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16-748-cv

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANONYMOUS,

Plaintiff,

MATTHEW CHRISTIANSEN,

Plaintiff-Appellant,

-against-

OMNICOM GROUP, INCORPORATED, DDB WORLDWIDE COMMUNICATIONS GROUP INCOPORATED, JOE CIANCIOTTO, PETER HEMPEL, and CHRIS BROWN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

LAW OFFICES OF
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I. INTRODUCTION

Defendants-Appellees' open with conceding that Title VII must protect against "sexual orientation" discrimination and they "fully support" that. Their concession is noted, and their half-hearted attempt to argue for the sake of opposition fails because they cannot navigate away from their original admission. So they contradict themselves by claiming that only Congress can amend Title VII, and misrepresent that Matthew Christiansen and his amici argued that. On the contrary, we argue for this Court to use its authority to interpret the statute to include sexual orientation. Congress's Amici Brief makes that clear. Accordingly, Appellees admit at their Brief page 15 that this Court can interpret the statute but need not to for reasons they never explain. Appellees also claim that *Simonton* and the Seventh Circuit's *Hively* are precedent, but they omit any explanation why *Hively* is precedential here because it is not. Nevertheless, it was vacated on October 11, 2016. They ignore that *Simonton* is precedential, which is the basis of this appeal for reversal. At pages 5 and 13 of, they misrepresent that the District Court dismissed the Title VII as time barred, while their Counter Statement, page 6, omits any appealable issue of Title VII statute of limitations. because the District Court never dismissed Title VII as time barred. Then at page 12 they admit it was dismissed based upon *Simonton*, nothing else. They never

address Appellant's and Amici arguments that this court's precedent, *Simonton*, is contrary to the statute, Supreme Court precedent and other authority and that under those circumstances this court can reverse *Simonton*. Instead, they argue that this court should ignore everyone's Federal rights under Title VII if they have a state court action and this court's decision would be valueless for anyone who does not reside in this Circuit. That absurd position simply undermines Appellees' entire brief attempting to convince this Court that *Hively*, an out of Circuit case, is precedential.

Regrettably, Appellee's argue their own wholesale loss of faith in our system that "this Court's decision would affect only individuals living and/or working in the Second Circuit". In other words, they say that a decision from this Circuit is valueless to anyone out of this Circuit. However, Appellees' loss of faith does not negate the truth that if this Circuit uses its power to interpret Title VII to protect against "sexual orientation" and overturns *Simonton*, then it would be a decision that other District and Circuit courts could rely on and follow exactly when this Circuit led the way to equality in *Windsor v. United States*, 699 F.3d 169,182 (2d Cir. N.Y. 2012), leading to *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

The truth is that someone has to be the leader in civil rights, and it does not have to be Congress in this case.

II. ARGUMENT

AN ACT OF CONGRESS IS NOT NECESSARY FOR THIS COURT TO INTERPRET TITLE VII.

Appellee's preliminary statement claims that only a Congressional amendment of Title VII to add "sexual orientation" is the answer but they abandon that position by failing to make that argument in their Brief. To be clear, they omit any argument because interpretation of that statute is exactly what this Circuit did in *Simonton*. That interpretation is why the District Court's decision implored this Circuit's reversal.

THE FACTS PLED ARE PRESUMED TRUE AT THIS MOTION TO DISMISS STAGE

Next, because the facts pled in the FAC are presumed to be true (*Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184, 187 (2d Cir. 2012)) then we must get the pleaded facts straight. Contrary to Appellee's characterizing that Cianciotto "suggested" that Matthew Christiansen knew what it was like to have AIDS, the FAC pleads that he "accused" him of AIDS in front of his colleagues (A17). The FAC also pleads how he accused Matthew of having AIDS just because he was gay to other employees to harass him since the day he started working there (A17,18 A33-39). That unacceptable and deplorable conduct is not a suggestion—it's a hostile statement meant to damage people.

Appellees continue to rewrite the facts at page 10 of their Brief that

Matthew Christiansen knew or should have known of the Facebook post in 2011. That is not what is pled in the four corners of the complaint. It was "discovered in 2014" by Matthew and three gay employees certify that post disturbingly depicts him as a "sissy" gay man consistent with the pervasive hostile environment Appellees created against gay employees (A17,18 A33-39). The FAC pleads that after he discovered it in September, that in October and November, 2014, Matthew Christiansen's counsel notified Appellees to remove the Facebook post because it distressed Matthew by depicting him as a sissy and was "objectionable and harassing considering the course of conduct directed towards" him, but Appellees refused to remove it in furtherance of their policy to harass him as a gay man (A20-22,26,29,81-85). It was only removed once Matthew had the EEOC involved by filing his EEOC complaints; thus, the posting clearly violated the law, otherwise they would not have removed it in January, 2015 (A21).

Unable to argue away from that violation, Appellees ignore the facts pled that the harassment continued into January, 2015 when they removed the post only after the EEOC became involved (A22). Hence, their time bar position fails because October, 2014 is the last incident pled as part of the continuing of harassment, and it continued by Appellees' own admission when they removed the offensive post in January 2015. Thus, Matthew Christiansen filed his EEOC well within 300 days of the last incident in October, 2014.

Finally, Appellees counterstatement at page 11 misrepresents the record as "Christiansen remains employed by DDB, **and Cianciotto is not**, A9 ¶10." (emphasis added). Nowhere does the FAC plead the Cianciotto is not Appellees' employee[1]. Also, the record establishes that Matthew Christiansen remained only because he could not afford to lose his salary and health benefits he needs to survive, and his remaining there does not discount the District Court affirming that "[b]y any metric, the conduct alleged is reprehensible."(A159). Employees should not have to be forced to commit financial or physical suicide to prove a Title VII violation against an employer's reprehensible misconduct**.**

TITLE VII WAS NEVER DISMISSED AS TIME BARRED

Without anything to argue, Appellees' turn to misrepresenting that the Title VII claim was dismissed as time barred when that never happened. Then they admit at their Brief, page 12, that it was dismissed only because of *Simonton*. At page 13, they omit a time-barred Title VII issue as appealable because there was nothing like that to appeal from the District Court's decision. That is why they never cross-appealed that issue. Instead, they inappropriately raise it for the first time in their opposition brief rather than filing a mandatory cross-appeal.

[1] He in fact was their employee when the FAC was filed.

THIS COURT HAS NO JURISDICTION TO HEAR A TIME BAR ARGUMENT BECAUSE IT WAS NOT CROSS-APPEALED

An appellate court may not alter a judgment to benefit a non-appealing party. *Greenlaw v. United States*, 554 U.S. 237, 128 S. Ct. 2559, 171 L. Ed. 2d 399(U.S. 2008). It is entrenched law that it takes a cross-appeal to justify a remedy in favor of an appellee. *Id*. citing *M'Donough v. Dannery*, 3 U.S. 188, 198, 3 Dall. 188, 198, 1 L. Ed. 563, 16 F. Cas. 981, F. Cas. No. 9212a (1796). The rule is "inveterate and certain." *Id.* citing *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S. Ct. 325, 81 L. Ed. 593 (1937). This Circuit holds that an appellee's challenge to the district court's decision was "not properly before us, given that it suggests that the district court's judgment should have been different, and given that [the appellee] did not file a cross-appeal." *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 349 (2d Cir. 2008).

DIFFERENT STATE LIBEL STATUTES OF LIMITATIONS DO NOT NEGATE THE EEOC'S UNIFORM STATUTE OF 300 DAYS, WHICH THE LAST INCIDENT HERE WAS THE SEPTEMBER, 2015 FACEBOOK POST REPORTED TO THE EEOC IN NOVEMBER, 2015.

In arguendo, an examination of Appellees' time barred position fails. First, without any law supporting them, they claim the EEOC statute of limitations depends upon this state's one-year libel statute of limitations. It is an absurd and unsupportable position to bootstrap a libel statute of limitations to a Title VII

claim under the jurisdiction of the EEOC. Every state has a different libel statute of limitations that is unrelated to Title VII claims. That is why the EEOC has one uniform rule of 300 days from when a claimant knew or should have known of the last incident, and that is subject to a continuing violation. *Harris v. City of New York*, 186 F.3d 243, (2d Cir. N.Y. 1999). The last thing Matthew Christiansen knew or should have known was the Facebook posting that started the statute of limitations running.

As explained above, the FAC pleads facts as true, and that includes the fact that Matthew Christiansen did not know about the offensive Face Book post until September, 2014. Although Appellees want to rewrite the facts as if he knew about it in 2011, they cannot and he did not know as pled. They cannot rely on their footnote 5 of a self-serving selection of alleged Face Book information because we can do the same thing to prove that Matthew had no knowledge of the post until 2014 as he pled because tagging did not exist when that post was made[2]. Anyhow, that Facebook information in their footnote is not capable of judicial notice in their unsworn brief. This fact issue should be taken up after discovery, in summary judgment, not at this motion to dismiss stage.

[2] The Muscle Beach Poster was posted July 11, 2011 to Facebook. That was one month before when in August 23, 2011 Facebook commenced photo tagging approvals, https://www.facebook.com/notes/facebook/making-it-easier-to-share-with-who-you-want/10150251867797131/. That means that Matthew Christiansen may have been tagged in July but never received the right to approve that, or even had actual notice of such as many Facebook factors could have prevented his notice, including that he may have been tagged as September, 2014 when he first had knowledge as pled.

THE DISTRICT COURT FOUND COMPELLING CIRCUMSTANCES IN THIS CASE AND DECLARED "[B]Y ANY METRIC, THE CONDUCT ALLEGED IS REPREHENSIBLE."(A159).

Appellees argue that only compelling circumstances warrant the continuing violation doctrine and that compelling circumstances did not exist here. That is not true. Honorable Katherine Polk Failla found this case very compelling as "[b]y any metric, the conduct alleged is reprehensible."(A159). She made it clear that the courts have had it with cases like Matthew Christiansen's coming before them where employees are victimized because of their sexual orientation without Federal protection in this Circuit. Therefore, Judge Fallia never dismissed the Title VII claim as time barred. Instead, she pled for this Circuit to overturn Simonton because that case constrained her from ruling differently in this case.

The continuing violation exception to a Title VII limitations period works when the plaintiff files an EEOC charge that is timely to any incident of discrimination in furtherance of an ongoing policy of discrimination, and all acts will be timely even if they were untimely standing alone. *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir 2015). That means that the FAC pleads hostile acts continuing since Matthew first started working there and Cianciotto accused him of AIDS to other employees (unbeknownst to Matthew), to everything in between of his witnessing employees being harassed with lewd and formidable pictures of

them and him fornicating, defecating and urinating on and with each other, to being called gay in a derogatory way, to Cianciotto ratcheting the harassment in May, 2013 to stating that Matthew had AIDS in front of him and all of his colleagues (although false) to the Facebook poster discovered in September, 2014 that Appellees refused to remove after more complaints from Matthew because their policy was to permit gay employees to be abused because they are gay; that is, until the EEOC got involved. The FAC pleads that was removed in January, 2015 and that other employees understood that post to mean that Matthew was depicted in a derogatory gay manner as a "sissy".

Conspicuously, Appellees knew that the source of the harassment was Cianciotto. Everyone, including Matthew complained about him. Appellees knew, but refused to do anything until the EEOC became involved. Cianciotto was the continuing violation. Furthermore, Appellee forced Matthew to continue working under Cianciotto, despite complaints made him and other employees. *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir.1992) (forcing plaintiff to work under supervision of a known sexual harasser created abusive work environment). Then they proved their support of the hostile environment by refusing to remove the "sissy" poster from Facebook in October, 2014 and many times thereafter when requested to all of the Appellees, not just to Cianciotto.

The facts pled are that the Facebook posting is the last complained of act

and it was ongoing until January, 2015. The fact pled is that if the poster did not violate Title VII, Appellees would not have removed it once the EEOC became involved. And that action proves our case that this Court must overturn *Simonton* to provide for sexual orientation protection; otherwise, without the protection then employers like Appellees will ignore employee complaints unless they know the EEOC can and will enforce a law to protect sexual orientation.

***HIVELY* IS NOT GOOD LAW AS THE SEVENTH CIRCUIT VACATED IT ON OCTOBER 11, 2016; JUST LIKE WE ASK FOR A REVERSAL OF *SIMONTON* BY THIS CIRCUIT. THIS COURT CAN REVERSE TOO.**

Appellees cannot rely on *Hively v. Ivy Tech Comm. College,* No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016) because it is not law; however, for purposes of correcting the record of Appellees' fundamental misunderstandings of *Hively*, we present this section. First, contrary to Appellees' assertion, the recent decision in *Hively* did not consider and reject "all of the arguments advanced by Christiansen and the amici" in this case. Appellees Brf. at 3. The *Hively* decision did not reach amici arguments because there were no amici briefs before the court. Amici briefs were filed only after the panel decision -- in support of the petition for rehearing, which was granted. Moreover, *Hively* did not reject analytically nor logically **any** of the arguments made in this litigation regarding coverage. Instead, it simply deemed its precedent binding and conclusive on the coverage question. 2016 WL 4039703 at *1 ("After a careful analysis of our precedent, however, this

court must conclude that Kimberly Hively has failed to state a claim under Title VII for sex discrimination"); *id*. at *15 ("Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent").[3]

Specifically, appellees are flatly wrong that "assertions that the EEOC's decision in *Baldwin v. Foxx* [] is entitled to *Chevron* deference – were recently addressed, and rejected" by *Hively*. *Baldwin* was decided after briefing in *Hively*. *Baldwin* was the subject of only a FRAP 28(j) letter, in which neither *Chevron* nor *Brand X* was mentioned by name or by concept. *Hively v. Ivy Tech. Comm. College*, No. 15-1720, Docket entry 22-1, Filed: 07/17/2015. Moreover, this passage from *Hively* makes clear that court did not consider *Chevron* and *Brand X* on its own:

> Based on our holding today, which is counter to the EEOC's holding in *Baldwin*, we need not delve into a discussion of the level of deference we owe to the EEOC's rulings. Whatever deference we might owe to the EEOC's adjudications, we conclude for the reasons that follow, that Title VII, as it stands, does not reach discrimination based on sexual orientation. . . . [W]e affirm our prior precedents on this point . . .

[3] *See also id*. at *2 ("We are presumptively bound by our own precedent"); *id*. ("Our precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination"); *id*. at *14 ("our own precedent holds that Title VII provides no protection from nor redress for discrimination on the basis of sexual orientation. We require a compelling reason to overturn circuit precedent.").

Hively, 2016 WL 4039703 at *4. This reveals a fundamental misunderstanding of how deference works: it is precisely when the holding you intend to announce is "counter to the" agency's ruling that a court must "delve into a discussion of the lever of deference we owe to the" agency's rulings. And the precise holding of *Brand X* is that a court cannot simply ignore an agency's ruling because of its own preexisting precedents, which must yield to a reasonable agency interpretation, unless the court previously held that the "statute unambiguously forecloses the agency's interpretation," which was not the case. *Brand X*, 545 U.S. at 982.[4] Again, a revelation that likely led to that Circuit vacating *Hively*.

Hively also bolsters the argument that *Simonton* and *Dawson* should be reexamined in light of this Court's more recent precedent in *Holcomb* declaring Title VII to cover discrimination against an employee because of his or her interracial relationship. *Hively* embraced without reservation the interracial relationship analogy, declaring that Title VII is violated if a white woman can associate romantically with a white man, but not an African-American man or a woman. 2016 WL 4039703 at *13 ("if Title VII protects from discrimination a white woman who is fired for romantically associating with an African-American

[4] There is no question that *Hively* regarded the *Baldwin* decision as reasonable, and likely persuasive absent its existing precedent. *See Id.* at *4 (noting that many courts are "taking heed of the reasoning behind the EEOC decision in *Baldwin"* and "are beginning to question the doctrinaire distinction between gender non-conformity discrimination and sexual orientation discrimination and coming up short on rational answers.").

man, then logically it should also protect a woman who has been discriminated against because she is associating romantically with another woman"). Hence, the likely reason that the Seventh Circuit reversed itself to vacate *Hively* is because *Hively* actually supports a ruling in favor of coverage in a circuit with no precedent on the coverage question, or this circuit, which permits revisiting precedent under these circumstances. See Members of Congress Brf., Docket 46 at 27-30.[5]

Appellees also offer the observation that "every other circuit that has considered this issue has ruled the same way." Appellees Brf. at 3. While true, none of the other cases considered the array of arguments presented to this Court nor had the EEOC decision in *Baldwin* to rely upon, nor the advantage of the latest developments in *Obergefell* and *Windsor*. Moreover, contrary to the supporting citations, the Fourth, Fifth, and Eighth circuits have no holdings regarding Title VII coverage of sexual orientation discrimination. *See Wrightson v.Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996) (plainly dicta in a same-sex sexual

[5] Appellees never mention *Dawson* and do nothing to rehabilitate *Simonton*. Moreover, their citation to *Hively* further undermines these precedents. In discussing the "jumble of inconsistent precedents" that attempt to distinguish sexual orientation claims from other sex-stereotyping claims, *Hively* disapprovingly notes that *Simonton*, *Dawson*, and similar cases have "foregone any effort" on the issue by simply invoking a rule against "boostrapping" that "essentially throw[s] out the baby with the bathwater," *Hively*, 2016 WL 4039703, at *6; this leads to "odd results" that improperly disfavor gay plaintiffs—including the "'absurd conclusion[]'" by a Northern District of New York judge that invoked Dawson to conclude that the "'actual sexual orientation of the harassed person'" is "'the critical fact'" determining the viability of a claim. *Id.* (*quoting Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, No., 715CV0484, 2016 WL 945350, at *8 (N.D.N.Y. Mar. 14, 2016) (additional citation omitted)). *Hively* rejects this approach, which it finds "hard to reconcile" with Supreme Court precedent. *Id.*

harassment case; explicitly recognized as such by *Hinton v. Virginia Union Univ.*, No. 3:15cv569, 2016 WL 2621967 **3 (E.D. Va. May 5, 2016); *Stewart v. Browngreer, P.L.C.*, No. 15-31022, 2016 U.S. App. LEXIS 14125, at *5 n. 3 (5th Cir. Aug. 3, 2016) (noting that the words "sexual orientation" do not appear in Title VII, and stating that the court is not reaching whether such discrimination is covered because of insufficient evidence of such discrimination); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (only a race claim was made; that the plaintiff, a black gay man, was being treated worse than his white gay counterparts).[6]

THE ADA & TOLLING ISSUES ARE ARGUED IN APPELLANT'S INITIAL BRIEF

Appellee Cianciotto improperly asks this court to accept the brief in *Hively* as his. This court cannot accept that as opposition. It is not filed here. The ADA and medical tolling issues are addressed in Appellant's initial Brief. We stand by those arguments.

[6] Appellees also note that "a number of the amici who have submitted briefs to this Court have expressly acknowledged [that] Title VII does not prohibit discrimination on the basis of sexual orientation." Appellees Brief at 1. But this is more of a rhetorical point than an argument. The prevailing judicial misinterpretation of coverage of sexual orientation discrimination understandably has led legislators to try to solve the coverage problem legislatively, and in the course of those efforts, legislators understandably have cited the prevailing judicial view of the statute's coverage.

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III. CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the case remanded to that court.

Dated: October 12, 2016

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Certificate of Compliance and Certificate of Service

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,372 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in Times New Roman, size 14 point.

I certify that on this date below I submitted the brief electronically in PDF format through the Electronic Case File (ECF) system and sent one original plus six paper copies of the foregoing brief to the Court by US Postal Service.

/s Susan Chana Lask

Dated: October 12, 2016

By: Susan Chana Lask, Esq.
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