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

BRIEF FOR PLAINTIFF-APPELLANT

LAW OFFICES OF
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June 21, 2016

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Stautes, Rules and Other Cites

I. JURISDICTIONAL STATEMENT

Subject-matter jurisdiction exists under Title VII of the Civil Rights Act. 28 U.S.C. §1331. Also, complete diversity jurisdiction exists under 28 U.S. Code §1332. Appellate jurisdiction is proper under 28 U.S.C. §1291 because the District Court issued a final judgment dismissing the case on March 9, 2016. Plaintiff Christiansen, timely filed his Notice of Appeal that same day. 28 U.S.C. §2107(a).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does Title VII of the Civil Rights Act protect sexual orientation as "because of…sex" discrimination?[1]

2. Did the District Court err at the motion to dismiss stage by determining a fact issue about Christiansen's medical condition to deny equitable tolling?

III. STATEMENT OF THE CASE

Plaintiff-appellant Matthew Christiansen sued his employer Omnicom Group, Inc. ("Omnicom") and DDB Worldwide Communications Group, Inc. ("DDB") and DDB executives Peter Hempel and Chris Brown and supervisor Joe Cianciotto. He alleged ADA disability and Title VII, 42 U.S.C. §2000e-2,

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[1] This Court is currently considering *Zarda v. Altitude Express*, #15-3775 , which poses the same question, and may be considered a related case.

[2] In human sexuality, top, bottom and versatile are sex positions during sexual activity, especially ... In gay male sexuality, a total bottom is someone who assumes an exclusively passive or receptive role during anal or oral intercourse. https://en.wikipedia.org/wiki/Top,_bottom_and_versatile

[3] ***Sissy*** (derived from *sister*; also *sissy baby*, *sissy boy*, *sissy man*, *sissy pants*, etc.) is a pejorative term for a boy or man who does not conform to "standard male" gender stereotypes. https://en.wikipedia.org/wiki/Sissy. Also, "receiving position" is the feminine sexual position for

discrimination claims at his workplace because of his sexual orientation and HIV disability, including state and local violations and slander per se, intentional infliction of emotional distress, breach of contract and labor violations. He also pled for relief under Title VII because of his non-compliance under gender stereotypes as an especially effeminate man, rather than strictly based upon his homosexuality.

Christiansen's complaint alleges facts that simply show a complete disregard for humanity in the modern-day work place where we would expect a sophisticated corporate environment; but instead bullying males and females because of their sexual orientation was permitted by supervisor named Joe Cianciotto who perverted the workplace. Among other things, he drew and published lewd pictures of employees fornicating with each other, called them "gay", "bottom"[2], "poof" and accused them of being murderers of the children they sexually abuse, forcing them to discuss their "gay" sex lives on a daily basis and accusing gay males of having AIDS because they are gay.

Southern District Judge Failla decided the allegations were "reprehensible" by any metric, but was constrained to dismiss the Title VII case because this Circuit's *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. N.Y. 2000) prohibits Title VII

[2] In human sexuality, top, bottom and versatile are sex positions during sexual activity, especially ... In gay male sexuality, a total bottom is someone who assumes an exclusively passive or receptive role during anal or oral intercourse. https://en.wikipedia.org/wiki/Top,_bottom_and_versatile

protection to sexual orientation. *Christiansen v. Omnicom Grp., Inc.*, 2016 U.S. Dist. LEXIS 29972,*39-46, (S.D.N.Y. Mar. 9, 2016). Judge Failla called for Circuit to recall *Simonton* by her extensive explaination that it was no longer good law. She provided examples of why sexual orientation should be protected and explained the changing legal landscape favoring sexual orientation protection, including the EEOC's recent landmark decision in *Baldwin v. Foxx*, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (July 16, 2015) holding that "sex" and sexual orientation are the same. *Christiansen,* at *39-46.

Who is Matthew Christiansen? He is first, foremost and always will be a man.

IV. FACTS OF THE CASE

A. Procedural Facts

On May 4, 2015, Matthew Christiansen commenced this action by filing in the Southern District of New York a complaint alleging workplace violations, including Title VII, against his employers Omnicom and DDB, executives Peter Hempel and Chris Brown and his direct supervisor Joe Cianciotto (collectively, the "defendants")[A3 see Dkt. #1]. On June 22, 2015, a First Amended Complaint was filed ("FAC") [A7-44]. On July 31 and August 24, 2015, the defendants filed motions to dismiss pursuant to FRCP 12(b)(1) and (b)(6) for failure to state a cause of action [A45-46,79]. Opposition and replies were filed [A6]. On March 9,

2016, U.S. District Court Judge Katherine Polk Failla granted the defendants' motions and dismissed the case in its entirety [A131-170]. Later on March 9, 2016, Christiansen filed his notice of appeal [A171].

B. Allegations in the FAC

In about April, 2011, Matthew Christiansen commenced employment as an Associate Creative Director for DDB, which is a worldwide advertising company and a subsidiary owned and operated by Omnicom [A9-10]. For years, employees complained to DDB, Omnicom, Hempel and Brown about the workplace harassment and hostile environment they suffered at the hands of Joe Cianciotto, but their complaints were ignored [A12-13,33,38-39]. Employee Tabor Theriot, a gay male with a limp caused by his cerebral palsy disability, was victimized by Cianciotto from 2012 to 2015 [A12-13, 37]. He mocked Theriot's disability by describing him with as a "creepster look", and harassed him as a gay man by asking to sleep with him and call him some time for gay sex because Cianciotto said "I feel like a gay man in a straight man's body" and he told him he had a hard on by looking at him ("It's growing a little.") [A13-15,37]. Theriot's complaints to management were minimized by Peter Hempel responding, "Are you going to be ok, we are going to get through this?" [A14]. To ostracize the gay males Christiansen and Theriot who complained about Cianciotto to management, Cianciotto then disrupted a meeting where Christiansen and Theriot were present

and drew on Christiansen's office whiteboard a picture of Theriot as a female dog peeing while another employee rode his back and beat him, with the caption "Mush" [A14]. Employee Ryan Murphy is a gay male who worked at DDB from 2005 to 2014 [A15]. Just as he did to Mr. Theriot, Cianciotto pressured Mr. Murphy to discuss gay sex and he told Mr. Murphy that if he was a gay man he would have sex with him [A15,35-36]. Employee Andy Taradath is a gay male who witnessed Cianciotto accuse another gay man of having AIDS because he had a short haircut, then he implied that Taradath could also have AIDS after he was out sick with pneumonia [A15-16,33-34]. Taradath often witnessed Cianciotto disparage gay men at office meetings [*Id.*]. Taradath witnessed Cianciotto's lewd drawings of gay male employees fornicating with other employees that he displayed at employee office meetings [Id.].

Unbeknownst to Christiansen at the time, and discovered after filing the FAC, as soon he started working at DDB in April, 2011, Cianciotto targeted him as a gay man because of his effeminate appearance, and accused him of having AIDS to the employees that Christiansen managed [A15,35-36]. Cianciotto repeatedly told Christiansen's colleague, Mr. Murphy, that Christiansen was effeminate and gay so he must have AIDS and speculating about his HIV status when Christiansen first started working at DDB by repeatedly telling Mr. Murphy "Yes, you're gay, but Matt is super gay, he sleeps around with everyone. He must have HIV, right?,

and that Christiasen is the "bottom in sex" and a "poof" (a derogatory name for an effeminate man) [Id.]. In May, 2011, Cianciotto ratcheted up his campaign of discrimination and abuse against Christiansen by drawing sexually explicit pictures of him and posting them in the office for everyone to know that Christiansen is a gay employee [A16]. He drew on office drawing boards a muscular shirtless Christiansen prancing around like an effeminate male, a shirtless Christiansen on the body of a four-legged animal urinating and defecating and a muscle-bound Christiansen without his pants on and an erect penis being manually pumped by his heterosexual creative partner while Christiansen says "I'm so pumped for marriage equality" to mock gay marriage that was then at issue in New York [A16, 40-41]. In July, 2011, Cianciotto created a "Muscle Beach" poster by photo-shopping employee heads onto other bodies but placing Christiansen on his back in a bikini with his legs in the air to mimic him in the gay sexual receiving position as a "sissy"[3] [A15-17,34,36,38,43].

Cianciotto created a pervasive hostile workplace atmosphere by targeting other male and female employees with his sexually explicit drawings of them naked and fornicating with each other, giving sexually suggestive holiday presents

[3] ***Sissy*** (derived from *sister*; also *sissy baby*, *sissy boy*, *sissy man*, *sissy pants*, etc.) is a pejorative term for a boy or man who does not conform to "standard male" gender stereotypes. https://en.wikipedia.org/wiki/Sissy. Also, "receiving position" is the feminine sexual position for gay males; meaning here again Christiansen is belittled for not just being perceived as effeminate but further being perceived as the more effeminate male homosexual who takes a traditionally feminine sexual role in gay relationships.

such as a President Obama figurine with an erection to a female employee or a thong to a gay male employee and telling gay men he wanted to have sex with them while accusing them of having AIDS or being child molesters and murderers of the children they molest [A12-16].

Christiansen witnessed Cianciotto routinely target employees at group meetings by drawing them fornicating with offensive narratives on his whiteboard in his office, then holding a meeting to have employees and their colleagues present to view the pictures and make them uncomfortable [A12]. Employees witnessed Christiansen visibly upset as he endured being publicly humiliated by Cianciotto as "the gay guy" with big muscles at the job [A13]. Because of Cianciotto's harassment, Christiansen was unable to attend many office meetings "because he was very disoriented by Joe's attacks against him as a gay man", "very uncomfortable at work around Joe" and was "tense and uncomfortable" because of Joe's harassment [A13,15-16].

In October, 2012, Christiansen received a promotion by title and workload but never received his commensurate salary, despite complaining for a year that it was due, because Cianciotto resented him as an effeminate gay man so he had his money due him withheld for the entire first year while making Christiansen spend his time complaining for an entire year to get what was due him-leaving him at a loss of $25,000 for the year before [A17,24,31]. After that, in May 2013,

Cianciotto decided to make sure that not just Christiansen's colleagues would be repulsed by him for being gay and having AIDS as Cianciotto falsely accused him of around the office, but to insure the clients of Christiansen's State Farm corporate account would be repulsed when at a meeting of employees and state Farm account executives of over 25 persons present, Cianciotto walked across the room after another gay male, Mr. Theiriot coughed, and stood next to Christiansen to announce that he (Cianciotto) was so sick over the weekend that **"[i]t feels like I have AIDS. Sorry, you know what that's like, Matt**." [A13,14,17,18,38]. That statement was understood to mean that Christiansen's supervisor Cianciotto just confirmed that Christiansen is gay man with AIDS [Id.]. Christiansen was paralyzed with fear because he did not have AIDS but he did have HIV, which he kept private, and he was shocked that Cianciotto, who had his entire career in his hands as his supervisor, just exposed his private HIV status to shame him as if HIV was AIDS [A18]. Tabor Theriot saw Christiansen turn red and become visibly upset [A38]. Theriot understood that Cianciotto just divulged Christiansen's private medical information, and he was concerned that Cianciotto would next accuse him of AIDS because he was a gay male [Id.]. Christiansen later told Mr. Theriot that he was horrified by Cianciotto's accusation that gay men have AIDS, and more horrified because he witnessed friends who die of AIDS [id].

Soon after that, in June, 2013, Cianciotto turned on Theriot and drew him in

a graphic picture as a female dog urinating and being submissively beaten by another employee riding on his back yelling "Mush" to reinforce his position that gay men or anyone with a disease will be publicly scorned at DDB and Omnicom's the office [A18,38,44]. Theriot complained about the AIDS accusation and dog picture to Wendy Rae, Director of Human Resources, who ignored the complaint [A13,14,38].

On or about June 26, 2013, Christiansen also met with Wendy Rae and complained about Cianciotto's harassment, the pictures and stating that he had AIDS [A19]. Rather than Omnicom, DDB or anyone taking corrective action, instead Cianciotto continued the abuse by next interrogating Christiansen to discover who complained, then concocted a bizarre excuse for his misconduct that he has a severe phobia of communicable diseases that his doctor has him carry cards printed with "herpes" and AIDS" to read when he obsesses about diseases [Id.]. To shut down the employees' complaints, around June 26, 2013, Peter Hempel held a meeting with Cianciotto and other employees present to claim that the company does not tolerate inappropriate behavior and Cianciotto said he hoped that no one was offended by his actions; nothing more was said and no retraction was made for accusing Christiansen of having AIDS [A20]. Also, the defendants never informed the employees that complaints about the pervasive hostile and harassing workplace environment could be filed with a third party such as the

EEOC so the employees were left in helpless and hopeless because they only knew to complain to human resources that ignored them anyhow [A12-16, 33-39].

In September, 2014, Christiansen discovered that the "Muscle Beach" poster was uploaded to Cianciotto's Facebook page, depicting Christiansen as a sissy and a bottom, and tagged Christiansen's name and other people for thousands of other people to see, including Christiansen's friends, colleagues and over 25 of his State Farm account clients and their friends to view[4] [A11-12,17,18-19, 20-21]. On October 21 and November 10, 2014, letters requesting removing from Face Book the Muscle Beach poster were sent from Christiansen's counsel to Brown and Cianciotto who ignored the letters, despite the letters stating the post distressed Christiansen, they did not have his permission to use his image and their Employee Handbook prohibited the post [A20]. They insisted on continuing harassing him as a gay man by refusing to remove the objectionable Face Book post [A20, 66].

On October 29 and December 17, 2014, Christiansen filed State and Federal EEOC complaints, the defendants responded by falsely denying receipt of his counsel's letters demanding removal of the "Muscle Beach" post, then they waited until January 27, 2015 to finally remove it [A20-22,66]. At about the same time when Christiansen filed his first agency complaints, it was in about July and

[4] Tagging someone in a picture on Face Book results in that person and their friends and friends of those friends being able to view the picture. *What Is Tagging and How Does It Work*? FACEBOOK, https://www.facebook.com/help/124970597582337 (last visited June 1, 2015).

August, 2014 that the Federal EEOC started calling in employees as witnesses because of another complaint against DDB regarding Cianciotto's years of sexual harassment, since 2012, of former female employee Shawna Laken whom he made cry at work because of his harassment, threw a soda can at her and caused her to leave her job [A12,15,33,35,37].

After filing his complaints with Federal and State EEOC agencies, on March 21, 2015, Omnicom and DDB asked Christiansen to resign in exchange for a paltry 3-month severance, without a legitimate reason for that resignation and without holding the actual perpetrator Cianciotta accountable [A21-22]. On March 30, 2015, Christiansen was evaluated by Dr. Stephen Reich, a licensed psychologist, who diagnosed him with chronic PTSD, anxiety and depression, including intense fear, helplessness and horror that traumatized him, with exacerbated trauma because of Defendants' misconduct directed at his sexuality, HIV disability and perceived AIDS disability, among other traumas [A23]. Dr. Reich concluded that Christiansen was emotionally and physically unable to complain because he protected himself by retreating and avoidance as a direct result of the "gay taunts and drawings" he was subjected to from 2013 to 2015 [Id.]. Resultantly, Christiansen was prescribed Xanax, and resorted to drinking to numb the pain of the harassment [Id.]. Because of his physical and mental infirmities, Christiansen was incapable of filing any complaints against the defendants before his initial

EEOC complaint filed October 29, 2014 [Id.].

V. SUMMARY OF ARGUMENT

At the heart of this appeal is whether Title VII protects those males and females whose sexual orientation is not heterosexual. In 2000, this Circuit in *Simonton* held that "because of…sex" does not include sexual orientation. Christiansen argues that *Simonton* must be abrogated as inconsistent with this Circuit upholding sexual orientation equality in *Windsor v. United States*, 699 F.3d 169 (2d Cir. N.Y. 2012). Next, he argues that this court can abrogate *Simonton* without a deference analysis by accepting the EEOC's *Baldwin* case; or using *Chevron* deference would still abrogate *Simonton.* Finally, Simonton is inapplicable because this case may be of first impression as a private sector Title VII case filed under 42 U.S.C. §2000e-2 unlike *Simonton* that was a public sector case brought under 42 U.S.C. §2000e-16 and now dead law under *Baldwin*[5]. Also, Mr. Christiansen argues that the District Court erred by not applying the continuing violation doctrine to extend the statute of limitations for his disability claim. In sum, Mr. Christiansen argues that, first and foremost, he is a man, and like any other man, he deserves protection "because of…sex" at the workplace.

[5] This is discussed more herein below, and expected to be further addressed in the Br. Amici Curiae of LAMBDA in Support of Plaintiff-Appellant.

VI. ARGUMENT

A. Under the Standard of Review, Christiansen's FAC Adequately Pled His Causes of Action

This court reviews the District Court decision *de novo* the grant of a motion to dismiss. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 (2d Cir. 2000). All factual allegations of the complaint are deemed true complaint as true, drawing all inferences in favor of the plaintiff, and the dismissal is affirmed only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Christiansen's FAC adequately pled facts to support a Title VII hostile work environment and his other claims.

B. Title VII Argument

i. The Purpose of Title VII is To Eradicate Discrimination at The Workplace.

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating "against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex,"[6] or "to limit, segregate, or classify his [or her] employees or applicants for employment in any

[6] 42 U.S.C. §2000e-2(a)(1).

way which would . . . tend to deprive any individual of employment opportunities or otherwise adversely affect [their] status as an employee, because of . . . sex." [7] The purpose of Title VII is "to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (U.S. 1987); *Griggs* v. *Duke Power Co*., 401 U.S. 424, 429-430 (1971); *McDonnell Douglas Corp*. v. *Green*, 411 U.S. 792, 800 (1973). As aptly said in *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (U.S. 2013), "the context of Title VII… focuses on eradicating discrimination."

ii. Sexual Orientation Discrimination Evolved from Being Criminal to this Circuit's *Windsor* and the Supreme Court's *Obergefell* Now Granting Same-Sex Couples Marriage Equality. However, *Windsor* is Meaningless If *Simonton* is Upheld Because "Married on Sunday, Fired on Monday" becomes the Rule.

"Congress' resolve not to incorporate a static definition of discrimination into Title VII is not surprising" (*Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265,339 (U.S. 1978)) as discrimination evolves over time. As Justice Kennedy observed in *Lawrence v. Texas*, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." (539 U.S. 558, 579, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Indeed, this Circuit in *Windsor v. United States*, 699 F.3d 169,182 (2d Cir. N.Y. 2012)

[7] Id. §2000e-2(a)(2). Title VII also protects against discrimination because of a person's "race, color, religion . . . or national origin. Id.

explained that "[n]inety years of discrimination is entirely sufficient to document a "history of discrimination" and then changed history by holding that the definition of marriage should not be limited to heterosexuals, but must include same sex couples.

Before *Windsor*, homosexual[8] history was bleak. In 1952, homosexuality was classified in the Diagnostic and Statistical Manual as a mental disorder by the American Psychiatric Association. Twenty-two years later that changed in 1974 when homosexuality was no longer listed in the seventh edition of DSM-II. In 1986, *Bowers v Hardwick*, 478 US 186, 92 L Ed 2d 140, 106 S Ct 2841(1986) held that states could criminalize homosexual sex and that the fundamental right to privacy did not protect gay people's intimate relationships. Seventeen years later in 2003, *Lawrence v. Texas*, 539 U.S. 558, 567, 574 (U.S. 2003) reversed *Bowers* by finding that "[t]he central holding of Bowers… demeans the lives of homosexual persons" by "touching upon the most private human conduct, sexual behavior..."

Lawrence enforced civil rights and equality for homosexuals, as follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about

[8] Homosexual is not meant to limit "sexual orientation" by excluding the LGBT community.

> these matters could not define the attributes of personhood were they formed under compulsion of the State."

Id. at 574 quoting Planned Parenthood of Southeastern Pa. v. *Casey,* 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992).

"Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence.* at 574.[9] That shift in attitude, and continuing with *Windsor* today, is consistent with the firmament of our Equal Protection Clause of the Fourteenth Amendment that "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); *Plyler* v. *Doe,* 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982).

In 2012, this Circuit's progressive decision in *Windsor* found that although homosexuals are a minority class of men and women, "[t]he aversion homosexuals experience has nothing to do with aptitude or performance" (*Id.* at 182). Although *Windsor,* involved striking DOMA's definition of marriage limited to heterosexuals, that decision undeniably makes homosexuals' "aptitude or performance" equal to the "aptitude or performance" of heterosexuals. That position should extend to Title VII's purpose to insure jobs based on merit, or

[9] Although *Lawrence* analyzed sexual orientation in a constitutional equal protection context, that does not negate the value of its decision here because courts use the same standard for adverse employment actions under Equal Protection and Title VII claims. *Griego v. City of Albuquerque*, 100 F. Supp. 3d 1192 (D.N.M. 2015). *Greigo,* at 1224, lists Circuits following this standard, including *Weeks v. N.Y. State (Div. of Parole),* 273 F.3d 76, 86 (2d Cir. 2001))(addressing adverse employment actions in the Title VII context).

aptitude and performance, "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices… to the disadvantage of minority citizens" and to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800,801 (U.S. 1973).

Windsor's wisdom led to the 2013 Supreme Court decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013) that deleted Section 3 of DOMA[10] defining marriage as a legal union only between a man and a woman, so same-sex couples could receive equal rights as heterosexuals under the thousands of existing federal laws and regulations. Two years later, in *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), the Supreme Court granted the right to marry to same sex couples after acknowledging that the institution of marriage has evolved over time notwithstanding its ancient origins. But *Windsor* and *Obergefell* are meaningless if the tens of thousands of same-sex couples in this Circuit are placed in the a most untenable position known as "married on Sunday, fired on Monday." Meaning, under *Windsor* they can marry on Sunday and then under *Simonton* they can be fired on Monday because their same sex marriage gets no Title VII protection. To close that gap, it stands to reason that the equality this Circuit

[10] *1 U.S.C. §7* and *28 U.S.C. § 1738C*

advanced with same-sex marriage in *Windsor* would extend to employment by including sexual orientation as protected "sex" in Title VII.

Paradoxically, sixteen years before *Windsor*, this Circuit in *Simonton* denied equality based on sexual orientation in the workplace by holding that Title VII protects only heterosexual males and females.

iii. *Simonton* Perpetuates Discrimination by Illogically Creating a Sub-Class of "Sex" Called "Homosexual", then Denies That Sub-Class Equality. That is Incompatible With Recent Precedent of *Windsor* and *Obergefell* Granting Equality to Heterosexuals and Homosexuals.

In 2000, this Circuit in *Simonton* recited facts almost identical to Matthew Christiansen's case that it found to be "the appalling persecution a male employee named Simonton allegedly endured" and "morally reprehensible". *Id.,* at 3,**4. Simonton worked at the United States Postal Service where he ultimately suffered a heart attack after his co-workers verbally assaulted him with "go fuck yourself, fag," "suck my dick," "so you like it up the ass?" and "fucking faggot", and hung pornographic and AIDS related pictures around his workplace. *Id.* Yet, the court denied Title VII protection by creating a sub-class of males and females called "homosexuals", then held that the legislature limited "sex" to membership in a gender class of male or female because Title VII only protects "a distinction based on a person's sex, not on his or her sexual affiliations." *Id.* at 306-07.

That is an absurd holding because not only did Congress never exclude a person's sexual affiliation from "because of…sex" as one read of the statute

shows, but the law is quite the reverse if that exclusion were true. Discrimination against one group cannot be justified merely because the legislature (as *Simonton* perceived) prefers another group. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985); *Hernandez v. Robles*, 7 N.Y.3d 338,394 (N.Y. 2006) ("[t]he government cannot legitimately justify discrimination against one group of persons as a mere desire to preference another group"). *Simonton's* creation of a homosexual sub-class further fails because not only is that a discriminatory line drawn by the court to create a group of people and then exclude them, but remarkably courts have protected the other Title VII components of race, religion and national origin by recognizing that sub-classes are inherent. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588-89 (5th Cir. 1998)(protecting "people in interracial relationships."); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (protecting "masculine women."); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988)(protecting "non-believers" of religion).

Simonton is discriminatory by its own rationale. First, the court analyzed the discriminatory conduct by claiming it was limited to interpreting a statute, not making a moral judgment. *Id.* **4. That limitation is explained away by Justice Scalia observing that laws encompass more than what Congress may have envisioned at the time because "… 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 v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); see also *Int'l Bhd. Of Teamsters v. United States,* 431 U.S. 324, 381, 97 S. Ct. 1843, 1878 (1977) (Marshall, J., concurring in part and dissenting in part) ("the evils against which [Title VII] is aimed are defined broadly"). *Simonton*, on the other hand, chose to exclude a "comparable evil" by creating a subcategory called "homosexuals" as an unjustifiable court concern so that court could eliminate Title VII protection for them. That is contrary to Title VII's purpose to treat everyone equal in the workplace, not just some considered as a higher category called "heterosexuals" who get protection "because of…sex", but not their lowly sub-class of "homosexuals".

Next, *Simonton* contradicts itself by claiming that "sex" could not include sexual orientation because legislative amendments to Title VII to add sexual orientation were rejected; but then the court admitted that post-legislative inaction does not prove the definition of "sex". Nevertheless, the Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit*

Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990). Thus, that legislative inaction position is eliminated.

iv. *Simonton* Illogically Relied on *DiCintio* as Well-Settled Law to Deny Title VII Protection to Homosexuals by Rationalizing That Sexual Orientation is the Same As a Voluntary Heterosexual Romantic Liason.

Failing on all counts, *Simonton* shifted its focus to *DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986)* to hold that case was well-settled law in this Circuit that sexual orientation is not included in sex. *DeCintio* involved a male employer who passed over other male employees for jobs in favor of his female paramour, whom he chose to have a romantic relationship with. *DeCintio* had nothing to do with sexual orientation or homosexuality. It was all about heterosexual males complaining that they were discriminated "because of…sex" because their heterosexual employer favored his heterosexual female paramour over them. *DeCintio* referred to that heterosexual affair as "sexual liaisons", "sexual attractions", "an ongoing, voluntary, romantic engagement" and a "special relationship" *Id.* at 6,10,13. *DeCintio* dismissed the sex discrimination claim based upon a heterosexual affair because "[w]e can adduce no justification for defining "sex," for Title VII purposes, so broadly as to include an ongoing, voluntary, romantic engagement" and "we hold that voluntary, romantic relationships cannot form the basis of a sex discrimination suit under either Title

VII. *Id.* at 307, 308. In sum, *DiCintio* actually meant to refuse to police private romantic affairs at the workplace under Title VII.

Simonton stretched our imaginations by taking *DeCintio*'s heterosexual office affair and extending it to define homosexual men and women as the same voluntary "sexual liaisons" or "sexual attractions". It is agreed that an office affair can be defined as a voluntary liason; but homosexuality should not be minimized to a voluntary romance to deny Title VII protection.

v. *Simonton* Creates Uncertainty Because the Recent Precedents of *Windsor* and *Obergfell* Contradict Its Central Holding of Distinguishing Between Heterosexual and Homosexual Males and Females When There is No Difference Because Homosexuality is Immutable.

This Circuit in *Windsor* declared that homosexuality is immutable. *Id.* at **33. In 2015, the Supreme Court in *Obergefell, supra., at* 2596, similarly accepted that "…in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7-17." Immutable is defined as "unable to be changed."[11] That is a far cry from a voluntary office affair. Today *Simonton*'s analogy of homosexuals as voluntary sexual liaisons is as passé as it is unacceptable.

Historically, courts have concluded that Title VII's "because of…sex' is limited to the traditional male and female genders. However, the Supreme Court

[11] http://www.merriam-webster.com/dictionary/immutable

eliminated that by finding that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (internal quotation marks omitted). As a result, "[s]ex stereotyping [by an employer] based on a person's gender non-conforming behavior is impermissible discrimination." *Smith v. City of Salem, Ohio,* 378 F.3d 566, 575 (6th Cir.2004).

If we continue to segregate "sex" by sexual orientation, then essentially Title VII would require discriminatory animus to be linked to characteristics that are observable at work. But Title VII "prohibits certain motives, regardless of the state of the actor's knowledge," and an employer may violate Title VII "even if he has no more than an unsubstantiated suspicion" that statutory protections may apply. *EEOC v. Abercrombie & Fitch Stores, Inc.,*___*U.*S. 135 S. Ct. 2028, 2033(2015); *Videckis,* supra, at *6 ("[I]t is the biased mind of the alleged discriminator that is the focus of the analysis."). Therefore, there is no reason for courts to classify, reclassify and segregate males and females into homosexuals, lesbians, bi-sexuals, transgender or anything else because individual should not be sub-classed by the court after they are bullied and harassed because of the discriminatory animus in the limited minds of their abusers who want these males and females to behave a certain male or female way. When our courts try to figure

out who these males and females are because of the actions of their abusers, the lines blur and the analysis becomes irrational.

vi. Recent District Holdings Refuse the Lines Drawn Between Gender, Gender Stereotypes or Sexual Orientation.

On March *9, 2016, Judge* Failla found that "since *Simonton*, numerous cases have demonstrated the difficulty of disaggregating acts of discrimination based on sexual orientation from those based on sexual stereotyping. *See, e.g., Dawson, 398 F.3d at 218* ("gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Christiansen*, supra., at *43-44. Just prior to that, Judge Pregerson of the Central District of California found "the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct." *Videckis v. Pepperdine Univ*., 2015 WL 8916764, at *5-6 (C.D. Cal. Dec. 15, 2015). *Videckis* explains that "[s]tereotypes 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 the women's basketball staff in this case 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." Id. at *7. In

agreement, is *Isaacs v. Felder Servs.,* 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015) that "claims of sexual orientation-based discrimination are cognizable under Title VII."

vii. Congress Created the EEOC to Uphold Title VII's Purpose. In 2015, the EEOC's in *Baldwin v. Foxx* Held That Sex Includes Sexual Orientation, and the Two "Concepts" are Inseparable.

In *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (July 16, 2015), the EEOC drew upon a substantial body of judicial decisions and EEOC precedent to hold that "sexual orientation is inherently a "sex-based" consideration" that deserves Title VII protection. *Id.* at *13. [12] "[S]exual orientation is inseparable and inescapably linked to sex and, therefore. . . allegations of sexual orientation discrimination involve sex-based considerations" and "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms." *Id*, at *5. "[M]any courts have gone to great lengths to distinguish adverse employment actions based on "sex" from adverse employment actions based on "sexual orientation." The stated justification for such intricate parsing of language has been the *bare conclusion* that "Title VII does not prohibit . . . discrimination because of sexual orientation." [*Dawson, 398 F.3d at 217*] (quoting *Simonton v. Runyon, 232 F.3d. 33, 35 (2d Cir. 2000))*. *Baldwin*, at *24.

[12] In the interests of economy, that entire analysis is not repeated because the decision is best read as authoritative on this issue.

And who better than the EEOC to look to when Congress authorized the EEOC to issue, amend, or rescind suitable procedural regulations to carry out the provisions of the Civil Rights Act of 1964. Section 713 (a) of Title VII, Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-12(a); *Griggs, supra.* (the EEOC is the enforcement agency of Title VII to vindicate the public interest in preventing employment discrimination).

viii. *Baldwin* Can Trump This Circuit's *Simonton* Without a Deference Analysis. Even Applying Deference Proves *Simonton* is Not Good Law.

Interestingly, *Simonton* involved a federal postal worker who filed his case under 42 U.S.C. §2000e-16, the part of Title VII limited to such public sector employees. *Baldwin* also involved a federal employee under §2000e-16. It may be said that if EEOC decisions are precedential to §2000e-16 cases, then *Baldwin* trumps *Simonton* and the case at bar is actually one of first impression under §2000e-2. Without *Simonton*, there is no precedent for Christiansen's case presently before the court under §2000e-2. [13].

If this court is not inclined to accept the above position, then there is an option short of using a deference analysis. *Baldwin* is a formal adjudication on the issue of "because of…sex" by the EEOC, the agency created by Congress to enforce Title VII. Under *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (U.S.

[13] To avoid duplicate arguments, the court is directed to Br. Amici Curiae of LAMBDA in Support of Plaintiff-Appellant where this argument is expanded.

2002), the Supreme Court held that it did not have to consider a deference analysis "[b]ecause we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much." Similarly, this court can review *Baldwin*, and agree with its rationale and holding without having to engage in a deference analysis to overturn *Simonton.*[14]

If this court does not follow *Edelman*, it can use *Chevron* deference to abrogate *Simonton. Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (U.S. 1984).[15] While *Chevron* involved an interpretive regulation, its rationale was not limited to that context. The Supreme Court observed in *United States* v. *Mead Corp.,* 533 U.S. 218, 230-231(2001) that "[w]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'"

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[14] The Second Circuit may engage in a "mini-*en banc*," where a panel "circulate[s] [an] opinion to all active members of [the] Court prior to filing" and overrules a prior panel decision when it "receive[s] no objection" to the circulated opinion. *Diebold Found., Inc. v. C.I.R.*, 736 F.3d 172, 183 n.7 (2d Cir. 2013). The *en banc* process is explained further in Br. Amici Curiae of Members of Congress in Support of Plaintiff-Appellant.

[15] The District Court in *Christiansen* said that the EEOC gets only Skidmore deference by citing *McMenemy v. City of Rochester, 241 F.3d 279, 284 (2d Cir. 2001)* to conclude that EEOC interpretation of Title VII and its terms is "entitled to respect" to the extent it has the "power to persuade," pursuant to *Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944))*. However, *McEnemy* involved only EEOC policy, statements, agency manuals and enforcement guidelines, not a formal adjudication of an issue that the EEOC was created by Congress to protect as it did in *Baldwin*. Anyhow, even *Skidmore* deference abrogates *Simonton*.

Id. at 843, quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231, 39 L. Ed. 2d 270, 94 S. Ct. 1055 (1974).

Accordingly, the Supreme Court has accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions presented in various other formats. *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425, 143 L. Ed. 2d 590, 119 S. Ct. 1439 (1999) (adjudication); *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256-257, 130 L. Ed. 2d 740, 115 S. Ct. 810 (1995) (letter of Comptroller of the Currency); *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U.S. 633, 647-648, 110 L. Ed. 2d 579, 110 S. Ct. 2668 (1990) (decision by Pension Benefit Guaranty Corp. to restore pension benefit plan); *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 978-979, 90 L. Ed. 2d 959, 106 S. Ct. 2360 (1986) (Food and Drug Administration's "longstanding interpretation of the statute," reflected in no-action notice published in the Federal Register). An agency interpretation can only be dismissed if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* at 844. *Baldwin* is an authoritative decision by the EEOC after adjudication that is far from arbitrary, capricious or contrary to the statute.

Finally, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* ("Brand X"), 545 U.S. 967 (U.S. 2005) held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only*

if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." (emphasis added) *Id*. at 2700. This Circuit affirmed that under *Chevron "*it must defer to the agency's reasonable interpretation unless "the intent of Congress is clear."" *Mhany Mgmt. v. Cnty. of Nassau*, 2016 U.S. App. LEXIS 5441 (2d Cir. N.Y. Mar. 23, 2016) citing *Chevron*, 467 U.S. at 842-43. Nowhere does *Simonton* explicitly hold that the statute is unambiguous where agency interpretation could not correct. On the contrary, that courts own full blown analysis of what it thought "because of…sex" meant shows it believed it was an ambiguous term. Thus, if *Baldwin* now defines the term then *Simonton* is moot, and we return back to *Edelman* that permits this court to accept the EEOC's position without a deference analysis.

B. The District Court Erred in Dismissing Christiansen's ADA Claim by Failing to Toll the Statute of Limitations by Deciding Factual Issues Regarding His Medical Condition at the Motion to Dismiss Stage.

The District Court factually resolved whether Christiansen was sick or not to deny him equitable tolling. The court ignored that the FAC delineated an expert psychological evaluation concluding that Christiansen suffered severe physical and mental trauma that prevented him from complaining any sooner. The court relied only on *Li-Lan Tsai v Rockefeller Univ*., 137 F Supp 2d 276 (SDNY 2001) to make that holding, but *Tsai* held that at the preliminary stage of a motion to dismiss a court can not determine the infirmities because they are issues of fact unique to

each case. This Circuit holds that it is error for a district court to "resolve[] the fact-specific equitable tolling issue" on a motion to dismiss when mental capacity is at issue. *Mandarino v. Mandarino*, 180 F. App'x 258, 261 (2d Cir. 2006) (summary order) ("When, as here, the facts are disputed, the best practice is to analyze a question of mental incapacity in the context of summary judgment."); *Brown v. Parkchester S. Condos*., 287 F.3d 58,60-61 (2d Cir. N.Y. 2002) (remanding for an evidentiary hearing "to determine to what extent, if any, [plaintiff's] condition did in fact inhibit his understanding or otherwise impair his ability to comply, such that equitable tolling would be in order"). In the least, this medical issue should be resolved on remand.

VI. CONCLUSION

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

Dated: June 21, 2016 Law Offices of Susan Chana Lask

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,747 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that I filed one original plus six paper copies of the foregoing brief with the Court by Federal Express overnight delivery on this 21st day of June, 2016. I also certify that on the same day I submitted the brief electronically in PDF format through the Electronic Case File (ECF) system.

Dated: June 21, 2016

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