# No. 16-748

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANONYMOUS,
Plaintiff,

MATTHEW CHRISTIANSEN,
Plaintiff/Appellant,

v.

OMNICOM GROUP, INC., DDB WORLDWIDE COMMUNICATIONS GROUP, INC., JOE CIANCIOTTO, PETER HEMPEL, and CHRIS BROWN,
Defendants/Appellees.

On Appeal from the United States District Court
For the Southern District of New York
Hon. Katherine Polk Failla, United States District Judge

## BRIEF OF AMICUS CURIAE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PLAINTIFF/APPELLANT AND REVERSAL

P. DAVID LOPEZ
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

MARGO PAVE
Assistant General Counsel

BARBARA L. SLOAN
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street NE, 5th Floor
Washington, D.C. 20507
(202) 663-4721
barbara.sloan@eeoc.gov

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**CASES** Page(s)

**STATUTES AND RULES**

**OTHER AUTHORITY**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

No. 16-748

---

MATTHEW CHRISTIANSEN,
Plaintiff/Appellant,

v.

OMNICOM GROUP, INC., et al.,
Defendants/Appellees.

---

On Appeal from the United States District Court
For the Southern District of New York
Hon. Katherine Polk Failla, United States District Judge

---

BRIEF OF AMICUS CURIAE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PLAINTIFF/APPELLANT AND REVERSAL

---

## STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC" or "Commission") is charged with interpreting and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, in private and federal sector cases. *Id.* §§2000e-5(f)(1), 2000e-16(b). The Commission is authorized to participate as amicus curiae in federal court appeals. Fed.R.App.P. 29(a).

An issue in this appeal is whether claims of sexual orientation discrimination are cognizable under Title VII as claims of sex discrimination. Because such claims necessarily involve sex stereotyping, gender-based associational discrimination, and consideration of an individual's sex, they fall within Title VII's ban on discrimination based on sex. While agreeing with this position, the district court here was "constrained" to reject plaintiff's claims in light of this Court's contrary precedent, *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005). We therefore offer our views to this Court.

## STATEMENT OF THE ISSUE[1]

In *Simonton*, this Court held that "Title VII does not proscribe discrimination because of sexual orientation." 232 F.3d at 36. Since that time, the legal landscape has changed. Most dramatically, the Supreme Court not only has overruled *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986), to hold that a state law criminalizing consensual homosexual conduct violates due process (*Lawrence v. Texas*, 539 U.S. 558, 578 (2003)), but has held that laws refusing to permit or recognize same-sex marriages are invalid. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2605-08 (2015); *U.S. v.*

[1] EEOC takes no position on any other issues.

*Windsor*, 133 S.Ct. 2675, 2693-96 (2013). In addition, the Commission now takes the position that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII. *See Baldwin v. Foxx*, Appeal No.0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

Should this Court use one of its en banc processes to reconsider its precedent and hold that discrimination on the basis of sexual orientation is cognizable under Title VII as a form of sex discrimination?

## STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

This is an appeal from the dismissal of a complaint for failure to state a claim. Fed.R.Civ.P. 12(b)(6). In pertinent part, plaintiff alleges that his employer subjected him to a sexually hostile work environment in violation of Title VII because his supervisor harassed him based on the fact that he is gay and perceived as unmanly. First Amended Complaint ("FAC"), district court docket number ("R.") 4. Defendants moved to dismiss the complaint. R.21-22, 24-25. Plaintiff opposed the motions. R.29-30. The district court granted defendants' motions (R.35), and judgment was entered. R.37. The court stated that it was "constrained" by circuit precedent which, though binding, was outdated and unworkable and, in the court's view, should be reconsidered.

2. Statement of Facts

According to the complaint and attached affidavits, Matthew Christiansen began working as an Associate Creative Director at DBB Worldwide Communications, a subsidiary of Omnicom, in 2011. FAC¶18. During the next few weeks or months, his boss, Executive Creative Director Joe Cianciotto, began making comments related to the fact that Christiansen is gay. ¶¶19, 30. For example, before starting a meeting, Cianciotto once told participants to play "Name That Tune." When Christiansen identified the song, Cianciotto asked the other participants how it felt to "be beaten out by a gay guy." ¶30. He also commented on Christiansen's muscular physique. *Id.* Most distressing to Christiansen, when an employee had a coughing fit during a meeting in 2013, Cianciotto observed that he had a cough too, adding: "It feels like I have AIDS — Sorry, you know what that's like, Matt." ¶38. Christiansen had not disclosed that he is HIV+ but other meeting participants inferred from his stricken expression that the remark had struck home. ¶¶30, 41.

Cianciotto also made remarks to and about other gay employees. He periodically suggested to one gay employee that he call Cianciotto sometime and that if Cianciotto were gay, he would immediately have sex with the employee. T.Theriot Decl.¶3. He also told people that another gay

employee took children to a cabin, had sex with them, and killed them. R.Murphy Decl.¶4. He asked men at meetings if they "did anal." *Id.* Moreover, beginning shortly after Christiansen was hired, Cianciotto repeatedly attempted to talk about him with another employee, asking if Christiansen had AIDS or was HIV+, stating that he is "super gay" and "sleeps with everyone," opining that he talks and dresses "gay," and asking whether he is a "bottom." Murphy Decl.¶6. In addition, Cianciotto requested a description of gay sex and asked whether other employees were "bottoms". *Id.* ¶4; Theriot Decl.¶3.

The complaint further objects to Cianciotto's lewd and/or offensive cartoons, several of which are attached to the complaint. Typically, he alleges, Cianciotto drew cartoons of employees on the white-board in the area where meetings were held, so participants could not avoid seeing them. FAC ¶30. For example, one drawing shows an overly muscular Christiansen naked with a giant erect penis and with his arm attached to an air pump, saying "I'm so pumped for marriage equality." ¶34(C). Another drawing has Christiansen, again heavily muscled, prancing around gleefully. ¶34(A). However, Christiansen most objects to a picture Cianciotto created from a poster for the movie "Muscle Beach Party," photoshopping various employees' heads onto the bodies of the characters on the poster.

Christiansen's head is on the body of a bikini-clad woman with her legs in the air in what Christiansen describes as the "gay sexual receiving position." ¶34(D). Cianciotto originally circulated the poster in 2011; in the fall of 2014, Christiansen discovered that at some point Cianciotto had posted it on Facebook with a link to Christiansen's own page. ¶¶45, 46. Despite repeated requests to Cianciotto and DBB management from Christiansen and his lawyer, the picture was not removed until January 2015. ¶¶54-56.

Christiansen alleges that he and other employees complained to management and Human Resources about Cianciotto's conduct from at least 2013. FAC ¶47. One employee was simply told, "[T]hat's just how Joe operates." ¶30. Once, Cianciotto gave employees a general apology, saying that he hoped no one was offended by his behavior. ¶51. No other remedial measures were taken; Cianciotto was promoted. ¶14.

Christiansen filed his EEOC charge in October 2014 alleging Title VII violations. He later filed a separate state/local charge raising other forms of discrimination. After receiving a right-to-sue notice, he brought suit, alleging, in pertinent part, "Title VII stereotypical animus." FAC at 19 ("Second Cause of Action").

3. District Court's Decision

According to the district court, Christiansen is arguing that Title VII "should be expanded to recognize sexual orientation claims" and that, "in any case, he has asserted a viable claim based on ... sexual stereotyping." Slip op. at 29. After examining the arguments and underlying legal standards, the court granted defendants' motion to dismiss. The court agreed that "[u]nder the law as it currently stands" — notably, *Simonton* and *Dawson* — "the Court is constrained to find that Plaintiff has not stated a cognizable claim for Title VII discrimination." *Id.*

In *Simonton*, the court stated, "the Second Circuit unequivocally held that 'Title VII does not proscribe discrimination because of sexual orientation.'" Slip op. at 30 (citing 232 F.3d at 36). In addition, while acknowledging that claims based on gender stereotyping are cognizable, the Second Circuit stressed that they "should not be used to bootstrap protection for sexual orientation into Title VII." *Id.* at 30-31 (citations omitted).

The district court then noted that the "broader legal landscape" has changed significantly since *Simonton*. To illustrate, the court listed the Supreme Court decisions overturning the Defense of Marriage Act and EEOC's *Baldwin* decision. Slip op. at 31-32 (citing *Windsor*, 133 S.Ct.

2675; *Obergefell*, 135 S.Ct. 2584, and noting that *Baldwin* is entitled to deference).

The court further noted that numerous courts including this Court in *Dawson*, 398 F.3d at 218, have acknowledged the "difficulty of disaggregating acts of discrimination based on sexual orientation from those based on sexual stereotyping." *Id.* at 32-33 (listing cases). This is because, the court explained, "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Id.* at 32 (quoting *Dawson*, 398 F.3d at 218). Further, the court reasoned, this "difficulty comes as no surprise, for, as [*Baldwin* stated], 'sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.'" *Id.* at 33.

However, the court continued, even though "no coherent line can be drawn" between sexual orientation and sexual stereotyping claims, *Simonton* is still "good law," so "such a line must be drawn." Slip op. at 34. And, the court concluded, consistent with *Simonton*, the plaintiff here "has not pleaded a claim based on sexual stereotyping, separate and apart from the stereotyping inherent in his claim for discrimination based on sexual orientation." *Id.* Although the Muscle Beach poster does suggest that

Christiansen was viewed as effeminate, basing a sexual stereotyping claim on that one piece of evidence "would obliterate the line the Second Circuit has drawn, rightly or wrongly, between sexual orientation and sex-based claims." *Id.* at 37.

"In light of [*Baldwin*] and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping," the court concluded, "one might reasonably ask — and, lest there be any doubt, this Court is asking — whether that line should be erased. Until it is, however, discrimination based on sexual orientation will not support a [Title VII] claim; Plaintiff's Title VII discrimination claim must therefore be dismissed." *Id.*

## STANDARD OF REVIEW

The standard of review is *de novo*. On a motion to dismiss under Rule 12(b)(6), all factual allegations in the complaint are accepted as true and all inferences are drawn in the plaintiff's favor. *Littlejohn v. City of New York*, 795 F.3d 297, 306-07 (2d Cir. 2015).

## ARGUMENT

### I. Sexual Orientation Discrimination Is Cognizable As Sex Discrimination Under Title VII.

Plaintiff alleges that he was subjected to a sexually hostile work environment in violation of Title VII because he is gay and considered unmanly. In *Simonton*, this Court held that "Title VII does not prohibit harassment or discrimination because of sexual orientation." 232 F.3d at 35. The district court was sympathetic to plaintiff's claim but concluded that, consistent with *Simonton*, he could not state a claim under any theory. In fact, however, sexual orientation discrimination can be considered sex discrimination under any of three theories. As such, it is covered by Title VII's general prohibition on discrimination "because of such individual's ... sex." 42 U.S.C. §2000e-2(a)(1). Because this Circuit's contrary precedent is outdated and unworkable, this Court should reconsider — en banc, if necessary — and vacate its precedent. To the extent the district court could find that plaintiff states a claim under any or all of these theories, the case should be reversed and remanded for further consideration.

#### A. Title VII's prohibition on discrimination based on sex stereotypes extends to discrimination based on sexual orientation.

Christiansen alleges that Cianciotto harassed and otherwise discriminated against him because, due to his sexual orientation, he did not

conform to Cianciotto's views of how manly men behave. Such allegations state a cognizable Title VII claim under a sex-stereotyping theory.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that an employer who bases employment decisions on stereotypical views of how men and women should or should not behave violates Title VII's ban on sex discrimination. The plaintiff there, though highly effective in her job, was perceived by her employer as too masculine. In denying her bid for partnership, several male partners commented that she was "macho" and "overcompensated for being a woman"; she would have a better chance of becoming a partner if she took "a course at charm school" or would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235. The Supreme Court concluded that these comments indicated illegal sex discrimination.[2] Writing for the plurality, Justice Brennan explained 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. "[W]e are

[2] The four-Justice plurality, as well as Justices White and O'Connor, who concurred separately, all agreed with this conclusion. *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004) (adding that Justice O'Connor "characteriz[ed] the 'failure to conform to [gender] stereotypes' as a discriminatory criterion").

beyond the day," the Court stated, "when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '"[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."'" *Id*. at 251 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (other citations omitted).

Applying *Price Waterhouse*, this Court held that an employer who denies tenure to a woman with small children on the assumption that she will not be committed to her job may prove sex discrimination under 42 U.S.C. §1983 based on a sex-stereotyping theory. *See Back*, 365 F.3d at 122. More to the point here, the *Simonton* Court entertained the notion that regardless of their sexual orientation, plaintiffs may ground a Title VII claim on evidence that they were victims of discrimination because they failed to meet stereotypical expectations of masculinity or femininity. 232 F.3d at 37 (citing, *e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)); *accord Dawson*, 398 F.3d at 218-21 (noting that "sex stereotyping by an employer based on a person's gender non-conforming behavior is impermissible discrimination") (citation omitted). The Court did not reach the merits of the claim in that case, however, because the issue was not

properly preserved. *Simonton*, 232 F.3d at 38; *see also Dawson*, 398 F.3d at 221-22 (finding no "substantial evidence" plaintiff was subjected to adverse action based on non-conforming conduct).

Similarly, the en banc Fifth Circuit upheld a jury verdict for the Commission in a Title VII same-sex harassment case under a sex-stereotyping theory. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013) (en banc). The Court concluded that the jury reasonably could have found that the victim, a heterosexual construction worker, was targeted because he "fell outside of [his supervisor's] manly-man stereotype." *Id.* at 453, 458-60.

Other circuits have also held that employers violate Title VII's ban on sex discrimination when they discriminate against employees for failing to conform to gender-based stereotypes. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) (holding that all persons including those who are transgender "are protected from discrimination on the basis of gender stereotype"); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("[E]mployers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are ... engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir.

2001) (reinstating gay waiter's Title VII claim, reasoning that "[a]t its essence, the systematic abuse directed at [plaintiff] reflected a belief that [he] did not act as a man should act"); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) ("Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).[3]

Fundamentally, an employer that discriminates on the basis of an employee's sexual orientation discriminates because of that employee's failure to conform to a gender-based stereotype: the stereotype of opposite sex attraction. Thus, for example, an employee would have a claim if his employer discriminated against him in the belief that "real men don't date men" — the "gender stereotype at work" being that "'real' men should date women, and not other men." *See Centola v. Potter*, 183 F.Supp.2d 403, 410

[3] The Sixth Circuit has held that a sex stereotyping claim must be based on conduct that was "readily demonstrable in the workplace." *Vickers v. Fairfield Med.* Ctr., 453 F.3d 757, 763-65 (6th Cir. 2006). *Back* is to the contrary, holding that remarks that the plaintiff could not be committed to her job and still be a good mother — clearly conduct outside the workplace — constitute evidence of sex stereotyping. 365 F.3d at 119-20. Cases under an associational theory, discussed *infra*, are also often based on conduct outside the workplace. *See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 585 (5th Cir. 1998) (noting that white plaintiff's work-related difficulties escalated after manager saw her kissing a black co-worker in a restaurant), *aff'd in pertinent part en banc*, 182 F.3d 333 (5th Cir. 1999).

(D. Mass. 2002) (noting possible claim even if plaintiff is otherwise perceived as stereotypically masculine); *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1222-24 (D. Or. 2002) (jury question whether supervisor harassed and ultimately fired plaintiff because she did not conform to his "stereotype of how a woman ought to behave" since she dates other women whereas the supervisor believes she should date only men).[4]

As noted above, in *Dawson* as well as *Simonton*, this Court acknowledged that, at least in theory, a gay or lesbian employee could maintain a Title VII claim based on a sex-stereotyping theory. Taking *Simonton*'s determination that Title VII "does not prohibit" sexual orientation discrimination one step further, however, the *Dawson* Court stressed that gender stereotyping claims "should not be used to 'bootstrap

[4] Other district courts have reached a similar conclusion. *Videckis v. Pepperdine Univ.*, 2015 WL 8916764, at *7 (C.D. Cal. Dec. 15, 2015) ("Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women – and the relationships between them. ... If [defendants] had a negative view of lesbians based on lesbians' perceived failure to conform to the staff's views of acceptable female behavior, actions taken on the basis of these negative biases would constitute gender stereotype discrimination."); *see also Boutillier v. Hartford Pub. Schs.*, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014) (allegation that plaintiff was "subjected to sexual stereotyping" based on her sexual orientation states plausible Title VII claim).

protection for sexual orientation into Title VII.'" 398 F.3d at 218.[5] And so, to ensure that no bootstrapping occurs, courts including the district court here have attempted to separate discrimination based on gender stereotyping from discrimination based on sexual orientation. Slip op. at 34; *see also, e.g.*, *Kiley v. Am. Soc'y for Prevention of Cruelty to Animals*, 296 F.App'x 107, 109 (2d Cir. 2008) (no claim separate from sexual orientation); *Birkholz v. City of N.Y.*, 2012 WL 580522, at *6 (E.D.N.Y. Feb. 22, 2012) (same).

But even *Dawson* recognized that it is difficult, at best, to draw this line. *Dawson* noted that "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." 398 F.3d at 218 (citations omitted); *see also, e.g.*, *Prowel v. Wise Bus. Forms*, 579 F.3d 285, 291 (3d Cir. 2009) (line is "difficult to draw"). As one court explained, the "distinction" between sex discrimination and sexual orientation discrimination is "illusory and artificial"; the line is difficult to draw because it "does not exist, save as a lingering and faulty judicial construct." *Videckis*, 2015 WL 8916764, at *5-*6. It just does not make sense to require courts to attempt to "disaggregate[] acts of discrimination based on sexual orientation from those

[5] *Dawson* attributes this concern to *Simonton*, but *Simonton* concluded that "[the stereotyping] theory would *not* bootstrap protection for sexual orientation into Title VII." 232 F.3d at 38 (emphasis added).

based on sexual stereotyping" when, as the court here concluded, "no coherent line can be drawn between these two sorts of claims." Slip op. at 34.

In fact, nothing in Title VII suggests that the statute protects persons like the heterosexual employee in *Boh Brothers*, 731 F.3d at 459-60, from egregious same-sex harassment but would not protect a gay man from the same conduct. *See Prowel*, 579 F.3d at 287 (noting that the employer "cannot persuasively argue that because Prowel is homosexual, he is precluded from bringing a gender stereotyping claim"); *Smith v. City of Salem*, 378 F.3d at 574-75 ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."). Indeed, neither *Price Waterhouse* nor *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79-80 (1998), which recognized same-sex harassment claims, even mentions the respective plaintiff's sexual orientation, thus lending credence to the assumption that it should not make a difference.

We therefore urge this Court to heed the district court's plea that it "erase" the line between sex stereotyping and sexual orientation discrimination claims. To the extent any plaintiff alleges that he or she was subjected to harassment or other discrimination for failing to conform to the

employer's "stereotypical notions about how men and women should behave" (*Dawson*, 398 F.3d at 218), this Court should hold that the allegation satisfies the requirement that the discrimination was because of sex.

### B. Title VII's prohibition on discrimination based on the race of employees' associates extends to discrimination based on the sex of their associates.

Sexual orientation discrimination treats individuals differently because of their personal associations. Just as it is race discrimination to discriminate against individuals based on the race of their associates, it should be considered sex discrimination to discriminate against individuals based on their associates' sex.[6]

"[A]n employer may violate Title VII if it takes adverse action against an employee because of the employee's association with a person of another race." *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008). "The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* Applying that rule, the *Holcomb* Court concluded that the white plaintiff, in claiming that he

[6] Although Christiansen did not plead this theory, a complaint need not "pin plaintiff's claim for relief to a precise legal theory." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011).

was terminated because his employer disapproved of his marriage to an African-American woman, alleged "discrimination as a result of his membership in a protected class under Title VII." *Id.*

Other courts agree. *See, e.g.*, *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (interracial friendships); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks*, 173 F.3d 988, 994-95 (6th Cir. 1999) (having a biracial child); *Deffenbaugh-Williams*, 156 F.3d at 589 (interracial dating); *Drake v. Minn. Min. & Mfg. Co.*, 134 F.3d 878, 883-84 (7th Cir. 1998) (interracial friendships); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (interracial marriage; noting that EEOC takes the same position).

Courts further agree that the "degree of association" is not critical to the inquiry. *Drake*, 134 F.3d at 884. Instead, the "key inquiries should be whether the employee has been discriminated against and whether that discrimination was 'because of' the employee's race." *Id.*; *accord Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512-13 (6th Cir. 2009); *McGinest*, 360 F.3d at 1118.

Aside from the availability of the narrow defense for bona fide occupational qualifications based on sex, but not race (42 U.S.C. §2000e-2(e)(1)) — not relevant here — Title VII "on its face treats each of the

enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9. Because the "same standards" apply to both race-based and sex-based discrimination claims (*see Whidbee v. Garzarelli Food Specialties*, 223 F.3d 62, 69 n.6 (2d Cir. 2000)), associational claims based on sex, like those based on race, should be considered actionable. An employer may therefore violate Title VII if it takes adverse action against an employee because of the employee's association with a person of the same sex.

Again, the reason is simple. The behavior of an employer that discriminates against a gay employee because it disapproves of same-sex dating is not materially different from the behavior of an employer that discriminates against an employee because it disapproves of interracial dating. In both cases, the employer bases its actions on the protected characteristic of its employee, viewed in relation to the individuals with whom that employee associates. Just as Holcomb was a victim of race discrimination, *Holcomb*, 521 F.3d at 139, an employee who dates or marries someone of his or her same sex would be a victim of sex discrimination. Accordingly, this Court should hold that an employee who is subjected to adverse action because his employer disapproves of the sex of his associates suffers discrimination because of the employee's *own* sex.

### C. Title VII's prohibition on sex discrimination extends to discrimination based on sexual orientation.

Title VII prohibits employers from considering sex when taking actions affecting employees' terms or conditions of employment. Because discrimination based on sexual orientation necessarily involves consideration of an employee's sex, it falls within the statutory ban on sex discrimination.

In passing Title VII, Congress made the "simple but momentous announcement" that sex, like other protected characteristics, is "not relevant" to the selection, evaluation, or compensation of employees, or to other terms or conditions of employment. *Price Waterhouse*, 490 U.S. at 239. That is, employers may not "take gender into account in making employment decisions." *Id.* An employer that discriminates on the basis of sexual orientation, however, violates this simple principle because, by definition, the employer is taking account of the employee's sex, in conjunction with the sex of those to whom the individual is sexually and/or emotionally attracted. *See Baldwin*, 2015 WL 4397641, at *5 (noting that "sexual orientation is inseparable from and inescapably linked to sex").

If an employer treats an employee less favorably than it would treat an employee who, aside from his or her sex, is otherwise identical (including, for example, the sex of that employee's spouse), the employer discriminates

against the employee "because of sex." The practice fails *Manhart*'s "simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." 435 U.S. at 711.

Thus, for example, if male employees are permitted to bring their wives to a business development retreat, a female employee who is excluded from the retreat for bringing her wife, and thereby misses this networking opportunity, is the victim of sex discrimination. *See Heller*, 195 F.Supp.2d at 1223 (noting that jury could find Title VII violation where evidence suggested that supervisor "would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman"). Similarly, the value of an employee's compensation package is diminished because of his sex if he is precluded from providing coverage for his husband when the company's health plan includes spousal benefits that cover the husbands of otherwise similarly-situated female employees. *See Hall v. BNSF Railway*, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014) (finding plausible Title VII claim where employer provided spousal benefits to men married to women but not to men married to men); *In re Levenson*, 560 F.3d 1145, 1146 (9th Cir. Jud. Council Feb. 2, 2009) (finding a violation of Court's Employment Dispute Resolution Plan where a male

plaintiff was unable to make his male spouse a family member for purposes of benefits "due solely to his spouse's sex").

The consideration of sex exists even though employers discriminating on the basis of sexual orientation do not discriminate against *all* men or women, but only against those who are gay or lesbian. Title VII has never required an employer to discriminate against all employees in a protected class before recognizing an individual employee's claim. *See Back*, 365 F.3d at 118 (need not be "all members of the disfavored class").

Sexual orientation discrimination is also sex discrimination even though the employer discriminates against both men and women. By analogy, an employer that fires a white employee for having a black spouse and a black employee for having a white spouse is discriminating against both employees based on race. The discrimination against one does not negate the discrimination against the other.

In short, sexual orientation discrimination requires impermissible consideration of sex. It should therefore be held illegal under Title VII.

## II. This Court Should Reconsider *Simonton*.

In *Simonton*, this Court held that Title VII does not prohibit discrimination based on sexual orientation. 232 F.3d at 35. In reaching this conclusion, the Court suggested that it was effectively pre-determined by

Circuit precedent, and that Congress had strongly signaled that sexual orientation was not protected. The holding in the decision, though well within the mainstream at the time, is now outdated. Several of the cases relied on by the Court are no longer good law, and the broader legal landscape has changed dramatically. The Court should therefore reconsider and overrule this precedent, either in a formal en banc proceeding or through this Court's "mini-en banc" process. *See, e.g.*, *Diebold Found. v. Comm'r*, 736 F.3d 172, 183 n.7 (2d Cir. 2013) (citing *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte* Ltd., 585 F.3d 58, 67 (2d Cir. 2009)).

A. **The legal underpinnings for the decision have shifted.**

*Simonton*'s holding that Title VII does not prohibit sexual orientation discrimination is based on two grounds: congressional inaction and an interpretation of the word "sex" in Title VII's list of protected characteristics. Both grounds warrant reconsideration.

Regarding the first ground, the Court explained that its role in interpreting a statute "is limited to discerning and adhering to legislative meaning." 232 F.3d at 35. The Court acknowledged that congressional inaction after passage of a statute is "not always a helpful guide" to statutory meaning. *Id.* With respect to sexual orientation, however, the Court concluded that the fact that Congress repeatedly refused to extend coverage

based on "sexual preferences," in the "face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation," is "strong evidence" that Congress agrees the statute does not cover sexual orientation. *Id.* at 36.

This reasoning is moored on proposed legislation from the 1980s and early 1990s. Since the mid-1990s, however, the bills circulating in Congress have not proposed simply to add "sexual orientation" to Title VII's list of protected characteristics. Rather, the bills would have created stand-alone statutes with numerous other provisions, some of which were highly controversial. Congress's failure to pass any of those bills, therefore, shows only that a majority of legislators could not agree on any single version of the provisions. *See, e.g.*, Note, *Taking the Fight Back to Title VII: A Case for Redefining 'Because of Sex' to Include Gender Stereotypes, Sexual Orientation, & Gender Identity*, 84 S. Cal. L. Rev. 487, 493-510 (Jan. 2011); *see also* Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 Law & Sexuality 1, *4 (2010) (noting, *e.g.*, that an openly gay House member refused to support one version of ENDA because it omitted coverage for transgendered people).

Furthermore, when interpreting Title VII, courts are not limited to the types of discrimination that Congress specifically considered. In holding

that Title VII's coverage extends to same-sex harassment, the *Oncale* Court explained that "statutory prohibitions often go beyond the principal evil [the law was passed to combat] 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." 523 U.S. at 79-80. The issue in *Oncale* was whether Title VII prohibited same-sex sexual harassment. The Court held that it did. While acknowledging that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," the Court saw "no justification in the statutory language or [Supreme Court] precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.* Similarly, here, while sexual orientation discrimination was assuredly not the principal evil Congress was concerned with, this Court should hold that "because of sex" encompasses sexual orientation.[7]

[7] *Simonton* cited three cases to support its view that "judicial decisions" consistently refuse to interpret the word "sex" to include "sexual orientation." 232 F.3d at 36, 37. Only one is still followed. The Ninth Circuit declared that one case, *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979), is "no longer good law" because it "predates and conflicts" with *Price Waterhouse*, 490 U.S. at 250-51. *See Nichols*, 256 F.3d at 875. A second case, *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989), relies exclusively on *DeSantis*; a later case reversing dismissal of a suit alleging harassment based on sex and "perceived sexual preference" describes *Williamson* as a "pre-*Oncale* case."

As for the second reason, *Simonton* explained that it was "not writing on a clean slate." 232 F.3d at 35-36 (also describing as "well-settled in this circuit" the proposition that "Title VII does not prohibit harassment or discrimination because of sexual orientation"). But the slate was actually relatively clean.

The Court quoted extensively from *DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 306-07 (2d Cir. 1986). According to *DeCintio*, "the other categories afforded protection under Title VII refer to a person's status as a member of a particular race, color, religion, or nationality. 'Sex' when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender ... a distinction based on the person's sex, not his or her sexual affiliations." 807 F.2d at 306-07. From this, *Simonton* concluded that "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation." 232 F.3d at 36.

---

*Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 n.3 (8th Cir. 1999). *Wrightson v. Pizza Hut of America*, 99 F.3d 138, 143 (4th Cir. 1996), is the exception. Although *Wrightson* relies on *Williamson* and *DeSantis*, district courts in the Fourth Circuit continue to cite the case in rejecting claims of sexual orientation discrimination. *See, e.g.*, *Hinton v. Va. Union Univ.*, 2016 WL 2621967, at *3 (E.D. Va. May 5, 2016) (rejecting argument that *Wrightson* is not good law).

Far from controlling, however, *DeCintio* has nothing to do with sexual orientation. A "paramour preference" case, *DeCintio* rejects the notion that the phrase "discrimination on the basis of sex encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially hired." 807 F.2d at 306. When *DeCintio* used the phrase "a distinction based on ... his or her sexual affiliation," it meant favoritism based on a romantic relationship; this Circuit has long held that Title VII does not forbid "favoritism, nepotism, or cronyism, so long as it is not premised on animus against a protected class." *Village of Freeport v. Barrella*, 814 F.3d 594, 613 (2d Cir. 2016) (citing, *e.g.*, *DeCintio*). Discrimination based on "favoritism, nepotism, or cronyism" was not an issue in *Simonton*.[8]

[8] It is true that in concluding that it could "adduce no justification for defining 'sex' ... so broadly as to include an ongoing, voluntary, romantic engagement," *DeCintio* noted that "many courts have ... refused to extend Title VII proscriptions beyond gender-based discrimination." *See* 807 F.2d at 307 (listing, as examples, *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) (transgender); *Sommers v. Budget Mkg.*, 667 F.2d 748 (8th Cir. 1982) (same); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (sexual orientation); and *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (effeminacy)). However, the Court did not adopt the holding in those cases, which were, at most, loosely analogous authority for its conclusion. Moreover, as noted above, the Ninth Circuit has overruled *DeSantis* in light of *Price Waterhouse (see Nichols*, 256 F.3d at 875), and *Smith* cannot stand for the same reason. As for *Ulane* and *Sommers*, recent cases hold that discrimination against a transgender individual violates Title

Moreover, this Court broadly defines "membership in a class" to include what could be considered "affiliation" or "activity." As noted above, it is actionable race discrimination if an employer harasses or otherwise discriminates against individuals based on the race of persons they date or associate with in other ways. *Holcomb* describes such discrimination as resulting from the plaintiff's "membership in a protected class" — race. 521 F.3d at 139. Logically, then, if an employer harasses or otherwise discriminates against individuals based on the sex of their dates or other associates, it should also be viewed as resulting from the individuals' membership in a protected class — sex. Because this Court has not addressed an associational argument, a panel accepting this theory would be writing on a relatively clean slate.

Furthermore, and significantly, neither Congress nor the courts would need to create a separate classification to cover sexual orientation. As a "remedial statute," Title VII "should be given a liberal interpretation."

---

VII. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d at 572-73; *cf. Glenn*, 663 F.3d at 1317 (Equal Protection); *Schwenk*, 204 F.3d at 1201-02 (explaining that cases such as *Ulane* and a Ninth Circuit predecessor, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977), are "overruled by the logic and language of *Price Waterhouse*"). While EEOC does not disagree that Title VII's proscriptions are limited to gender-based discrimination, we view gender-based discrimination to include sexual orientation discrimination.

*Teamsters v. U.S.*, 431 U.S. 324, 381 (1977). Consistent with that principle, courts have construed existing classifications to encompass subsets of individuals with particular characteristics within a specified classification. The word "race," of course, includes association with persons of another race (*see, e.g.*, *Holcomb*); "national origin" has been construed to include an individual's linguistic or cultural characteristics (29 C.F.R. §1606.1). More directly for this case, the word "sex" has been construed to include women with small children (*Back*, 365 F.3d at 122); "unfeminine" women as well as "unmanly" men (*see Price Waterhouse*, 490 U.S. at 251); and transgendered individuals (*see, e.g.*, *Smith*, 378 F.3d at 574-75). Without amendment, therefore, the word "sex" should also be construed broadly to include sexual orientation.

### B. The rule that Title VII does not prohibit discrimination based on sexual orientation is outdated.

Finally, this Court should reconsider *Simonton* because, although that ruling fell within the mainstream at the time, times have changed. When *Simonton* was decided in 2000, for example, *Bowers*, which upheld state legislation criminalizing private homosexual conduct, was the law of the land. 478 U.S. at 192-93. In 2003, however, the Supreme Court overruled *Bowers*, reasoning that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. Even more dramatically,

in the last three years, the Supreme Court has held that same-sex couples may marry and that laws refusing to permit or recognize such unions are invalid. *Obergefell*, 135 S.Ct. at 2605-08; *Windsor*, 133 S.Ct. at 2693-96 (affirming this Court's decision and upholding New York's same sex marriage law and holding that federal Defense of Marriage Act is unconstitutional).

Similarly, whereas when *Simonton* was decided, the Commission's position was that Title VII did not prohibit sexual orientation discrimination, EEOC has since reconsidered. In *Baldwin*, the Commission held that such claims are actionable under Title VII. *Baldwin* is recent, so no appellate court has yet adopted that position, but several district courts have done so. *See, e.g.*, *Isaacs v. Felder Servs.*, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015); *Videckis*, 2015 WL 8916764, at *8 (Title IX case); *cf. Roberts v. UPS*, 115 F.Supp.3d 344, 363-68 (E.D.N.Y. 2015) (quoting *Baldwin* but construing state law); *see also Matavka v. Bd. of Educ.*, 2016 WL 3063950, at *1-*2 (N.D. Ill. May 31, 2016) (staying case pending decision post-*Baldwin* in *Hively v. Ivy Tech Cmty. Coll.*, No.15-1720 (7th Cir.)). Because EEOC "has a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Baldwin* is "entitled to

respect." *McMenemy v. City of Rochester*, 241 F.3d 279, 283-84 (2d Cir. 2001) (citations omitted).

In light of *Obergefell* and *Windsor*, a company could not deny an employee's application for health benefits for his same-sex spouse if health benefits would be available for an employee's opposite-sex spouse. *See Marie v. Mosier*, 122 F.Supp.3d 1085, 1113 (D. Kan. 2015) (declaring unconstitutional state's refusal to provide health benefits to employees' same-sex spouses); *Hall*, 2014 WL 4719007, at *2-*5 (plausible Title VII claim based on denial of benefits to plaintiff's same-sex spouse). Logically, an employer likewise may not discriminate against an individual in other terms or conditions of employment based on his same-sex relationships. *See Manhart*, 435 U.S. at 711 (potential Title VII violation where "evidence shows 'treatment of a person in a manner which but for that person's sex would be different'").

Unlike *Bowers*, *Simonton* may not have been incorrect when it was decided, but, like *Bowers*, "it is not correct today" (*Lawrence*, 539 U.S. at 578). This Court should therefore take this opportunity to reconsider its precedent. Consistent with the well-reasoned decisions of the district court and the Commission, as well as the language of Title VII and applicable case law, the Court should hold — en banc if necessary — that Title VII's ban on

discrimination based on sex includes discrimination based on sexual orientation.

## CONCLUSION

For the foregoing reasons, the Commission respectfully asks this Court to heed the district court's plea that it reconsider its existing precedent and hold that Title VII's ban on sex discrimination includes discrimination based on sexual orientation.

Respectfully submitted,

P. DAVID LOPEZ
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

MARGO PAVE
Assistant General Counsel

s/ Barbara L. Sloan
BARBARA L. SLOAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street NE, 5th Floor
Washington, D.C. 20507
(202) 663-4721
barbara.sloan@eeoc.gov

## STATEMENT OF RELATED CASE

The Commission is aware of another case, *Zarda v. Altitude Express*, No.15-3775 (2d Cir.), that raises a similar issue and is presently pending in this Court.

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because it contains 6,993 words, from the Statement of Interest through the Conclusion, 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 proportional typeface using Microsoft Word 2010 with Times New Roman 14-point font.

s/ Barbara L. Sloan
BARBARA L. SLOAN
Attorney

Dated: June 28, 2016

## CERTIFICATE OF SERVICE

I certify that on June 28, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Barbara L. Sloan
BARBARA L. SLOAN
Attorney