's Revenge* to Shipwreck Cove Harbor in Jonestown. When Black Pearl investigated the ship's condition, it determined that *Anne's Revenge* had suffered some hull[10] damage when it steered close to a shoal on the September 15 assignment. As a result, there was a dent in a ***6** critical valve[11], causing heat and steam to gradually accumulate in the one of the pipes, creating pressure through the pipe. The use of *Anne's Revenge's* power supply for the vacuum accelerated the buildup of the pressurized steam, causing the plug[12] to blow while the engine was running. When the plug blew, *Anne's Revenge* lunged forward as Sparrow was boarding the ship. Black Pearl also determined that the purring sounds detected by the C-Crew in the weeks before the accident were indicative of the damage.

[10] The ship's hull is the lower frame of the ship that holds the cargo and equipment.
[11] The valve is a device that monitors and controls liquids and steam that flow through a pipe.
[12] The plug is a cap located above the valve.

PROCEDURAL HISTORY

Sparrow filed a complaint in 2016 alleging that, first, Black Pearl was negligent, causing the injuries that Sparrow sustained during the accident on October 7, 2015, for which she sought both compensatory damages and prejudgment interest. Second, Sparrow claimed that she was discriminated against based on her sexual orientation in violation of Title VII of the Civil Rights Act of 1964.[13]

Black Pearl, in its answer, alleged that Sparrow's Title VII claim fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). Arguments on this motion were heard during the pre-trial *motions in limine* hearing along with Black Pearl's motion to preclude the jury from awarding Sparrow prejudgment interest based on Sparrow's mixed Jones Act claim and maritime unseaworthiness claim. We granted Black Pearl's 12(b)(6) motion on the Title VII claim and reserved a written opinion. We postponed decision on the prejudgment interest motion.

After a two-week trial, the jury found that Black Pearl was liable for Sparrow's injuries under both unseaworthiness and Jones Act negligence theories. The jury awarded Sparrow compensatory damages in the amount of $950,000 for hospital bills, including expenses associated with in-patient care, surgical costs and physical therapy, plus $250,000 for continued physical therapy expenses and other recovery expenses. The jury also awarded prejudgment interest in the amount of 10% per annum. The total damages awarded by the jury was $1,200,000 plus prejudgment interest.

Following the verdict, Black Pearl renewed its motion to preclude prejudgment interest from the damages award.

[13] Sparrow followed all administrative procedures and received a generic Notice of Right to Sue from the EEOC.

DECISION

This decision is our consolidated decision on both of Black Pearl's motions.[14]

First, we DENY Black Pearl's renewed pretrial motion to preclude prejudgment interest from the damages award because we find that such an award is merited in this case. Further, we GRANT Black Pearl's pretrial motion to dismiss Sparrow's Title VII claim because we find that Title VII does not include sexual orientation as a protected class.

PREJUDGMENT INTEREST

The issue of whether an award of prejudgment interest is appropriate in a mixed Jones Act and unseaworthiness claim has never been litigated in this jurisdiction. Therefore, we rely on persuasive precedent and conclude that prejudgment interest is appropriate in this case.

Currently, circuit courts are split ***7*** regarding awarding prejudgment interest for mixed cases claiming both Jones Act negligence and general maritime law unseaworthiness. *See generally Nevor v. Moneypenny Holdings, LLC*, 842 F.3d 113 (1st Cir. 2016); *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985); *Wyatt v. Penrod Drilling*, 735 F.2d 951 (5th Cir. 1984). The First and Second Circuits have found that prejudgment interest is available in a mixed claim. *See Nevor*, 842 F.3d at 122–23; *see also Magee v. U.S. Lines, Inc.*, 976 F.2d 821, 822 (2d Cir. 1992). In *Nevor*, a seaman was injured during a transfer from one vessel to another. *Nevor*, 842 F.3d at 116. The court upheld the award, noting that prejudgment interest is assessed to ensure a plaintiff's full recovery. *Id.* at 113. The First Circuit relied on *Magee* for support, concluding that the award of prejudgment interest in a mixed case was preferable to allow a plaintiff's complete recovery. *Id.* at 122; *see also Magee*, 976 F.2d at 821.

[14] For purposes of this competition, disregard any procedural question raised by this motion schedule.

In contrast to the First and Second Circuit, the Fifth Circuit maintains that a plaintiff cannot be awarded prejudgment interest when asserting a mixed claim. *See Williams,* 750 F.2d at 491; *Wyatt*, 735 F.2d at 956. The Fifth Circuit reasoned that these awards are not appropriate in cases of mixed claims because a single claim under the Jones Act precludes the award of prejudgment interest. Further, the Fifth Circuit reasoned that when the claims of general maritime law essentially merge into the Jones Act, prejudgment interest is not appropriate because, when relying primarily on the Jones Act for relief, a plaintiff would ordinarily not be entitled to such interest. *Wyatt*, 735 F.2d at 955-56. Additionally, the Sixth Circuit has held that prejudgment interest in mixed claims is inappropriate where the jury does not specify which portion of the award is attributed to the unseaworthiness claim and which portion is attributed to the Jones Act claim. *See Petersen v. Chesapeake & Ohio Ry. Co*., 784 F.2d 732, 740-41 (6th Cir. 1986).

To this point, we find that Sparrow should not be penalized for bringing a mixed claim when the merits of her case warrant redress and relief under both theories of law. Though the Fifth and Sixth Circuits have accurately found that prejudgment interest is not proper in a Jones Act claim alone, we find that because prejudgment interest is relief that is available under the common law, the facts here warrant such relief. We recognize that the exact amount of liability attributable under each theory of law can be unclear, especially when awarded by a jury. However, we think that the justification provided by the First and Second Circuits, namely the concept of full compensation, should be the policy governing the damages award in this case. Here, we think that the prejudgment interest award by the jury is appropriate.

MOTION TO DISMISS - TITLE VII

Sparrow also alleges in her complaint that she was discriminated against based on her sexual orientation under Title VII of the Civil Rights Act of 1964. We dismiss that claim for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) because Title VII does not protect against sexual orientation discrimination. ***8**

This is an issue of first impression for this Court. While not addressing this specific issue, the Supreme Court has recognized that a party may be a victim of workplace harassment despite sharing the same gender as the accused. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). The Supreme Court has also been clear that Title VII prohibits employers from using gender nonconformity as a basis for making employment decisions. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). These cases, while significant in Title VII jurisprudence, do not necessarily shed light on the issue at hand. They merely provide some guidance to the type of behavior that the Court has found violates Title VII's prohibitions. Though the Supreme Court has recently ruled on issues involving sexual orientation in the context of marriage equality, the Court has not incorporated sexual orientation as a protected class for the purposes of its analysis in equal protection cases or Title VII cases. *See generally Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also United States v. Windsor*, 133 S. Ct. 2675 (2013).

We recognize that while this argument is one of great societal interest, a plain reading of the text of Title VII does not point to such protection. However, we recognize that the Equal Employment Opportunity Commission (hereinafter "EEOC"), the agency that oversees the administration of Title VII, has interpreted Title VII as including discrimination based on sexual

orientation.[15] *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015). In *Baldwin*, the EEOC held that the complainant's employer violated Title VII's protection against sex discrimination when it denied the complainant a permanent position because he was gay. *Id.* at 15. The EEOC reasoned that sexual orientation cannot be separated from sex because, by definition, sexual orientation depends largely on gender constructs. *See id.* at 6–7. Further, the EEOC found that the term "sex" encompasses sexual orientation because it is largely a question of discriminating against someone based on their association with a person of the same sex. *Id.* at 8–9.

Despite this finding by the EEOC, the agency's adjudicative interpretation of Title VII is not binding on this court. This fact was recently noted by the Seventh Circuit, one of the only circuits to address this issue since the EEOC's decision in *Baldwin*. *See Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 702-04 (7th Cir. 2016). In *Hively*, the Seventh Circuit found, as we do, that although the EEOC's adjudicative body decided to recognize sexual orientation discrimination under Title VII in an individual case, Congress has yet to take action, and the meaning of Title VII does not plainly include sexual orientation. *Id.* at 701-03. The Seventh Circuit also noted that every circuit which has heard this issue in the last twenty ***9*** years has agreed that the language of Title VII and the precedent in Title VII jurisprudence does not support the EEOC's reading of Title VII. *Id.* at 709–714. The Seventh Circuit, recognized, as do we and many courts around the country, the difficulty of reconciling the EEOC's opinion with precedent and the complicated lines drawn in this area of law. *Id.* Therefore, until Congress or the U.S. Supreme Court make it clear that sexual orientation fits within the meaning of Title VII's sex discrimination prohibition, we cannot find that Sparrow has an actionable claim under Title VII.

[15] For purposes of this Competition, the question of agency interpretive authority is not at issue.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

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JACLYN SPARROW Docket No. 2017WG122917

Plaintiff-Appellant,

-against-

BLACK PEARL REPAIR, CO.

Defendant-Appellee.

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Argued: November 16, 2017; Decided: December 21, 2017[16]

2001 Christina Fiore (argued), Santora, Rizzolo & Associates, Jonestown, Wagner, for Jaclyn Sparrow, Plaintiff-Appellant.
Brenda Alejo (argued), Jessica Brenner, Granell, Naphor & Niermeyer, New York, New York, for Black Pearl Repair Company, Defendant-Appellee.

Before: GUZZO, ROMERO Circuit Judges, and BAPTIST, Chief Judge.

Monique Baptist, Chief Judge:

This is an appeal from the judgment of the United States District Court for the Southern District of Wagner, in a maritime personal injury and Title VII of the Civil Rights Act of 1964 ("Title VII") claim. Plaintiff appealed and the Defendant cross-appealed.

Jaclyn Sparrow, an engineer who was injured while dismounting from an oil-drilling rig onto her employer's vessel, after responding to an emergency located in the Robert Ferdinand Ocean, sued her employer, Black Pearl Repair, Co. ("Black Pearl") for damages under the Jones

[16] For purposes of this competition, cite to the Court of Appeals for the Thirteenth Circuit decision in the following format: *Sparrow v. Black Pearl Repair Co.*, 575 F.3d 2001 (13th Cir. 2017).

Act and general maritime law. After finding that Sparrow satisfied the elements of both her Jones Act negligence and general maritime unseaworthiness claims, the jury awarded Sparrow, and the District Court subsequently upheld as a matter of law, prejudgment interest based on her mixed claim of Jones Act negligence and general maritime unseaworthiness. *Sparrow v. Black Pearl Repair Co.,* 16WG2018 at *7 (S.D. Wg. 2016). Black Pearl is cross-appealing the District Court's decision to allow prejudgment interest on Sparrow's full award.

Sparrow also brought a Title VII claim alleging that she was discriminated against because of her sexual orientation. *Id.* at *1. The District Court dismissed this claim pursuant to Federal Rule of Civil Procedure 12(b)(6) because it determined that Title VII does not explicitly protect against sexual orientation discrimination. *Id.* at *7-8. Sparrow is appealing that decision.

We hold the following: (1) in a matter of first impression, prejudgment interest is not available when a jury awards damages based on mixed Jones Act negligence and general maritime unseaworthiness claims, absent any indication of which portion of the damage award, if any, was attributed to the general maritime unseaworthiness claim rather than to the Jones Act negligence claim; and (2) a claim for employment discrimination based on sexual orientation is not actionable under Title VII. Therefore, we REVERSE the district court's grant of prejudgment interest, we AFFIRM the district court's dismissal of the Title VII claim, and REMAND for further proceedings consistent with this opinion, allowing Plaintiff-Appellant leave to amend her complaint.

Kiera Guzzo, Circuit Judge, concurs in part and dissents in part in a separate opinion.

I. ISSUES

There are two issues presented on this appeal. The first question presented is whether a seaman can recover prejudgment interest on a total award when she prevails in both Jones Act

negligence and general maritime unseaworthiness claims before a jury. The second issue is whether workplace discrimination based on sexual orientation is prohibited by Title VII.

II. STANDARD OF REVIEW

We review the two issues before this court *de novo* as they both address a matter of law. *Essgee Co. of China v. United States*, 262 U.S. 151 (1923).

III. DISCUSSION

A. ADMIRALTY LAW CLAIMS

When a seaman is injured at sea, she does not file a worker's compensation claim, as the federal courts have jurisdiction to grant remedy for such injuries under the Jones Act and general maritime law.[17] ***2002*** The Jones Act allows an injured seaman to recover damages for injuries resulting from her employer's negligence. *See* 46 U.S.C. §§ 30101–30104; *Gautreaux v. Scurlock Marine*, 107 F.3d 331, 335 (5th Cir. 1997); *see also Chandris Inc. v. Latsis*, 515 U.S. 347, 353 (1995). It is undisputed that 'but for' Black Pearl's negligence, Sparrow would not have been injured while performing her duties.

The unseaworthiness doctrine, under general maritime law, permits an injured seaman to recover damages from the owner of the vessel where the injury occurred if that vessel is deemed unseaworthy or unfit to carry out its mission. *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196, 199 (1st Cir. 1980) (citing *Usner v. Lukenbach Overseas Corp.*, 400 U.S. 494, 499 (1971) (finding that an unseaworthy condition is the proximate cause of the harm suffered by a seaman); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-550 (1960) (holding that a shipowner's duty to provide his crew with "a vessel and appurtenances reasonably fit for their intended use" is

[17] Generally, traditional worker's compensation laws do not cover seamen. The Longshore and Harbor Workers Compensation Act ("LHWCA") "provides scheduled compensation (and the exclusive remedy) for injury to a broad range of land-based maritime workers." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995). The LHWCA does not extend to any master or member of a crew of any vessel, reserving such remedies for seamen to the Jones Act. *See* 33 U.S.C. § 902(3)(G); *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347-48 (1991).

breached when there are equipment defects); *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 104 (1944) (shipowner's duty includes maintaining the ship's equipment in proper operating condition)). It is also undisputed that *Anne's Revenge's* malfunction, which rendered the vessel unseaworthy, was the proximate cause of Sparrow's injury.

1. JURISDICTION

Federal courts have authority over "any civil case of maritime or admiralty jurisdiction." 28 U.S.C. § 1333. *See also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674–75 (1982) (holding that a case is generally actionable under admiralty jurisdiction if the claim originates from an accident on navigable waters which resulted from the negligent operation of a vessel). Therefore, this court has jurisdiction. The parties are not disputing this court's jurisdiction over this case.

2. PREJUDGMENT INTEREST

We disagree with the award of prejudgment interest in this case because the jury awarded prejudgment interest on Sparrow's full award without apportioning the damages between her Jones Act negligence and general maritime law unseaworthiness claims. If the damages were apportioned between the two claims, Sparrow would have been entitled to receive prejudgment interest on her unseaworthiness award, but not her Jones Act award. An award of prejudgment interest is not permissible on Jones Act claims. *See McPhillamy v. Brown & Root, Inc.*, 810 F.2d 529, 531-32 (5th Cir. 1987). Additionally, juries cannot grant an award for prejudgment interest in a mixed case. *See Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985). Such a discretionary award is solely reserved for judges during bench trials. *See* 28 U.S.C. § 1961(a) (2000). Finally, when it is unclear whether damages were assessed based on past or future harm, prejudgment interest is not applicable because prejudgment interest cannot be

awarded for future losses. *See Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 444 (1st Cir. 1991).

Once the plaintiff in a maritime lawsuit has satisfied the elements necessary to establish a *prima facie* Jones Act negligence and general maritime unseaworthiness claim, a court can calculate damages. *See Nevor v. Moneypenny Holdings, LLC*, 842 F.3d 113, 119-20 (1st Cir. 2016). Here, the jury found Black Pearl liable to Sparrow for damages under both Jones Act ***2003** negligence and general maritime law unseaworthiness. *Sparrow*, 16WG2018 at *6. The jury awarded Sparrow $950,000 for hospital-related expenses, plus $250,000 to cover Sparrow's recovery; the jury also awarded, and the District Court subsequently upheld, a prejudgment interest award of 10% per annum on the full amount of $1,200,000. *Id.* Black Pearl is cross-appealing the award of prejudgment interest.

Black Pearl asserts that a successful Jones Act claim precludes any award of prejudgment interest and, further, Black Pearl submits that Sparrow should not be granted prejudgment interest with respect to damages for future harm. *See Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 378 (5th Cir. 1989) (finding that recovery of prejudgment interest is not permitted on a claim under the Jones Act); *see also Borges*, 935 F.2d at 444 (holding that prejudgment interest cannot be awarded for future losses).

Sparrow argues that the District Court properly upheld the jury's prejudgment interest award "because the Jones Act claim was brought on the admiralty side of the court, where prejudgment interest is generally awarded as a matter of discretion." *See Martin v. Harris*, 560 F.3d 210, 219 (4th Cir. 2009); *see also Williams*, 750 F.2d at 491 (noting that the trial court has discretion to award prejudgment interest when a Jones Act case is brought under the court's admiralty jurisdiction). Sparrow also argues that mixed cases of Jones Act negligence and

general maritime law unseaworthiness claims do not prohibit an award of prejudgment interest. *See Nevor*, 842 F.3d at 123 (finding that prejudgment interest is available when a court, in a bench trial, awards damages based on mixed Jones Act and unseaworthiness claims); *see also Magee v. U.S. Lines, Inc.*, 976 F.2d 821, 822–23 (2d Cir. 1992) (holding that a seaman may be awarded prejudgment interest on the total amount of the award if she prevails on both her Jones Act and unseaworthiness claims, as long as there are no exceptional circumstances mitigating against such an award). We address these matters under *de novo* review to questions of law and under our admiralty jurisdiction.

a. Prejudgment Interest Generally

Prejudgment interest is interest that accrues on the amount of a legal award, from the time of the injury to the time the judgment is entered by the court. *Martin v. Walk, Haydel & Assocs., Inc.*, 794 F.2d 209, 212 (5th Cir. 1986). Prejudgment interest awards are intended to compensate a plaintiff for the "lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Arete Partners, L.P. v. Gunnerman*, 643 F.3d 410, 412–13 (5th Cir. 2011), as revised (June 30, 2011) (quoting *Cavnar v. Quality Control Parking*, 696 S.W.2d 549, 552 (Tex. 1985)); *see also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) ("Prejudgment interest traditionally has been considered part of the compensation due [to a] plaintiff.").

This type of award has proved to be a useful incentive for encouraging the parties to agree to settlement and it has played a role in expediting proceedings ***2004*** by removing any incentive for the defendant to delay. *See Perceptron, Inc. v. Sensor Adaptive Machines, Inc.*, 221 F.3d 913, 923 (6th Cir. 2000) (finding that the purpose of awarding prejudgment interest is to "provide an incentive for prompt settlement"); s*ee also Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 752 (8th Cir. 1986) ("Awarding prejudgment interest is intended to serve at

least two purposes: to compensate prevailing parties for the true costs of money damages incurred and, where liability and the amount of damages are fairly certain, to promote settlement and deter attempts to benefit unfairly from the inherent delays of litigation.").

b. Prejudgment Interest is Not Available Under Pure Jones Act Claims

The Jones Act fully incorporates the provisions of another federal statute, the Federal Employers' Liability Act ("FELA"), which provides railway workers with a federal cause of action against their employers for injuries and illnesses incurred as a result of their employer's negligence. 45 U.S.C. §§ 51-60. The Jones Act adopts "the entire judicially developed doctrine of liability" under FELA, giving seamen "rights that parallel those given to railway employees under FELA." *Martin*, 560 F.3d at 216 (quoting *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439 (1958)). The Supreme Court's decision in *Monessen Southern Railway Co. v. Morgan* held that prejudgment interest is not available under FELA. 486 U.S. 330, 336-39 (1988); *see also Barton v. Zapata Offshore Co.*, 397 F. Supp. 778, 779 (E.D. La. 1975) (finding that, when FELA was enacted, prejudgment interest was limited to liquidated claims and this distinction applied to Jones Act cases). The Fourth Circuit applied *Monessen* to Jones Act cases, therefore finding that prejudgment interest is not permissible in Jones Act cases. *Martin*, 560 F.3d at 219, 221 (citing *Monessen*, 486 U.S. at 336-39). This rule is applicable regardless of whether a Jones Act claim has been brought at law or in admiralty because the allowance of prejudgment interest is a substantive provision. *Id.* at 220.

The *Martin* holding is limited to Jones Act cases, and does not affect the availability of prejudgment interest in other provisions of admiralty law. *Martin*, 560 F.3d at 221; *see also U.S. Fire Ins. Co. v. Allied Towing Corp.*, 966 F.2d 820, 828 (4th Cir. 1992) ("Under maritime law, the awarding of prejudgment interest is the rule rather than the exception, and, in practice, is well-nigh automatic."). However, the circuit courts are currently split on whether a plaintiff who

succeeds on both a Jones Act negligence claim and another provision of admiralty law, such as general maritime law regarding unseaworthiness, should be entitled to prejudgment interest on the full amount awarded. If so, the question then becomes whether a jury may grant that prejudgment interest award.

In the Fifth and Sixth Circuits, the prevailing view is that since prejudgment interest is prohibited on pure Jones Act suits, such interest is also prohibited on mixed claims that do not specify how much of the interest is allocated to ***2005*** the unseaworthiness claim. *See Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 740 (6th Cir. 1986) (concluding that prejudgment interest should not be awarded where the special interrogatories did not provide any basis for determining which portion of the damage award, if any, was attributable to unseaworthiness rather than to Jones Act negligence); *see also Colburn*, 883 F.2d at 378 (holding that prejudgment interest is not permissible where damages are awarded for both Jones Act negligence and unseaworthiness, without any indication as to whether any portion of those damages was awarded for the unseaworthiness claim).

The First and Second Circuits, however, hold that prejudgment interest is available when a plaintiff succeeds on a mixed Jones Act and general maritime law unseaworthiness claim. *See Nevor*, 842 F.3d at 123; *see also Magee*, 976 F.2d at 822–23. The Second Circuit, in its *Magee* decision, relied on decisions by other courts permitting prejudgment interest where a plaintiff was awarded damages under separate tort theories of liability, even when only one of those theories allowed for prejudgment interest. *Magee*, 976 F.2d at 822 (citing *Doty v. Sewall*, 908 F.2d 1053, 1063 (1st Cir. 1990) (finding that plaintiff was entitled to prejudgment interest on full award in his mixed fair representation claim under the Labor-Management Reporting and Disclosure Act and state civil rights law); *see Foley v. City of Lowell, Mass.*, 948 F.2d 10, 17 (1st

Cir. 1991) (awarding prejudgment interest on federal and state civil rights claims); *see also Mallis v. Bankers Trust Co.*, 717 F.2d 683, 695 (2d Cir. 1983) (granting prejudgment interest on a mixed federal securities law and common law fraud and misrepresentation)). The Second Circuit holds that a plaintiff who is successful under mixed theories of liability should be awarded damages under the theory that provides the most complete recovery. *Magee*, 976 F.2d at 822.

We agree with the Second Circuit insofar as a plaintiff who is successful under more than one theory of liability should be able to receive the most complete recovery that each theory allows. However, the theory that allows for the most complete recovery should not be used as a bootstrap to grant an award that goes beyond the limits of the other theory. In other words, a jury cannot use the unseaworthiness doctrine as a catchall to grant a larger award than allowed under the Jones Act negligence claim. *See Colburn, Inc.*, 883 F.2d at 378; *see also Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 (5th Cir. 1984). For this reason, Sparrow's argument must fail.

c. Juries Cannot Award Prejudgment Interest

Juries cannot award prejudgment interest on a mixed Jones Act negligence and general maritime law unseaworthiness claim. The Supreme Court has established that a plaintiff is entitled to a jury trial when she brings a general maritime law claim and a Jones Act claim if both claims arise out of one set of facts. *Fitzgerald v. U. S. Lines Co.*, 374 U.S. 16, 21 (1963). However, the Court has not addressed whether a jury may award prejudgment interest on a mixed claim. ***2006** In *Barton v. Zapata Offshore Co.*, Justice Rubin opined that *Fitzgerald* "did not say that an unseaworthiness claim becomes a claim 'at law' when joined with a Jones Act claim and sent to a jury; therefore, the unseaworthiness claim should be governed by normal admiralty principles, which allow prejudgment interest to be awarded." 397 F. Supp. 778, 780 (E.D. La. 1975). Justice Rubin, however, explained that because prejudgment interest is barred in

a pure Jones Act case, there is "no separate 'pure' admiralty item on which to allow interest" when a jury finds the employer liable under both a Jones Act and unseaworthiness claims, and "the elements and amounts of damage claimed [are] identical." *Id.*

The only instances where Jones Act cases have resulted in the award of prejudgment interest is when such cases are brought in under the court's admiralty jurisdiction. When this occurs, the case is tried to the bench, not to a jury. Prejudgment interest is within the discretion of the trial court even if there is no finding of unseaworthiness. Jones Act, 46 U.S.C. app. § 688(a) (2006) (recodified in 2006 with minor changes at 46 U.S.C. § 30104 (2006)); see also *Wyatt*, 735 F.2d at 955–56 ("[Pr]ejudgment interest is awarded almost as a matter of course in cases tried to a judge under general maritime principles, and when a Jones Act claim is tried jointly with the maritime claim before a judge, interest may be awarded at the judge's discretion."). Prejudgment interest, however, is not usually awarded when a Jones Act negligence case is tried before a jury, even if it is jointly filed with a general maritime law unseaworthiness claim, and both claims arise from the same facts. *Id.*; *see also Colburn*, 883 F.2d at 378.

Furthermore, while the First Circuit, in *Nevor*, holds that prejudgment interest may be awarded on mixed claims, that award is only available when a judge, in a bench trial, awards prejudgment interest. 842 F.3d at 123. The First Circuit found that the lower court, absent a jury, was entitled to weigh the evidence and use its discretion to grant the damages award. *Id.* at 122; *see also Nevor v. Moneypenny Holdings, LLC*, No. CV 13-407-M-LDA, 2016 WL 183906, at *1 (D.R.I. Jan. 14, 2016), aff'd in part, rev'd in part, 842 F.3d 113 (1st Cir. 2016) (entering a judgment after bench trial pursuant to Fed. R. Civ. P. 52(a)). The Second Circuit, however, held that a plaintiff is entitled to prejudgment interest on her full award in a mixed claim, when a jury

returns a verdict of full recovery without apportionment between the two theories of liability. *Magee*, 976 F.2d at 822. This is allowable so long as there are no exceptional or extraordinary circumstances militating against award of prejudgment interest on the maritime claim. *Id.* at 823.

Here, Sparrow relies on *Martin* and *Williams* to assert that a Jones Act claim brought in admiralty permits prejudgment interest. 60 F.3d at 219; 750 F.2d at 491. ***2007*** While this assertion is true, Sparrow omits a vital portion of that rule. Only a judge at a bench trial may exercise such discretion when a Jones Act claim is brought on the admiralty side of the court. *See* 28 U.S.C. § 1961(a); *see also Martin*, 560 F.3d at 219 (finding that trial courts have discretion to award prejudgment interest when a Jones Act case is brought under the court's admiralty jurisdiction before the court, not a jury); *see also Nevor, 842 F.3d at 113; compare Williams*, 750 F.2d at 491 (holding that when a claim is brought in admiralty jurisdiction, the federal judge may exercise discretion to award prejudgment interest on a Jones Act claim) *with Wyatt*, 735 F.2d at 955 (noting that the Fifth Circuit has "disapproved the award of prejudgment interest in a Jones Act case tried to a jury").

Here, the jury awarded Sparrow prejudgment interest of 10% per annum on the full amount of $1,200,000, but did not specify which portion of the award is attributable to her Jones Act claim, and which is attributable to her unseaworthiness claim. Instead, the jury merely itemized $950,000, to be awarded for hospital bills and related expenses, and $250,000 to be awarded for Sparrow's recovery. We find that there is no "separate pure admiralty item" on which prejudgment interest is allowed because Sparrow's Jones Act negligence and general maritime law unseaworthiness claims both arose from the same facts. *See Barton*, 397 F. Supp. at 780. The damages appear identical. Since the jury did not indicate which portion of Sparrow's

award was attributed to her unseaworthiness claim, we find the application of prejudgment interest to be improper. *See McPhillamy*, 810 F.2d at 531-32.

d. Prejudgment Interest Does Not Apply to Future Losses

Even if the jury had separately apportioned the award to each of the two claims, there is still the matter of whether or not the jury awarded damages for past losses or future losses. Black Pearl relies upon *Borges* to address this concern. 935 F.2d at 445. The *Borges* court noted that an award of prejudgment interest is improper where the jury awards a plaintiff prejudgment interest on a lump sum award which includes both past and future damages. *Id.* at 443. Prejudgment interest may be awarded for past wages, medical expenses that have been incurred, and past pain and suffering. *Id.* at 445. However, damages for future loss of wages, future medical expenses, and future pain and suffering should not to be factored into an award for prejudgment interest. *Id.*; *see also Blackburn v. Snow*, 771 F.2d 556, 573 (1st Cir. 1985) (finding that, in order for prejudgment interest to apply, the court must specify the date that the award of interest should apply). Though not specified, it seems to us that the jury may have awarded prejudgment interest, at least in part, to compensate for future harm. The Court fails to specify a start and end date for the award of interest, ***2008** leaving the application of the award open to interpretation to the jury. Such an award is not permissible. *See Walk, Haydel & Assocs., Inc*, 794 F.2d at 209 (holding that prejudgment interest could be recovered only on damages accrued as of the date of judgment and not on any portion of the judgment that has compensated for future damages).

3. Conclusion

Therefore, for the reasons discussed above, we cannot agree with the award of prejudgment interest in this case. As prejudgment interest does not apply to Jones Act claims, and the jury did not specify which portion of the award was attributable to Sparrow's

unseaworthiness claim rather than her Jones Act claim, the interest award is improper. Additionally, juries cannot grant an award for prejudgment interest. And finally, prejudgment interest cannot be awarded to compensate for future harm.

B. DISMISSAL OF TITLE VII CLAIM

On her appeal, Sparrow alleges that the District Court erred in dismissing her claim as it excludes an entire group of citizens from protection under Title VII without providing any alternative avenue for relief. As a matter of first impression, we must determine whether Sparrow presented an actionable claim under Title VII when she alleged that she experienced discrimination on the basis of her sexual orientation.

1. Actionable Title VII Claims

Title VII provides that "[i]t shall be an unlawful employment practice . . . to discriminate against any individual . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). There are at least three actionable sex discrimination theories that courts have recognized under Title VII: (1) harassment that is motivated by sexual desire or *quid pro quo*; (2) harassment expressing a general hostility to the presence of one sex in the workplace; and (3) harassment with the purpose of punishing the victim's noncompliance with gender stereotypes. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001). The first theory is not at issue in this case.

a. Sex-Based Discrimination Claims

Title VII prohibits employers from discriminating against employees "because of [their] sex." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). The plain meaning of Title VII prohibits discrimination "against women because they are women and against men because they are men." *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984). Thus, anyone discriminated against "because of" his or her sex may bring a lawsuit, regardless of his or her gender or that of his or her harasser. *Doe by Doe v. City of Belleville*, 119 F.3d 563, 573 (7th Cir. 1997), *vacated, Oncale*, 523 U.S. at 75.

In sex-based claims, the plaintiff "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. ***2009*** The statutory "because of . . . sex" requirement focuses on "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (holding that Title VII requires plaintiffs to show that an employer has treated "similarly-situated employees" of different sexes unequally); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569 (1978) (finding that under a Title VII "disparate treatment" claim based on sex, the plaintiff must show that the employer treated some people less favorably than others on the basis of sex).

b. Gender Stereotype Discrimination

In addition to discrimination based on one's biological sex, a plaintiff may be able to prove sex discrimination by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989): *see also Simonton v. Runyon*, 232 F.3d 33, 37–38 (2d Cir. 2000). In *Price Waterhouse*, a female plaintiff brought a Title VII claim after she had been denied partnership in an accounting firm. 490 U.S. at 235. She alleged that this denial, at least in part, was based on statements by her employer that she was "macho," "overcompensated for being a woman," needed "a course in charm school," was "masculine," and was "a lady using foul language." *Id.* Additionally, the plaintiff was advised that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" if she wanted to be considered for partnership. *Id.* The Supreme Court held that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief

that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. "Forcing an employee to fit into a gendered expectation—whether that expectation involves physical traits, clothing, mannerisms or sexual attraction—constitutes sex stereotyping and, under *Price Waterhouse*, violates Title VII." *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F.Supp. 3d 834, 841 (W.D. Pa. 2016); *see also Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.").

Black Pearl, in its appeal, asserts that Sparrow alleged neither of these forms of discrimination in her complaint, and that the dismissal of her Title VII claim was therefore permissible. We agree that Sparrow's complaint did not allege discrimination based on her sex.

2. Sexual Orientation

We now move to the central issue in this claim, whether discrimination based on sexual orientation is actionable under Title VII. While discrimination based on one's sexual orientation may be the basis for harassment in the workplace, to date, neither the Supreme Court nor Congress has explicitly clarified whether sexual orientation discrimination is actionable under Title VII. *See EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 842 (W.D. Pa. 2016) (determining that derogatory slurs regarding an employee's sexual orientation were sufficient to state a claim that the employee was discriminated against for being gay); *see also Bibby*, 260 F.3d at 261 (noting that Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 207 (2d Cir. 2017) (Katzmann, C.J., concurring) (noting that with the circuit courts split on whether Title VII prohibits discrimination based on sexual orientation, the Supreme Court may eventually address the issue).

***2010** The dissent and Sparrow both argue that we should apply Justice Scalia's reasoning in *Oncale*, which states that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79. Sparrow argues that discrimination on the basis of her sexual orientation would be the evil she seeks this court to remedy. While this is a compelling argument, it must be noted that Congress has had multiple opportunities to explicitly include sexual orientation as a protected category under Title VII, but has not. *See Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation"); s*ee also* Brief for U.S. Dep't of Justice at 34-36, as Amici Curiae Supporting Defendant-Appellees, *Zarada v. Altitude Express*, 855 F.3d 76 (2d. Cir. 2017). Both Congress' and the Supreme Court's inaction are strong indicators that sexual orientation is not an included category covered by existing Title VII protections.

The Seventh and the Second Circuits have recently taken a new position on discrimination based on sexual orientation with regards to Title VII. *See Hively v. Ivy Tech Cmty. Coll.*, 583 F.3d 339, 348-349 (7th Cir. 2017) (en banc) (overruling its own precedent and finding that sexual orientation is protected under Title VII, as it is "impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."); *see also Christiansen*, 852 F.3d at 199–200 ("[G]ay, lesbian, and bisexual individuals do not have *less* protection . . . against traditional gender stereotype discrimination than heterosexual individuals.") (emphasis in original). While the Seventh Circuit found that sexual orientation is protected under Title VII, the Second Circuit took a narrower position, holding that gay, lesbian and bisexual individuals may

bring a Title VII claim on the theory that they were discriminated against for gender nonconformity. *See Christiansen*, 852 F.3d at 200–01.

Conversely, several circuits have not re-examined their precedent in light of recent decisions of other circuits and the Equal Employment Opportunity Commission. *Compare Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015). (finding that Title VII protects against discrimination on the basis of sexual orientation) *with Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017), *cert. denied*, No. 17-370, 2017 WL 4012214 (U.S. Dec. 11, 2017) (holding discrimination based on sexual orientation was not actionable under Title VII); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Medina*, 413 F.3d at 1135 ("Title VII's protections, however, do not extend to harassment due to a person's sexuality . . . [and] 'Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.'"); *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale*, 523 U.S. at 75 ("Title VII does not afford a cause of action for discrimination based upon sexual orientation"); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals.").

2011 It should also be noted that, with the exception of the Second Circuit, district and circuit courts have repeatedly rejected employment discrimination claims that were based upon allegations involving sexual orientation discrimination rather than discrimination based upon gender stereotypes. *Compare Christiansen*, 852 F.3d at 200-01 ("gay, lesbian, and bisexual individuals [have the same protections] under *Price Waterhouse* against traditional gender

stereotype discrimination [as] heterosexual individuals"); *with Bibby*, 260 F.3d at 264-65 (finding that once a plaintiff shows that he or she was discriminated against because of his or her sex or failure to conform to traditional gender stereotypes, the plaintiff is irrelevant); *see also Trigg v. New York City Transit Auth.*, 2001 WL 868336, at *6 (E.D.N.Y. July 26, 2001) (rejecting gender stereotyping claim because plaintiff's Amended Complaint had many references to sexual orientation, homophobia, and accusations of discrimination based on homosexuality).

Here, Sparrow alleges that she was harassed in the workplace because she is a lesbian, not because she is a woman. As the law currently stands, she does not state a claim regarding an unlawful employment practice under Title VII. *See Evans*, 850 F.3d at 1255.

Because Sparrow chose to pursue a Title VII claim under the unfounded theory of discrimination based on sexual orientation, she missed the opportunity to present an argument that her crew possessed hostility towards her either because she was a woman or she failed to comply with gender stereotypes of how women ought to appear or act, which the record below might support. When "a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). Sparrow was not given such a chance. Therefore, we remand to allow Sparrow to amend her complaint to assert discrimination on the basis of her sex. We note, however, that the District Court is not obligated to allow a futile amendment. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) ("Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant."). Should Sparrow amend her claim, she must allege sufficient facts of sex discrimination beyond the mere fact that she is

married to a woman. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (stating that a gender-stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII"). ***2012***

IV. CONCLUSION

This Court is aware of the Supreme Court's recent opinion requiring states to recognize licensed marriages between two people of the same sex. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015). However, just as the Supreme Court changed the law regarding same-sex marriages, it can change the law regarding discrimination based on sexual orientation under Title VII. The Supreme Court has recently denied the *Evans* plaintiff's petition for writ of certiorari, but has granted the parties in *Evans* leave to file briefs as *amici curiae*. *Evans*, 850 F.3d at 1248, *cert. denied*, No. 17-370, 2017 WL 4012214 (U.S. Dec. 11, 2017). We can assume that the Court will hear oral arguments on this issue within the next year. However, until such time, this Court is bound by the plain language of Title VII, which currently does not proscribe discrimination on the basis of sexual orientation.

V. HOLDING

On the matter of prejudgment interest, we REVERSE the district court's decision. On the matter of the Title VII claim, we REMAND the decision, granting Sparrow the opportunity to amend her complaint for a fresh review.

So Ordered.

GUZZO, Circuit Judge, concurring in part and dissenting in part:

Regarding the issue of prejudgment interest, I concur with my colleagues in whole.

Regarding Title VII, while harassment based on sexual orientation may not have been contemplated at the time Congress enacted Title VII, it is still covered because it falls under the

"because of sex" provision. Employees who face discrimination on the basis of their sexual orientation experience such discrimination because they are in a relationship with a partner of the same sex. This is no different to the situation in *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, a Virginia law prohibiting members of different races from getting married was struck down for violating equal protection laws. *Id.* That law discriminated against couples because of whom they chose to marry. Analogous here, Sparrow, a lesbian, was discriminated against because she was married to a partner of the same sex. Such discrimination is prohibited under Title VII. *Hively v. Ivy Tech Cmty. Coll.*, 583 F.3d 339, 348-49 (7th Cir. 2017).

Courts must go beyond the "principal evil" of Title VII, the statute's enumerated traits, in order "to cover reasonably comparable evils." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). "That someone can be subjected to a barrage of insults, humiliation, hostility, and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor's ****2013*** view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate." *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 842 (W.D. Pa. 2016); *see also See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015). (finding that "allegations of discrimination on the basis of his sexual orientation state a claim f discrimination on the basis of sex within the meaning of Title VII."). Sparrow's claim of discrimination based on sexual orientation should be allowed to proceed.

For these reasons, I respectfully dissent.

In the
Supreme Court of the United States

Spring Term, 2018
Docket No. 20180309

JACLYN SPARROW,

Petitioner,

- against -

BLACK PEARL REPAIR CO.,

Respondent.

On Writ of Certiorari to the Supreme Court of the United States

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In response to the appeal by ("Petitioner") of the judgment of the United States Court of Appeals for the Thirteenth Circuit, this Court hereby grants review of the above-entitled matter on the following two issues:

1. Whether the Thirteenth Circuit correctly upheld the jury's award of prejudgment interest in the Petitioner's mixed Jones Act and unseaworthiness claim.

2. Whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation.

JOINT APPENDIX

Policies of Black Pearl Repair Company (excerpts)

1.2 Inner-Crew Meetings of Individual Crew's Leadership

(a) If it is determined that an Inner-Crew meeting is necessary, the composure of attendance at the meeting should adhere to the following guidelines:

(i) The Crew Captain OR Co-Captain must be present.

(ii) If the meeting pertains to an upcoming repair or maintenance: the Supervising Engineer must be present, and for any other topic, the Supervising Engineer should be present but it is not necessarily required.

(iii) The Administrator should be present to make a record of the meeting.

(a) However, as a general matter, any crew member in a supervisory role should be at inner-crew meetings, if possible.

(b) If any member whose attendance is required cannot be at the meeting, except in emergency situations, the meeting should be rescheduled.

2.2 Hierarchy of Leadership

(a) The Captain is the chief supervisor of the following employees:

(i) Co-Captain

(ii) Navigator

(iii) Cook

(iv) Administrator

(v) All support staff

(b) The Co-Captain is the chief supervisor of the following employees:

(i) Supervising Engineer

(ii) Engineer

(iii) Mechanic

(c) Notwithstanding subsections (a) and (b), the Captain is the ultimate authority on the seas.

(d) The Captain is subordinate to the Executive Staff.

Appendix 1

5.1 Equal Employment Opportunity

(a) Black Pearl Repair Company provides equal employment opportunities ("EEO") to all employees and applicants for employment without regard to race, color, religion, sex, sexual orientation, national origin, age, disability, or genetics. In addition to federal law requirements, Black Pearl Repair Company complies with applicable state and local laws governing non-discrimination in employment in every location in which the company has facilities. This policy applies to all terms and conditions of employment, including recruiting, hiring, placement, promotion, termination, layoff, recall, transfer, leaves of absence, compensation and training.

Black Pearl Repair Company expressly prohibits any form of workplace harassment based on race, color, religion, gender, sexual orientation, gender identity or expression, national origin, age, genetic information, disability, or veteran status. Improper interference with the ability of the company's employees to perform their job duties may result in discipline up to and including termination.

(b) Employees should follow the company's hierarchy (see, 2.2) to make a complaint, unless doing so might result in retaliation, in which case the employee should contact the EEO officer to file make a complaint.

Appendix 2

Agreement

This is an agreement for services between Black Pearl Repair Company (hereinafter "Black Pearl"), the service provider, and Flying Dutchman Oil Tech (hereinafter "Flying Dutchman"), the buyer. This agreement, which, is executed on August 26, 2014, governs the relationship between these parties.

Services
Black Pearl is to provide repair services for Flying Dutchman in emergency situations within a reasonable amount of time.

Payment
Upon the completion of good faith repairs, Flying Dutchman will pay Black Pearl a reasonable market price for repairs.

Site
Black Pearl will provide services at Flying Dutchman's oil rigs in the Robert Ferdinand Ocean off the coast of Jonestown, Wagner.

Term and Termination
The term of this contract is five (5) years and can be terminated only by consent and may be renewed by the signing of a new service contract.

Daniel Calypso, CEO
Black Pearl Repair Company

S. Weatherby
Samuel Weatherby, CEO

Flying Dutchman Oil Tech, Inc.

Sworn to before me, this 26 day of August 2015

Bill Turner

Bill Turner
Notary Public, State of Wagner
ID # 12984367-0
My Commission Expires Jan. 21, 2019

Appendix 3

FROM: JOSH GIBBS jgibbs@bprc.com

TO: JEFF BARBOSA jbarbosa@bprc.com

SENT: June 8, 2015

SUBJECT: RE: Meeting on 6/15

Hey Cap,

We need to have a meeting about the upcoming BP job, but I don't think the meeting would benefit from having you know who there. I don't really think it will be necessary for her to be there. We just need to solidify the plan. It can still be executed if she's not there. She might just need to call her wife or something. 
We can have Norrington sit in.

JG

Appendix 4

FROM:	JEFF BARBOSA jbarbosa@bprc.com
TO:	JOSH GIBBS jgibbs@bprc.com
SENT:	June 8, 2015
SUBJECT:	RE: Meeting on 6/15

Josh,

I think that we should probably have her there. She is the supervising engineer. I think we have to have her there because we are finalizing the plans for the BP job. I don't know. She is usually fairly helpful at the meetings. Please let her know that she should be there.

Barbosa

Appendix 5

FROM:	JOSH GIBBS jgibbs@bprc.com
TO:	JEFF BARBOSA jbarbosa@bprc.com
SENT:	June 14, 2015
SUBJECT:	RE: Meeting on 6/15

Hey Cap,

I'm not saying anything to Jack about the meeting on the 15th. We don't need him there. She just disrupts the staff and isn't good for the meetings. If that's okay with you, let me know.

Josh

Appendix 6

FROM:	JEFF BARBOSA jbarbosa@bprc.com
TO:	JOSH GIBBS jgibbs@bprc.com
SENT:	June 14, 2015
SUBJECT:	RE: Meeting on 6/15

Josh,

I still think that we are supposed to have HER at the meeting, but if you really don't want her there, I guess we can bring in Norrington and he can update her after the meeting. I don't think this is the best course of action, but if you think it will be okay we'll do it this once. Next time she's coming to the meeting. She is the supervising engineer. Don't forget that.

Captain Barbosa

Appendix 7

FROM:	JACLYN SPARROW jsparrow@bprc.com
TO:	JEFF BARBOSA jbarbosa@bprc.com ; JOSH GIBBS jgibbs@bprc.com
SENT:	June 16, 2015
SUBJECT:	Meeting on 6/15

Captain Barbosa,

I have become aware that I was not informed about a meeting that took place yesterday. My understanding is that even though I was clearly available to attend this meeting, you had Jeremy sit in on the meeting instead. This is going against, not only the chain of command, as I am the supervising engineer, but this also goes against the company policy in regard to meetings, as you are very much aware. I know that Mr. Gibbs seems to have a problem with my sexuality, but that is no reason to exclude me from meetings. I expect that I will be at the next meeting. I am also going to be speaking to someone about this.

Regards,
J. Sparrow

Appendix 8

FROM:	JEFF BARBOSA jbarbosa@bprc.com
CC:	JOSH GIBBS jgibbs@bprc.com
TO:	JACLYN SPARROW jsparrow@bprc.com
SENT:	June 16, 2015
SUBJECT:	RE: Meeting on 6/15

Jaclyn,

I understand your concern. I apologize that you believe Mr. Gibbs to be holding some sort of bias against you but that is not the case. We just wanted to give Mr. Norrington the opportunity to sit in on a meeting in the hopes that under your tutelage and ours he is able to move up at some point. It will not happen again.

Best,

Captain Barbosa

Appendix 9

FROM:	SHAWN TURNER sturner2@bprc.com
TO:	JEFF BARBOSA jbarbosa@bprc.com
SENT:	May 27, 2015
SUBJECT:	RE: “Practical” jokes

Captain Barbosa,

It’s come to my attention that most of the crew have been playing jokes on Jackie. At first, it wasn’t great, but it wasn’t completely out of the ordinary. Lately though it has gotten worse and they are making crude jokes about, not only her, but her orientation and the fact that she’s married to a woman. They have been making a lot of jokes about her being a man kind of indirectly calling her a butch lesbian. She’s a supervisor and deserves respect and Co-captain Gibbs doesn’t stick up for her and only makes it worse, which is why I didn’t email him about this. Something should be done about this. Please reach out to me about anything regarding this matter.

Thanks,
Shawn

Appendix 10

FROM:	SHAWN TURNER sturner2@bprc.com
TO:	TIM DALMA tdalma@bprc.com
SENT:	June 25, 2015
SUBJECT:	“Practical” jokes

Mr. Dalma:

I emailed my Captain about a month ago about some troublesome behavior that has been occurring in the C-Crew. Our engineering supervisor is a lesbian and has been getting a lot of flak and crude jokes because of it. She’s also been left out of meetings for no real reason. I don’t know what I should do since my Captain never replied to my email about this behavior. I know that you are the EEO Officer so I thought it would appropriate for me to email you about this problem. Please advise what I should do about this.

Best,
Shawn Turner

Appendix 11

FROM: JACLYN SPARROW jsparrow@bprc.com

TO: TIM DALMA tdalma@bprc.com

SENT: July 2, 2015

SUBJECT: Harassment

Mr. Dalma:

I have been experiencing a lot of harassment with my assigned crew. At first, though annoying and inappropriate, I thought that it was more or less harmless. My fellow crew members started by calling me Jack and inviting me to strip clubs and “boys’ nights.” However, it has only gotten worse. They have been leaving items in my locker like boxers and making it to where I cannot get into the women’s restroom and locker room, only the men’s. Most recently they put a picture of the crew on my cabin door that was Photoshopped. My face was on a man’s body while none of the men's faces were on female bodies. I also think that I’m being left out of crew meetings which I should be at. I am supervising engineer for C-Crew, and my junior engineer is being invited to meetings and I am not. I think that my Co-Captain, Josh Gibbs is not okay with my sexual orientation and is discriminating against me because of it. This is unacceptable. I will go outside of the company if I have to. I can’t work like this. I also have not gotten a raise or promotion since I have been here and I know that my junior, straight engineer has gotten at least two raises. Something needs to be done.

Please advise,
J. Sparrow

Appendix 12

Black Pearl Repair Co. Requests Parlay

The Wagner Intercept

May 15, 2014
By: Lois Lane

Black Pearl Repair Company is one of the larger employers in the Jonestown, Wagner community. Many families have had generations of members in the business of boats and oil rigs. And no generation has faced as many problems with these companies as the current generation because suddenly there's an expectation that companies stand up and protect their employees from various forms of abuse from both superiors and colleagues.

Companies like Black Pearl Repair Company have had problems adjusting to this new awareness. Just last year, Black Pearl tried to wiggle its way out of a lawsuit for discrimination. This incident was involving a man who was openly gay who was being mistreated within his crew. The company argued that sexual orientation was not protected by the company's Equal Employment Opportunity policy and as such the man did not have a claim.

Despite this claim the company settled out of court for $500,000 and changed their EEO policy to add sexual orientation as protected. If this seems suspicious to you, that's because it is. If the company was not aware that there were problems in the company with homophobia and probably a host of other discrimination.

In fact, this is not the first claim filed by an employee. Racial and gender discrimination claims have been brought left and right since the company was founded in 1978. Hopefully, the company's policy change will bring about a positive change in the culture and protect more individuals.

Appendix 13

The Wagner Intercept

Op-Ed Contributor

Black Pearl Repair Co. Strikes Again

August 19, 2016
By: Clark Kent

In an exclusive anonymous interview with an employee of Black Pearl Repair Company, The Wagner Intercept has discovered that Black Pearl still hasn't learned from the sins of its predecessors. We are informed that the company is once again discriminating in violation of federal law.

This time the company's target is a veteran who just happens to be a lesbian. The information which The Intercept has received indicates that the employee is being ridiculed and mistreated by members of her crew even though she is technically a supervisor, she is also receiving mistreatment from above from superiors.

We have received information that there have been multiple complaints filed with both supervisors in that particular crew and also with the company's EEO officer. Despite all of this outcry, the company has yet to reach out to the employee for further follow up and is still being treated unfairly.

In 2016, we as a society cannot settle for big companies to treat its employees unfairly and get away with it. These robber barons are getting away with highway murder at the expense and the victimization of their employees. They take advantage of low production costs from abroad, low corporate taxes domestically, low minimum wage, and minimal employee protections. This kind of behavior cannot and should not be tolerated. The people must fight this establishment and all establishments like it.

Appendix 14

A. Salazar, M.D.
Salazar and Associates, LLC

November 15, 2015

To whom it may concern:

I have examined and treated Jaclyn Sparrow after her surgery, overseeing her physical therapy. She has sustained multiple fractures in both her left radius and her right tibia along with a serious concussion. I have treated Ms. Sparrow in outpatient care. She is in her second week of outpatient care and her first day of PT.

She has some mobility in her arm but is still displaying difficulty walking. The leg muscles have atrophied from the accident and subsequent surgeries. I have consulted with her surgeon and am authorized to report those results.

Per Dr. J. Scarfield, Ms. Sparrow sustained two complete fractures in her left radius and her right tibia. She also has sustained extensive swelling and trauma to the brain. Dr. Scarfield performed the surgery on her radius and tibia and also monitored the brain injury. Based on my observations as well as the observations of Dr. Scarfield, it appears that the concussion has not resulted in long-term brain damage and minimal memory loss. However, the damage to the nerves as a result of the right arm injury has led to significant impairment of fine motor skills in Ms. Sparrow's right hand. The leg injury, similarly, has resulted in nerve damage and limited mobility. Since the accident, Ms. Sparrow has been wheelchair bound.

I have also spoken to Ms. Sparrow's therapist, Dr. K. Angeline. Dr. Angeline has been watching Ms. Sparrow carefully since the accident as she has been suffering from serious depression and suicidal thoughts. Because Ms. Sparrow has always been a physically active person, her inability to perform basic tasks has taken a toll on her psyche.

Ms. Sparrow will be doing PT every day for the next six months in the hopes of restoring as much motor function as possible in the affected areas. She is also undergoing counseling twice a week for the next four weeks.

Regards,
Dr. A. Salazar

Appendix 15

A. Salazar, M.D.
Salazar and Associates, LLC

July 18, 2016

To whom it may concern:

This letter is meant to be an update on the condition of Ms. Jaclyn Sparrow. It has been eight months since Ms. Sparrow began physical therapy. Her condition has improved, but Ms. Sparrow is still complaining of pain, and she is still suffering from depression because of her condition. I have been consulting with Ms. Sparrow's therapist and her mental condition is still unstable. Though her brain swelling has diminished, continued issues with her arm.

Ms. Sparrow no longer requires a wheelchair. Her leg strength has improved substantially since my initial letter. Unfortunately, the physical therapy has not been as effective for her arm injury. She is still experiencing limited mobility due to nerve damage.

In addition to depression, Ms. Sparrow is also still dealing with her short-term memory loss. This has created an additional level of frustration for Ms. Sparrow, who feels both mentally and physically impaired.

Though she has come a long way, based on my professional opinion, Ms. Sparrow may never be able to return to her former position and perform the duties associated with that position in any meaningful way.

Regards,
Dr. A. Salazar

Appendix 16