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

JOINT APPENDIX

LAW OFFICES OF
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Suite 2369 New York, NY 10001
917/300-1958

INDEX TO JOINT APPENDIX OF CHRISTIANSEN v. OMNICOM, et.al.

Christiansen Index cont'

Christiansen Index cont'

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:15−cv−03440−KPF

Christiansen v. Omnicom Group, Inc. et al
Assigned to: Judge Katherine Polk Failla
Cause: 42:12112 Americans with Disabilities Act − Employment Discrimination

Date Filed: 05/04/2015
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Diversity

Plaintiff

Anonymous
TERMINATED: 07/21/2015

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V.

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Date Filed	#	Docket Text
05/04/2015	1	COMPLAINT against Chris Brown, Joe Cianciotto, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Filing Fee $ 350.00, Receipt Number 465401124316)Document filed by Anonymous.(moh) (mps). (Entered: 05/05/2015)
05/04/2015		SUMMONS ISSUED as to Chris Brown, Joe Cianciotto, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (moh) (Entered: 05/05/2015)
05/04/2015		Magistrate Judge Ronald L. Ellis is so designated. (moh) (Entered: 05/05/2015)
05/04/2015		Case Designated ECF. (moh) (Entered: 05/05/2015)
05/04/2015	2	CIVIL COVER SHEET filed. (moh) (mps). (Entered: 05/05/2015)
05/13/2015		*****NOTE TO ATTORNEY TO E−MAIL PDF. Note to Attorney Susan Chana Lask for noncompliance with Section 14.2 of the S.D.N.Y. Electronic Case Filing Rules &Instructions. E−MAIL the PDF for Document 1 Complaint to: caseopenings@nysd.uscourts.gov. (moh)** (Entered: 05/13/2015)
05/13/2015		*****NOTICE TO ATTORNEY TO SUBMIT PDF OF CIVIL COVER SHEET. Notice to Attorney Susan Chana Lask, to submit PDF of the Civil Cover Sheet. Email a copy of Civil Cover Sheet to: caseopenings@nysd.uscourts.gov. (moh)** (Entered: 05/13/2015)
06/05/2015	3	NOTICE OF INITIAL PRETRIAL CONFERENCE: Initial Conference set for 8/6/2015 at 11:00 AM in Courtroom 618, 40 Centre Street, New York, NY 10007 before Judge Katherine Polk Failla. (Signed by Judge Katherine Polk Failla on 6/5/2015) (spo) (Entered: 06/05/2015)
06/22/2015	4	**ACCEPTED FOR FILING BY CHAMBERS, SEE DOCKET ENTRY 18** − FIRST AMENDED COMPLAINT amending 1 Complaint against Anonymous with JURY DEMAND.Document filed by Anonymous. Related document: 1 Complaint filed by Anonymous.(Lask, Susan) Modified on 6/23/2015 (moh). Modified on 8/5/2015 (tro). (Entered: 06/22/2015)
06/23/2015		*****NOTICE TO ATTORNEY REGARDING DEFICIENT PLEADING. Notice to Attorney Susan Lask to RE−FILE Document No. 4 Amended Complaint,. The filing is deficient for the following reason(s): the wrong filer/filers were selected for the pleading; the wrong party/parties whom the pleading is against were selected. Re−file the pleading using the event type Amended Complaint found under the event list Complaints and Other Initiating Documents − attach the correct signed PDF − select the individually named filer/filers − select the individually named party/parties the pleading is against. (moh)** (Entered: 06/23/2015)
06/24/2015	5	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. Identifying Corporate Parent Omnicom Group Inc. for DDB Worldwide Communications Group Inc.. Document filed by DDB Worldwide Communications Group Inc., Omnicom Group, Inc..(Feinstein, Daniel) (Entered: 06/24/2015)
06/24/2015	6	LETTER MOTION for Conference *regarding Defendants' anticipated motion to dismiss the First Amended Complaint* addressed to Judge Katherine Polk Failla from Daniel A. Feinstein dated June 24, 2015. Document filed by Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc..(Feinstein, Daniel) (Entered: 06/24/2015)
06/24/2015	7	LETTER addressed to Judge Katherine Polk Failla from Susan Chana Lask, Esq. dated June 24, 2015 re: Pre Motion Conference. Document filed by Anonymous.(Lask, Susan) (Entered: 06/24/2015)

06/26/2015	8	NOTICE OF APPEARANCE by Jeffrey Kevin Brown on behalf of Joe Cianciotto. (Brown, Jeffrey) (Entered: 06/26/2015)
06/26/2015	9	NOTICE OF APPEARANCE by Rick Ostrove on behalf of Joe Cianciotto. (Ostrove, Rick) (Entered: 06/26/2015)
06/29/2015	10	LETTER MOTION for Conference addressed to Judge Katherine Polk Failla from Rick Ostrove dated 06/29/2015. Document filed by Joe Cianciotto.(Ostrove, Rick) (Entered: 06/29/2015)
06/30/2015	11	ORDER granting 6 Letter Motion for Conference ; granting 10 Letter Motion for Conference: that the parties are directed to appear for a pre−motion conference before the Court on July 16, 2015, at 11:00 a.m., in Courtroom 618 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York, 10012. Defendant Cianciotto is directed to submit a letter of no more than three pages setting forth the basis of his proposed motion to dismiss no later than July 6, 2015. Plaintiff is directed to respond to the substance of both parties' letters by letter of no more than three pages no later than July 10, 2015. The Clerk of Court is directed to terminate Docket Entries 6 and 10. Pre−Motion Conference set for 7/16/2015 at 11:00 AM in Courtroom 618, 40 Centre Street, New York, NY 10007 before Judge Katherine Polk Failla. (Signed by Judge Katherine Polk Failla on 6/30/2015) (tn) (Entered: 06/30/2015)
07/07/2015	12	LETTER addressed to Judge Katherine Polk Failla from Rick Ostrove dated July 7, 2015 re: Cianciotto's proposed motion to dismiss. Document filed by Joe Cianciotto.(Ostrove, Rick) (Entered: 07/07/2015)
07/12/2015	13	LETTER addressed to Judge Katherine Polk Failla from Susan Chana Lask, Esq. dated 7/12/2015 re: Pre−Motion Conference Letter. Document filed by Anonymous.(Lask, Susan) (Entered: 07/12/2015)
07/14/2015	14	NOTICE OF APPEARANCE by Shira Franco on behalf of Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Franco, Shira) (Entered: 07/14/2015)
07/14/2015	15	NOTICE OF APPEARANCE by Howard Jeffrey Rubin on behalf of Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Rubin, Howard) (Entered: 07/14/2015)
07/15/2015	16	LETTER addressed to Judge Katherine Polk Failla from Susan Chana Lask, Esq. dated 7/15/2015 re: Adjourn pre−Motion Conference to Monday,7/20/15. Document filed by Anonymous.(Lask, Susan) (Entered: 07/15/2015)
07/17/2015	17	MEMO ENDORSEMENT on re: 16 Letter filed by Anonymous. ENDORSEMENT: The conference scheduled for July 16, 2015, is hereby adjourned nunc pro tunc to July 21, 2015, at 4:30 p.m. (Pre−Motion Conference set for 7/21/2015 at 04:30 PM before Judge Katherine Polk Failla.) (Signed by Judge Katherine Polk Failla on 7/17/2015) (tn) (Entered: 07/17/2015)
07/21/2015	18	ORDER: The Clerk of Court is directed to accept the Amended Complaint as filed (Dkt. #4), and to amend the caption of the case to match this Order. Defendants are directed to submit their motions to dismiss no later than August 14, 2015. Plaintiff's opposition, in the form of a single memorandum of law of no more than 30 pages in length, is due no later than September 21, 2015. Defendants' replies are due no later than October 5, 2015. The initial pretrial conference scheduled for August 6, 2015, is hereby adjourned sine die. (Motions due by 8/14/2015., Responses due by 9/21/2015, Replies due by 10/5/2015.), Matthew Christiansen added. Anonymous terminated. (Signed by Judge Katherine Polk Failla on 7/21/2015) (mro) Modified on 7/22/2015 (mro). (Entered: 07/22/2015)
07/21/2015		Minute Entry for proceedings held before Judge Katherine Polk Failla: Pre−Motion Conference held on 7/21/2015. (Court Reporter Martha Drevis) (Lopez, Jose) (Entered: 07/22/2015)
07/28/2015	19	TRANSCRIPT of Proceedings re: Conference held on 7/21/2015 before Judge Katherine Polk Failla. Court Reporter/Transcriber: Martha Drevis, (212) 805−0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of

		Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2015. Redacted Transcript Deadline set for 8/31/2015. Release of Transcript Restriction set for 10/29/2015.(Rodriguez, Somari) (Entered: 07/28/2015)
07/28/2015	20	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a Conference proceeding held on 07/21/2015 has been filed by the court reporter/transcriber in the above−captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(Rodriguez, Somari) (Entered: 07/28/2015)
07/31/2015	21	MOTION to Dismiss *Plaintiff's First Amended Complaint*. Document filed by Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. Responses due by 9/21/2015(Rubin, Howard) (Entered: 07/31/2015)
07/31/2015	22	MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss *Plaintiff's First Amended Complaint*. . Document filed by Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Rubin, Howard) (Entered: 07/31/2015)
07/31/2015	23	DECLARATION of Daniel A. Feinstein in Support re: 21 MOTION to Dismiss *Plaintiff's First Amended Complaint*.. Document filed by Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Rubin, Howard) (Entered: 07/31/2015)
08/14/2015	24	MOTION to Dismiss *Plaintiff's First Amended Complaint*. Document filed by Joe Cianciotto.(Ostrove, Rick) (Entered: 08/14/2015)
08/14/2015	25	MEMORANDUM OF LAW in Support re: 24 MOTION to Dismiss *Plaintiff's First Amended Complaint*. . Document filed by Joe Cianciotto. (Ostrove, Rick) (Entered: 08/14/2015)
09/22/2015	26	LETTER addressed to Judge Katherine Polk Failla from Daniel A. Feinstein dated September 22, 2015 re: Write in response to Plaintiffs counsels letter to the Court today in which she requests an extension of Plaintiffs deadline to file his opposition to the motion to dismiss the First Amended Complaint (the Complaint).. Document filed by Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Feinstein, Daniel) (Entered: 09/22/2015)
09/22/2015	27	LETTER addressed to Judge Katherine Polk Failla from Susan Chana Lask, Esq. dated 9/22/15 re: letter Explaining Civility for Mr. Feinstein to Acknowledge for Brief 1st Extension Request. Document filed by Matthew Christiansen.(Lask, Susan) (Entered: 09/22/2015)
09/22/2015	28	ENDORSED LETTER addressed to Judge Katherine Polk Failla from Susan Chana Lask dated 9/22/2015 re: a brief three day extension to file my opposition pursuant to your motion scheduling Order (Dkt. 18) from September 21 to September 24, 2015 with a reciprocal extension for defendants replies from October 5 to October 8, 2015. ENDORSEMENT: Application GRANTED. Set Deadlines/Hearing as to 21 MOTION to Dismiss *Plaintiff's First Amended Complaint*. 24 MOTION to Dismiss *Plaintiff's First Amended Complaint*: Responses due by 9/24/2015, Replies due by 10/8/2015. (Signed by Judge Katherine Polk Failla on 9/22/2015) (tn) (Entered: 09/22/2015)
09/24/2015	29	DECLARATION of Susan Chana Lask, Esq. in Opposition re: 21 MOTION to Dismiss *Plaintiff's First Amended Complaint*., 24 MOTION to Dismiss *Plaintiff's First Amended Complaint*.. Document filed by Matthew Christiansen. (Attachments: # 1 Exhibit A−10−21−14 letter to Brown, # 2 Exhibit B−11−20−14 letter to Cianciotto, # 3 Exhibit C−12−19−14 Defendants' Federal EEOC Response, # 4 Exhibit D−2−25−15 Defendants' State EEOC Response, # 5 Exhibit E−EEOC July 15, 2015 FOXX Decision, # 6 Exhibit F−EEOC Foxx Pamphlet of Cases, # 7

		Exhibit G−EEOC Foxx Pamphlet)(Lask, Susan) (Entered: 09/24/2015)
09/24/2015	30	MEMORANDUM OF LAW in Opposition re: 24 MOTION to Dismiss *Plaintiff's First Amended Complaint*., 21 MOTION to Dismiss *Plaintiff's First Amended Complaint*. . Document filed by Matthew Christiansen. (Lask, Susan) (Entered: 09/24/2015)
10/08/2015	31	REPLY MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss *Plaintiff's First Amended Complaint*. . Document filed by Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Rubin, Howard) (Entered: 10/08/2015)
10/08/2015	32	DECLARATION of Daniel A. Feinstein in Support re: 21 MOTION to Dismiss *Plaintiff's First Amended Complaint*.. Document filed by Chris Brown, DDB Worldwide Communications Group Inc., Peter Hempel, Omnicom Group, Inc.. (Rubin, Howard) (Entered: 10/08/2015)
10/08/2015	33	REPLY MEMORANDUM OF LAW in Support re: 24 MOTION to Dismiss *Plaintiff's First Amended Complaint*. . Document filed by Joe Cianciotto. (Ostrove, Rick) (Entered: 10/08/2015)
10/15/2015	34	NOTICE OF APPEARANCE by Brandon Okano on behalf of Joe Cianciotto. (Okano, Brandon) (Entered: 10/15/2015)
03/09/2016	35	OPINION AND ORDER re: 24 MOTION to Dismiss *Plaintiff's First Amended Complaint* filed by Joe Cianciotto, 21 MOTION to Dismiss *Plaintiff's First Amended Complaint* filed by Chris Brown, Peter Hempel, DDB Worldwide Communications Group Inc., Omnicom Group, Inc.: For the reasons given in this Opinion, Defendants' motions are GRANTED in full. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case. (Signed by Judge Katherine Polk Failla on 3/9/2016) (tn) (Entered: 03/09/2016)
03/09/2016		Transmission to Judgments and Orders Clerk. Transmitted re: 35 Opinion and Order, to the Judgments and Orders Clerk. (tn) (Entered: 03/09/2016)
03/09/2016	36	NOTICE OF APPEAL from 35 Memorandum &Opinion,,. Document filed by Matthew Christiansen. Filing fee $ 505.00, receipt number 0208−12046979. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Lask, Susan) (Entered: 03/09/2016)

UNITED STATES DISTRICT
SOUTHERN DISTRICT COURT OF NEW YORK

MATTHEW CHRISTIANSEN,

CASE NUMBER: 15 CV 3440

Plaintiff,

FIRST AMENDED CIVIL COMPLAINT

-against-

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

Plaintiff demands trial by jury

Defendants.

INTRODUCTION

1. **MATTHEW CHRISTIANSEN** brings this action to remedy and seek damages against his employer for libel, discrimination and labor law violations occurring at the workplace of **OMINICOM** and **DDB WORLDWIDE COMMUNICATIONS GROUP INC. ("DDB")**, one of the largest international advertising agencies. The basis of discrimination is an HIV disability in violation of 42 USCS §12112, 12117, animus towards a gender stereotype in violation of Title VII of the Civil Rights Act of 1964 and sexual orientation in the terms, conditions and privileges of employment in violation of the New York State Human Rights Law, N.Y. Executive Law §290, *et seq.* and the New York City Human Rights Law, N.Y.C. Admin. Code 8-101, *et seq.* Also alleged are violations of Labor Law §§ 190-198, breach of contract and slander.
2. Defendants for years permitted a pervasive harassing environment against their employees because of gender, sexual orientation and race. Defendant **JOE CIANCIOTTO** in his management position victimized employees on a daily basis for years with his lewd statements, drawing male employees fornicating, accusing women of being lesbians, accusing gay men of having AIDs and asking gay males to describe gay sex to him while he told them he was turned on by them. Plaintiff does not have AIDs but is HIV positive. **JOE CIANCIOTTO** targeted him as having AIDs as soon as he started work because he was gay.

3. For years, employees have complained to Defendants and human resources about the pervasive hostile environment. An EEOC investigation commenced in about 2014 against Defendants because of a female employee's complaints about the conditions there.
4. In retaliation to Plaintiff's complaints to the EEOC, Defendants asked him to leave so they could retain **CIANCIOTTO**, threatened he may lose his job as part of a lay-off and now threaten to sue him for libel for filing this complaint. Defendants Omnicom and DDB provided Defendant **CIANCIOTTO** with counsel for years to defend him from the harassment complaints, and then shifted counsel to another firm to engage in a secret settlement between themselves after this complaint was filed, allegedly so Defendants can release each other from liability and regroup to file a baseless "libel" counterclaim they threatened against Plaintiff**.** Defendants' threats to sue are retaliatory, make it more intolerable for Plaintiff to work there and were made to reveal his identity in a counterclaim. He is forced to file this amended complaint identifying himself. Plaintiff remains working at DDB because he cannot find similar work, he needs a paycheck to survive and by law the victim does not have to leave, the abuser does.

JURISDICTION & VENUE

5. This Court has jurisdiction to 42 USCS §§12112,12117, which incorporates by reference §706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5.
6. All conditions precedent to jurisdiction under §706 of Title the VII, 42 USC §2000e-5(F)(3), have occurred or been complied with.

(a) A charge of employment discrimination on the basis of disability was filed with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the commission of the unlawful employment practice alleged herein.

(b) A Notification of Right to Sue was received from the EEOC on March 13, 2015.

(c) This complaint has been filed within 90 days of receipt of the EEOC's Notification of Right to Sue.

Also alleged are animus towards a gender stereotype in violation of Title VII of the Civil Rights Act of 1964, retaliation, and disability discrimination. Pursuant to 28 U.S.C. §1367(a), this Court also has jurisdiction over the pendent state law claims, including slander, because they are so related to the other claims as to form pendent jurisdiction of this Court as part of the same case and controversy under New York State Human Rights Law and the New York City Human Rights Law, N.Y.C. Admin. Code 8-502.

7. Plaintiff exhausted his administrative remedies by filing complaints with the EEOC, the New York State Division of Human Rights ("SDHR"), and the New York City Commission on Human Rights ("CCHR") regarding the misconduct alleged herein.
8. Prior to commencing this civil action, Plaintiff served a copy of this complaint on the New York City Commission on Human Rights and the New York City Corporation Counsel pursuant to N.Y.C. Admin. Code 8-502d.
9. This Court also has jurisdiction under 28 U.S. Code §1332 because there is complete diversity between the plaintiff and the defendants and the amount in question is over $75,000.00. Venue is proper in this Court as all of the acts occurred in New York County and the defendants are present there.

PARTIES

10. The Plaintiff **MATTHEW CHRISTIANSEN** is a resident and domicile of the State of New Jersey. At all times relevant hereto he was and still is an employee of Defendants **OMNICOM GROUP, INC.** and **DDB.**
11. At all times herein, Plaintiff, in the course of his employment with the Defendants**,** was an openly gay male who had HIV**,** and he kept that medical condition private. His HIV status puts him in a group protected against the acts described herein under the relevant New York State Human Rights Law and Federal and local New York City laws and ordinances.
12. The Defendant **OMNICOM GROUP, INC. ("Omnicom"),** upon information and belief, is the parent company of Defendant **DDB WORLDWIDE COMMUNICATIONS GROUP INC. ("DDB"),** and was and still is a corporation authorized to conduct business in the State of New York, maintaining a place of business at 437 Madison Avenue New York, NY 10022. The parent company, Defendant Omnicom, exercises extensive control over its subsidiary's, Defendant **DDB**, operations and personnel decisions. The parent and subsidiary companies are considered as a single employer accountable for the discriminatory and other misconduct alleged herein.
13. The Defendant **DDB,** upon information and belief, is a subsidiary of Defendant **Omnicom**, and was and still is a foreign corporation duly organized and existing under and by virtue of the laws of the State of California. It is authorized to conduct business in the State of New York, maintaining a place of business at 437 Madison Avenue New York, NY 10022.
14. Defendant **JOE CIANCIOTTO,** upon information and belief, is a resident and domicile of the State of New York, and at all times relevant hereto was and is employed by Defendant

DDB and **Omnicom** as an Executive Creative Director from 2011 and Chief Digital Officer from April, 2013 to date**.**

15. Defendant **PETER HEMPEL,** upon information and belief, is a resident and domicile of the State of New York, and at all times relevant hereto was and is employed by the Defendant **DDB** as the CEO until June 24, 2014.
16. Defendant **CHRIS BROWN,** upon information and belief, is a resident and domicile of the State of New York and is employed by the Defendant DDB as CEO since June 24, 2014.

FACTS

17. Defendant **DDB** is a worldwide marketing communications network owned by Defendant **OMNICOM**, which is a global marketing and corporate communications network **(collectively, the "Corporate Defendants"). OMNICOM** is one of the world's largest advertising holding companies with a market capital of $19.5 Billion Dollars[1]. DDB's
18. In or about April, 2011, Plaintiff **MATTHEW CHRISTIANSEN** commenced employment with the Corporate Defendants as an Associate Creative Director**.** His employment was based upon an April 5, 2011 job offer letter from **DDB** that stated Defendant **OMNICOM** was the parent of DDB that controlled **MATTHEW**'s health, retirement and other benefits.
19. At all times herein mentioned, Defendant **JOE CIANCIOTTO** was and is a supervisor with immediate authority over Plaintiff as an employee of the Corporate Defendants, and Defendants **PETER HEMPEL** and **CHRIS BROWN** supervised, managed and controlled Defendant **JOE CIANCIOTTO** and the terms and conditions of Plaintiff's employment.
20. Since the filing of the State and Federal EEOC complaints by Plaintiff commencing October, 2014, all of the Corporate and the individual Defendants named herein have been represented by counsel, have filed responses and have participated in a conciliatory mediation process by their request to Plaintiff. That conciliatory process included a mediation agreement, dated June 10, 2015, executed by Defendants' counsel on behalf of "Omnicom Group, Inc., DDB Worldwide Communications Group, Inc., Peter Hempel, Chris Brown"(sic) and by independent counsel for "Joe Cianciotto". All Defendants have and had notice of the charges and opportunity to, and did participate in, several conciliation proceedings.

[1] http://www.forbes.com/companies/omnicom-group/ (as of May, 2015)

A. Defendants' Employee Handbook by Omnicom

21. During all relevant times hereto, the Corporate Defendants maintained an "Employee Handbook" regarding their employment policies and practices (the "Handbook", this Complaint uses the 2014 Handbook incorporating its 2011 policies).
22. The entire Handbook relates to policies promulgated by and involving Defendant Omnicom For instance, at page 14 it states "As an employee of the Company, you have an obligation to conduct business according to the Omnicom Code of Business Conduct…". It also lists Omnicom e-mails and contact information for employee issues.
23. The Handbook at pages 8-10 defines "Sexual Harassment as "verbal, physical or psychological conduct that denigrates or shows hostility toward an individual because of his/her … sexual orientation, gender identity … disability or any other protected characteristic, and that creates an intimidating, hostile or offensive work environment, unreasonably interferes with an individual's work performance and/or adversely affects an individual's employment opportunities."
24. The Handbook describes sexual Harassment at pages 9 as:

- Unwelcome sexual advances - whether they involve physical touching or not
- Sexual epithets, slurs, jokes, written or oral references to sexual conduct, gossip regarding one's sex
- life; comments on an individual's body or comments about an individual's sexual activity,
- deficiencies or prowess
- Displaying sexually suggestive objects, pictures or cartoons
- Leering, whistling, brushing against the body, sexual gestures or suggestive or insulting comments
- Sending or circulating, whether in print or electronic form, literature or communications (articles,
- magazines or emails) of a sexual nature
- Inquiries into one's sexual experiences; and
- Discussion of one's sexual activities

25. The Handbook at pages 8-10 defines harassing conduct as "Epithets, Slurs, Negative stereotyping, Threatening, intimidating or hostile acts that relate to …sexual orientation or disability or any other protected category, Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of … sexual orientation, gender, identity … disability or any other protected characteristic and that is placed on walls, bulletin boards, the internet, websites, blogs, etc. or elsewhere on the employer's premises, or circulated in the workplace."
26. The Handbook at page 10 states that when "corrective action is called for, such action may include disciplinary measures up to and including "termination of the employment of the

offender." It further claims that employees must report harassment to Human Resources which will take action. And it mandates that supervisors report any known harassment.

27. The Handbook contains a "Blog/Social Media Policy at pages 11-13 that prohibits "inappropriate conduct" on personal social media such as Facebook.
28. Defendants blatantly ignore and continue to ignore their own corporate prohibitions, in addition to Federal, State and City laws, and allowed Defendant Cianciotto to engage in a discrimination campaign against the employees, including Plaintiff because of his disability, gender stereotype and sexual orientation. All of which created a hostile work environment.

B. Defendants Know that Defendant JOE CIANCIOTTO's History of Harassing Employees and Ignored it to Permit a Pervasive Environment of Harassment.

29. Defendants knew that Defendant **JOE CIANCIOTTO** violated the law as he harassed employees sexually and in other ways according to previous complaints against him.
30. That harassment includes the following employee complaints against **JOE**:

-In about 2012, Employee Shawna Laken filed a Federal EEOC complaint after Defendants refused to acknowledge her complaints about **JOE**'s sexual harassment at the workplace. Employee witnesses attested to the EEOC of the pervasive hostile environment at DDB and that their complaints to human resources and management were ignored for years. Many complaints at exit interviews when employees left DDB were made verbally and in writing on the exit interview questionnaire about **JOE**, but Defendant **Kempel** and the other Defendants ignored them.

-**JOE** routinely targeted an employee at group meetings. On a whiteboard in his office he would draw employees fornicating with offensive narratives about them, then call people in his office for a meeting to make everyone uncomfortable by observing their colleagues he drew.

- From 2012 to 2015, **JOE** victimized a gay male employee named Tabor Theriot who is disabled with cerebral palsey that gives him a slight limp. Joe told him to the effect that "You have this creepster look and I don't want anyone creeped out about you." Joe mocked Tabor as a gay man by stating to him many times "I feel like a gay man in a straight man's body", "Oh god, if only I was gay, I would sleep with you now" and "What are you doing tonight, call me some time." Tabor witnessed Joe harassing his colleague Megan Sheehan, and then after abusing her he asked her in front of everyone "Why are you always upset or always crying?" Tabor heard stories about Joe sexually harassing Shawna Laken until she left because **DDB** ignored her complaints. A former employee named Heidi Frank told Tabor that Joe threw a Pepsi can at her. Joe insisted that before

starting a meeting the employees guess a song to win a chance to sleep with his wife because he said he hated her. When Matthew guessed the song so the meeting could start, Joe said to everyone "How does it feel to be beat by the gay guy in the room?" Tabor witnessed Joe saying to Matthew in front of everyone that "Your muscles are big" and "Everybody look at Matt's muscles". Tabor confirms that Matthew would do anything to make Joe go away, and appease him to go away, which was a learned response everyone did knowing it was futile to complain about Joe. Tabor was present in May, 2013 when Joe accused Matthew of AIDs after Tabor coughed at a State Farm meeting. Joe went to Matthew and said he was sick and "It feels like I had AIDs, you know what that's like Matt?" Tabor feared that Joe just disclosed a private medical condition about Matthew that no one knew and feared he would next attack Tabor the same way for being gay. Tabor saw Matthew visibly upset from that, and subsequently told Tabor that Joe had no right to say that because many of his friends died from AIDs. Tabor complained to Human Resources about Joe. The response was more harassment by Joe bolting into a room where Tabor and his colleagues were in a meeting and Joe drew on the whiteboard Tabor on a female dog's body peeing with the caption "Mush". Tabor complained to Wendy Raye and Stacey Mellus, Director of Digital Operations. Ms. Mellus defended Joe as "Well, that's just how Joe operates." A subsequent meeting had Joe say in front of everyone that he was not a good leader, nothing more. No apology to anyone for his harassment. After that, Defendant Hempel approached Tabor and said "Are you going to be ok, we are going to get through this?" Joe was not terminated and continued his harassment, including threats at meetings that he had to leave early because he was being investigated since someone complained about him. Tabor confirms Joe created a Muscle Beach poster placing Matthew's face on a woman's body in a bikini on her back with her legs in the air to represent Matthew in the gay sexual receiving position as a submissive sissy. Tabor confirms Matthew could not attend many employment meetings because he was very disoriented by Joe's attacks against him as a gay man. It was understood that complaints about Joe would be ignored because Joe is friends with the Corporate Defendants. Tabor did not know he could complain past human resources to an agency such as the EEOC. Defendants also did not tell him he had that right when he complained to Human Resources. Tabor knows that employees were always promised bonuses but they never received when promised. Tabor made a detailed complaint to human resources and others at Defendants' office in the following e-mails:

From: Tabor Theriot <Tabor.Theriot@ny.ddb.com>
Date: July 16, 2013, 10:35:22 AM EDT
To: Peter Nish <Peter.Nish@ny.ddb.com>
Subject: FW: Follow Up

Per our discussion, Fyi below/attached. There have been more instances like below since my return from vacation. Happy to share those if necessary.

-----Original Message-----
From: Tabor Theriot
Sent: Friday, June 21, 2013 12:07 AM
To: Wendy Raye
Subject: Follow Up

Wendy -

See below/attached for the info per your request.

As discussed, the State Farm PM/Account team (myself, Veronica Parker, Kristi Diaz, Heidi Frank, Ayan Bhattacharyya, Bob Davies, Matthew Christiansen, Meredith Friedman) has a weekly Monday business mtg with Joe. On a weekly basis, Joe often makes explicit sexual comments geared toward both male and female team members and, on one occasion, Joe responded to a comment from a team member who suggested submitting a request through a PM (female), "Nobody is putting anything into that PM."

On a number of occasions, I've worn business/business casual attire to the office and Joe has made comments referring to himself as the gayest straight guy you know and how I look sexually appealing, and, if he were gay, he'd like to have gay intercourse with me. On one occasion, he commented on my snappy wardrobe and said "It's growing a little..."

Other examples are...

Mid - October 2012
- Joe referred to me as a "Creepster" creeping down the hallways, next day pulled me aside to apologize for the comment bc he felt bad for calling out my gate, (which is a result of my permanent disability) directly to me.
- Asked SF team to "Name That Tune". One person guessed incorrectly. The second person guessed correctly - Joe replied to the first person "How does it feel to be beaten out by the gay guy" (SF Team referenced above)

May 2013
- Joe attended a full SF team mtg and pointed out that I had a cough. I replied it was a sinus infection. Joe started talking about how he was ill all weekend with cold/cough/sinus aches ad body aches, then said, "It feels like I have AIDS...you know what that's like, Matt."

Tues 6/18
2:45 pm mtg for State Farm AOL Tablet Magazine Review
Attendees: Bob Davies, Matthew Christiansen, Amanda Millwee, Bobby Finger
Notes: Joe walked into the mtg and proceeded to sketch the attached photo of my face on a dog's body urinating like a "female" dog. The person pictured in the attached photo is Bobby Finger.
* The photo is still up on Bob and Matt's whiteboard on the 5th floor if you'd like to see it in person.

Please let me know if you need additional detail or want to set up follow up discussions, etc.

Tabor J. Theriot
Sr. Digital Project Manager

DDB Worldwide

Attached hereto as **Exhibit "A"** is Tabor's Certification, dated June 18, 2015, which is incorporated herein in its entirety.

-Ryan Murphy started working at DDB in 2005 and left in 2014 as an associate creative director. He is a gay male. He was called in by the EEOC regarding the Shawn Laken case. He understood that she complained about JOE and the hostile work environment and DDB tried to fire her in retaliation, so she left. He witnessed Joe harass Matthew since the first week he started there by approaching Ryan and repeatedly telling him that Matthew was effeminate and gay so he must have AIDs. He told Ryan many times that Matthew was the "bottom in sex. " JOE would ask Ryan about gay sex and tell him how handsome he was and that if Joe was gay he would have sex with him. Joe would discuss women's anatomy in a derogatory manner. Joe would photo shop employee's faces on posters to make fun of them. For instance, he took an Arab employee and put him on a flying carpet. Ryan saw the Muscle Beach poster with Matthew on his back in a bikini and understood that to depict Matthew as a gay sissy. Ryan said he complained about Joe to human resources that said they could not do anything. Even after complaints, Joe would continue to sexually harass employees and create a pervasive hostile work environment that made it difficult to work there. Ryan witnessed Matthew very uncomfortable at work and around Joe. Attached hereto as **Exhibit "A"** is Ryan Murphy's Certification, dated June 18, 2015, which is incorporated herein in its entirety.

-Andy Tarradath started working at DDB in 2010. He witnesses an entire summer where JOE would take employees' faces from Face Book and photo shop them on posters he would create to make fun of the employees. Most of his pictures he drew were of men fornicating, and they always involved a gay employee. He drew their penises and would post these on a whiteboard in his office to make employees uncomfortable at meetings he would hold there. Andy witnessed in a group meeting Joe tell Luke that he looked like an AIDs patient because Luke got a buzz haircut. In October, 2011, Andy returned to work after being sick for months and when someone told Joe Andy had pneumonia, Joe said "Well, be glad its not AIDs", meaning if you are a gay man then you will get AIDs which implies reckless behavior. Joe DDB would promote employees and give them more job responsibilities but would never pay the salary commensurate with the promotion. Joe would give perverted Christmas presents to employees. He gave Andy a leotard thong and another woman a President Obama statute with its penis out. Joe would comment at meetings that he did not want his advertisements to be "too black or too gay" when Andy was present because Andy is a gay black male. Employees never received the raise in salary they were promised or DDB would withhold it for months, in Andy's case, 6 months, and they would not give him the retroactive pay for his promotion work. JOE was the supervisor who could get their raises. Employees knew not to complain about JOE because they felt powerless knowing DDB ignored their complaints. Andy witnessed JOE abusing Shawna Laken by talking to her in an unprofessional and degrading manner. She finally went to the EEOC and in about August, 2014 Andy was requested to speak to them regarding the

hostile environment there. The employees did not know they had the option to go anywhere else but human resources and human resources never told them they could go to the EEOC when they complained about Joe. Andy witnessed that Matthew was tense and uncomfortable around JOE. Andy saw the Muscle Beach poster and confirms JOE put Matthew on his back in a bikini with his legs in the air to make him a gay sissy. Andy feared Joe would next accuse him of AIDs for being a gay man. Attached hereto as **Exhibit "A"** is Andy's Certification, dated June 18, 2015, which is incorporated herein in its entirety.

31. Defendants protect Defendant **JOE CIANCIOTTO's** unlawful conduct rather than protect the employees he victimizes because he handles high paying client accounts. Upon information and belief, one such account he is responsible for is the State Farm account estimated at $20 Million Dollars.
32. Defendants refuse to correct the situation by transferring Plaintiff away from Defendant Cianciotto or terminating Cianciotto as the offender. Instead, Defendants further victimize Plaintiff by defending **JOE** and asking **MATTHEW** to leave his job after he complained about the harassment.

C. The Harassment Commences With Explicit Pictures Depicting Matthew as a Shirtless Gay Man With an Erect Penis, Defecating and Urinating to Mock Gay Marriage Equality

33. Beginning about May, 2011, just one month after Plaintiff commenced employment under Defendant **JOE CIANCIOTTO's** supervision, **CIANCIOTTO** became openly resentful and hostile towards Plaintiff because of his sexual orientation.
34. This animosity was expressed by the Defendant **JOE CIANCIOTTO** harassing, intimidating and mistreating Plaintiff as a homosexual male by drawing offensive sketches and creating other pictures of Plaintiff in a sexually suggestive manner, and circulating them in Defendants' office and publishing them on Facebook for colleagues and others in Plaintiff's industry to view, as follows:
    A. In May 2011, a sketch of a shirtless, muscle bound Plaintiff prancing around and his creative partner saying "I fucking hate you all" (**Exhibit "B"**).
    B. In May 2011, a picture of a shirtless, muscle bound Plaintiff on the body of a four legged animal with a tail and penis, urinating and defecating (**Exh. B)**.
    C. In late June, 2011, a picture of his creative partner pumping a muscle bound Plaintiff with a manual air pump, giving Plaintiff an erect penis, while he states "I'm so pumped for marriage equality" and his creative partner states "I fucking hate being pumped", meaning Bob is not homosexual and homosexual's do not get "pumped" to get an erect penis (**Exh. B**). This picture was published and circulated at the same time that New York marriage equality for same-sex couples was publicly at issue.

D. In July 2011, a "Muscle Beach Party" poster had Plaintiff's head attached to a female body, on his back in a bikini with his legs up in the air in the gay sexual receiving position displaying him as a sissy bottom (**Exh. B).** This was also posted to Defendant CIANCIOTTO's Face Book page for years unbeknownst to Plaintiff until he discovered it in September, 2014 with his name tagged on the picture for thousands of people to see.

D. The Discrimination Includes Withholding Plaintiff's Monetary Raises and Refusing to Announce his Promotion

35. In October, 2012, Plaintiff was promoted from associate creative director to creative director.

36. Defendants refused to pay Plaintiff the corresponding salary raise of $25,000 in 2012 despite his promotion, withheld it from him for a year and Defendants refused to publicly announce that Plaintiff was promoted when everyone else received promotion announcements.

E. Defendant JOE CIANCIOTTO Publicly Accuses Plaintiff of Having AIDS

37. In May, 2013, there was a Monday morning status meeting where some 20 people or more attended for Defendant DDB's State Farm account, including the account team, the Director of Operations, the creative team, project managers, Plaintiff and his creative partner Bob, and Defendant **JOE CIANCIOTTO**, who was then the Chief Digital Officer.

38. At that meeting, Tabor Theriot, a project manager, was sitting behind Plaintiff. When he coughed, Defendant **JOE CIANCIOTTO** commented that it sounded like a very bad cough. and walked towards Plaintiff as he informed everybody that he was also ill all weekend with a cold, cough, sinus and body aches. Then he sat beside Plaintiff, looked at him and said, **"It feels like I have AIDS. Sorry, you know what that's like, Matt**."

39. Some of the persons present at that meeting were:

Veronica Parker-Hahn	Account Supervisor
Heidi Frank	Account Exec
Kristi Diaz	Account Exec
Stacey Mellus	Director, Operations at DDB
Tabor Theriot	Project Manager
Meredeth Friedman	Project Manager
Rachael Newell	Art Director
Megan Mitchell	Art Director
Melissa McCarthy	Copywriter
Brandon Hampton	Copywriter
Bobby Finger	Copywriter
Amanda Millwee	Art Director
Patrick Cannata	Assoc Creative Dir.
Bob Davies	Creative Director

Joe Cianciotto	Chief Digital Officer

40. Plaintiff was ridiculed his entire life for being a gay male and now he was experiencing it all over again at Defendants' offices while the Corporate Defendants' management, including **Hempel** and **Brown**, ignored Defendant **JOE CIANCIOTTO's** harassment. That further paralyzed Plaintiff with fear by having to relive the entire shameful experience now being ridiculed by adults in senior positions in the corporate workplace, and by the very person, Defendant **JOE CIANCIOTTO** who held his career and job at stake by having the ability to promote, demote or fire **MATTHEW CHRISTIANSEN**.
41. Plaintiff was paralyzed with fear because he actually was HIV positive and he kept that fact private. He feared that human resources disclosed his private medical facts to Defendant **JOE CIANCIOTTO**.
42. Upon information and belief, Defendants obtained knowledge of Plaintiff's HIV status, although they perceived it as AIDs, from their internal human resources records showing his high monthly use of insurance for high cost prescriptions to treat his disability. That in turn raised their insurance premiums. From that information, Defendants deduced that because Plaintiff is a gay man using high insurance benefits monthly then he had AIDs.
43. Upon information and belief, that private medical information was disclosed to Defendant **JOE CIANCIOTTO** who used it to publicly accuse and shame Plaintiff of having AIDs.

F. The Harassment Continues

44. After relating Mr. Tabor's cough to Plaintiff having AIDS, Defendant **JOE CIANCIOTTO** then drew the graphic picture of a female dog urinating with Mr. Tabor's head on its body to reinforce his position that anyone with a disease will be mocked at the office (**Exhibit "C"**).
45. In September, 2014, Plaintiff discovered a "Muscle Beach Party" poster depicting him in the gay receiving position was published on Defendant **JOE CIANCIOTTO's** Facebook page.
46. Some of Plaintiff's professional colleagues on that Facebook posting who saw that picture are as follows:

Wendy Raye	The Director of Human Resources
Barry Burdiak	Exec Creative Director on my account
John Hayes	Exec Creative Director
Patti Dirker Morris	The lead marketing client at State Farm.
Tammy Miller White	The primary digital client at State Farm.
Jeff Greeneberg	Client at State Farm
Tim Thomas	Client at State Farm.
Gustavo de Mello	Director of Strategy on Plaintiff's account

Kim Brun	Account Supervisor on Plaintiff's account
R Lee Newell (Rachel)	Art Director
Megan Mitchell	Art Director
Mario Azzi	Art Director
Hawley Tremblay	Executive Assistant
Heather Gorman	Group Account Director
Cassandra Anderson	Creative Director
Kimb Luisi	Art Director
Step Schultz	Copywriter
Veronica Parker-Hahn	Account Supervisor
Erika Amundson	Social Media Strategist
Kelli Lane	Account Supervisor
Staci Alfano	Director of New Business
Klane Harding	Copywriter
Trac Nguyen	Producer
Lindsay Marano	Account Executive
Heidi Frank	Account Executive
Tyler Kirsch	Copywriter
Lauren Brooks	Information Architect
Ryan Murphy	Art Director
Sarah Ramey	Producer
Luke Carmody	Associate Creative Director
Tont Bartolucci	Associate Creative Director
Marilyn Kam	Associate Creative Director
Diego Rionda	Art Director
Marcia Murry	Group Creative Director

H. Defendants Never Correct the Abuse and Instead Minimize It. Defendant JOE CIANCIOTTO Admits to Plaintiff that He Has a Disorder of Fearing Communicable Diseases.

47. On or about June 26, 2013, Plaintiff met with Wendy Raye, former Director of Human Resources of Defendant DDB. He complained that Defendant **JOE CIANCIOTTO's** drawings and public accusations that Plaintiff had AIDS were harassing and intimidating.

48. After that meeting, instead of correcting the hostile environment and ceasing the abusive and intimidating conduct, Defendant **JOE CIANCIOTTO** approached Plaintiff and interrogated him to discover whether he was the one who complained to human resources about **JOE.**

49. Plaintiff confirmed that he felt harassed by Defendant's conduct, to which Defendant **JOE CIANCIOTTO** justified his harassment and abuse towards Plaintiff by stating that he has a severe phobia of communicable diseases such as AIDS and herpes, and he has severe Attention Deficit Disorder. He said it is so bad that his doctor advises him to carry around cards in his pocket that read "AIDS" and "herpes" so he can pull them out and read them when he starts to obsess about contracting these diseases. He offered to play for Plaintiff a

voicemail from his doctor where he revealed the recent results of an HIV test to show Plaintiff how fearful he was of having AIDS.

50. Plaintiff was rendered even more helpless now knowing that Defendants prepared an outrageous justification for Defendant **JOE CIANCIOTTO**'s misconduct that because he was sick himself with a fear of communicable diseases then he can harass the employees, including Plaintiff as a gay man whom **JOE** resented as people with communicable diseases.

I. Defendants Refuse to Retract the AIDS Accusation Against Plaintiff and Further Harass Him by Refusing to Remove a Facebook Post Prohibited by the Employee Handbook Despite Plaintiff's Protestations to Remove it. Then Defendants Deny to the EEOC that they had no Knowledge of Plaintiff's Letters Objecting to the Post to Conceal Their Misconduct.

51. After being interrogated by Defendant **JOE CIANCIOTTO**, on or about July 26, 2013, a meeting was called with the CEO Defendant **PETER HEMPEL**, the Director of Human Resources, and the Chief Creative Officer present. Defendant **JOE CIANCIOTTO** gave a broad apology to the effect of hoping that no one was offended by anything he did, but he never addressed nor retracted his accusation that Plaintiff had AIDS, nor did he address his years of publishing lewd pictures depicting Plaintiff as a gay man.
52. Defendant **PETER HEMPEL** was present at that meeting. He gave a speech that **DDB** does not tolerate inappropriate behavior, but he refused to acknowledge or retract the harassment and AIDS accusation directed to Plaintiff.
53. After that meeting. Defendant JOE CIANCIOTTO
54. On October 21, 2014 and November 10, 2014, Plaintiff's counsel sent letters to Defendants **Joe Brown** and **Joe Cianciotto** requesting that the "Muscle Beach Poster" be removed from Facebook because Plaintiff does not consent to his image being posted in that manner and that posting violated Defendants' DDB's Employee Handbook terms.
55. In their staunch position to discriminate against and harass Plaintiff and to further shame and humiliate him, Defendants refused to remove that post. Plaintiff's counsel's letters make it clear to Defendants that the Facebook posting was distressing and explained that the harassment he endured by Defendant **JOE CIANCIOTTO** made the posting more distressing. Defendants chose to maintain the hostile work environment against Plaintiff by ignoring even

his counsel's not one, but TWO letters, insisted on keeping that improper posting public and would not remove it until Plaintiff complained to the EEOC.

56. More disturbing and evident of the bizarre and callous environment Defendants support at the workplace, when Plaintiff complained to the EEOC, Defendants denied to the EEOC that they received any letters to remove the offensive poster. After that false denial, the posting was removed as late as January 27, 2015 for the public to see as long as possible despite the distress it caused Plaintiff.
57. That poster was clearly objectionable and harassing considering the course of conduct directed toward Plaintiff and it violated the terms of employment. If not objectionable, Defendants would not direct **CIANCIOTTO** to remove it; a direction made only after Plaintiff was forced to complain to the EEOC that is investigating another harassment complaint against **CIANCIOTTO**.

J. Defendants Retaliate Against Plaintiff and Request He Leave his Employment Solely Because He Filed EEOC Complaints.

58. Plaintiff's worst fears came true as on or about March 21, 2015, without any basis or legitimate reason regarding Plaintiff's work performance, Defendants' counsel contacted Plaintiff's counsel and requested that Plaintiff accept a 3 month severance to leave his employment.
59. There is absolutely no legitimate reason for Defendants to request that Plaintiff leave his employment.
60. Defendants request that he leave his employment rather than correct the situation and terminate the real offender, Defendant **JOE CIANCIOTTO**, was meant to notify Plaintiff that he is not wanted there because he is a gay man whom they perceive has AIDs and they prefer to tolerate the unlawful discrimination and harassment by their employee Defendant **JOE CIANCIOTTO** who has a history of harassment at the workplace rather than have a gay man with AIDs work there.
61. Plaintiff's above stated fears regarding retaliation if he complained about Joe's behavior were justified because when he finally complained to the Corporate Defendants after the May, 2013 incident then they concocted a justification that Joe's own sickness and fear of AIDS led him to victimize the Plaintiff and now they request that Plaintiff leave his job.
62. His fears were also justified because Defendants lied about receiving notice to remove Joe's offensive poster on Facebook to show Plaintiff his feelings and position were inconsequential to them. They only removed it after Plaintiff's EEOC complaint raised that issue again

because Defendants could not deny receiving a complaint that came directly from the EEOC, a federal government agency.

63. His fears were also justified because after the EEOC complaint, on or about March 21, 2015, Defendants' counsel contacted Plaintiff's counsel and requested that Plaintiff leave his employment solely because of his complaints and not based on his work performance.

64. Remarkably, Defendants refuse to remove the actual culprit Defendant **JOE CIANCIOTTO** who created and engaged in the discrimination campaign against Plaintiff.

65. After filing this complaint, Defendants circulated a company-wide e-mail stating the following to make it appear that this complaint is false when it is not and falsely stating that Plaintiff never made a previous complaint when he did:

From: Mark O'Brien <Mark.OBrien@ddb.com>
Date: June 4, 2015 at 2:29:51 PM EDT
To: Corporate <DDBCorporate@ny.ddb.com>, DDB NY <DDBNYEveryone@ny.ddb.com>
Cc: Christie Giera <christie.giera@ddb.com>
Subject: Re: Press Reports

Media outlets are reporting about a recent harassment lawsuit filed against DDB New York. The complainant, a current employee, alleges behavior that violated our policies. The actions alleged in the lawsuit by the complainant took place years ago and the employee never filed a complaint with the Agency. We believe the lawsuit is without merit and we intend to defend ourselves vigorously. We are committed to a work environment free of harassment of any type and we encourage anyone who feels they have been subjected to behavior that violates our harassment policy to immediately report it to your supervisor or to human resources so that we may take appropriate action.

As this is pending litigation, we are limited in the amount of information that we can share at this time. Please refer any client or press inquiries to our Director of Public Relations, Christie Giera at (212) 415-2186 or to her email address above.

Mark O'Brien
President and CEO – North America
DDB Worldwide
437 Madison Ave
New York, NY 10022
Mark.OBrien@ddb.com
O: 212.415.2166

K. The Discrimination Continued up to January 27, 2015 When Defendants Refused to Remove the Prohibited Poster. All Statutes of Limitations Are Tolled Considering the Discrimination and Harassment Caused Plaintiff Severe Emotional and Physical Distress.

66. The discrimination and harassment was continued, up to and including Defendants' refusal to remove the offensive Facebook poster until January, 2015 and including their request that he leave their employment in March, 2015.

67. Equitable tolling of all causes of action is warranted because Plaintiff suffered a combination of physical and mental conditions directly related to the harassment and discrimination.
68. Plaintiff grew up in the mid-west and was repeatedly gay-bashed there. That along with his later discovery that he had HIV caused him to fear every day his possible death from that disease. That led to his diagnoses of post-traumatic stress disorder ("PTSD").
69. His HIV status is an infirmity in itself that disables him physically by attacking his body and rendering him sick and disabled and mentally by living in fear of dying any day from it. His PTSD compounds those infirmities.
70. Plaintiff moved to New York City to benefit from its tolerable atmosphere towards the gay community and persons with HIV/AIDs, but was setback physically and mentally when Defendants abused him in his workplace in a City he came to escape the same abuse.
71. Defendants abuse led Plaintiff to become despondent, hopeless and numb by going to work every day and having to make believe the abuse was not happening in a corporate environment run by such brand names as OMNICOM and DDB where one would never expect such rampant harassment and hostility.
72. Plaintiff retreated during the abuse while he suffered physically and mentally from it, including, but not limited to, increased anxiety, depression, sleeplessness, inability to eat, headaches and social anxiety.
73. Plaintiff's mental and physical condition, which is not limited to depression and anxiety from the harassment and discrimination, is now exacerbated by any mention of his gay status and HIV or AIDs.
74. Confirming the above statements in paragraphs 65-72, on March 30, 2015, Plaintiff was evaluated by Dr. Stephen Reich, a licensed psychologist who diagnosed Plaintiff with chronic PTSD, anxiety and depression, including intense fear, helplessness and horror that traumatized Plaintiff, with exacerbated trauma because of Defendants misconduct alleged herein directed at his sexuality and disability and perceived disability, among everything else alleged above.
75. Dr. Reich concluded that as a direct result of the "gay taunts and drawings" that Defendants subjected him to from 2013 to 2015 that he was emotionally and physically unable to complain as Defendants harassment caused Plaintiff to retreat and avoid. Plaintiff instead resorted to medication, including Xanax, and drinking, to numb the pain during the harassment.
76. As a result of his physical and mental infirmities, Plaintiff was incapable of filing any complaints against Defendants.

77. All unlawful misconduct as alleged in the following causes of action was on a continuing basis up until March 21, 2015 when Defendants requested that Plaintiff leave his employment in retaliation for his EEOC complaints regarding their misconduct.
78. Because of Defendants' misconduct as alleged herein, Plaintiff entered therapy.

FIRST CAUSE OF ACTION: **Federal Disability HIV/AIDS Perceived**

79. All of the foregoing paragraphs are incorporated here as if set forth here in their entirety.
80. At all relevant times, Plaintiff has tested positive for Human Immunodeficiency Virus (HIV) antibodies and is an individual with a "disability" as that term is defined in Section 3(2) of the ADA, 42 U.S.C. §12102(2).
81. Defendants Omnicom and DDB (collectively, the "Corporate Defendants") are New York domestic and/or foreign corporations, with offices and principal places of business in New York.
82. The Corporate Defendants are a "person" within the meaning of §101(7) of the ADA, 42 U.S.C. §12111(7), and §701(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(a).
83. The Corporate Defendants are engaged in an "industry affecting commerce" within the meaning of Section 101(7) of the ADA, 42 U.S.C. §12111(7), and Section 701(h) of the Civil Rights Act of 1964, 42 U.S.C. §2000e(h).
84. Each of the Corporate Defendants employ 15 or more employees and is an "employer" within the meaning of Section 101(5)(A) of the ADA, 42 U.S.C. §12111(5)(A).
85. Plaintiff is a "qualified individual with a disability" within the meaning of Section 101(8) of the ADA, 42 U.S.C. §12111(8), in that Plaintiff is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position of creative director with DDB and Omnicom.
86. By refusing to provide Plaintiff his bonus and raise timely and in full, by permitting Plaintiff to be harassed at the workplace by their supervisor Defendant Cianciotto's pictures and accusation of AIDs and by requesting Plaintiff to leave his employment without any basis regarding his work performance after he complained to the EEOC and indicated that he actually had HIV, and making work there intolerable, among all of the other above allegations herein, including failing to remove Plaintiff from the offender Defendant Cianciotto or

transferring Cianciotto away from the Plaintiff, the Corporate Defendants constructively discharged Plaintiff.

87. The Corporate Defendants terminated Plaintiff because of his HIV status, particularly after that was revealed and asked him to leave so Defendant Cianciotto could stay as he feared HIV as a communicable disease.
88. The Corporate Defendants termination of Plaintiff's employment on the basis of his HIV status is a discriminatory action prohibited by Section 102(a) of the ADA, 42 U.S.C. §12112(a).
89. The Corporate Defendants discriminatory conduct as to Plaintiff was taken with malice with reckless indifference to the federally protected rights of Plaintiff.
90. The Corporate Defendants termination of Plaintiff's employment on the basis of his HIV infection has caused, continues to cause, and will cause Plaintiff to suffer substantial damages for future pecuniary losses, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.
91. Pursuant to Section 107(a) of the ADA, which incorporates by reference Section 706 of the Civil Rights Act of 1964, and 42 U.S.C. §2000e-5, Plaintiff is entitled to injunctive relief enjoining Defendants from engaging in any further prohibited discrimination against Plaintiff on the basis of his HIV status.
92. Pursuant to 42 U.S.C §1981a, Plaintiff is entitled to recover compensatory damages, including future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses.
93. Pursuant to 42 U.S.C §1981a, Plaintiff also is entitled to recover punitive damages from Defendants because they acted with malice or with reckless indifference to the federally protected rights of Plaintiff.
94. Pursuant to Section 505 of the ADA, 42 U.S.C. §12205, Plaintiff is entitled to attorney's fees, including litigation expenses and the costs of this action.

SECOND CAUSE OF ACTION: Title VII Stereotypical Animus

95. All of the foregoing paragraphs are incorporated here as if set forth here in their entirety.
96. Plaintiff suffered harassment, abuse, discrimination, was forced to work in a hostile work environment and faced adverse employment actions as a result of Defendant Cianciotto's animus toward Plaintiff's exhibition of behavior considered to be stereotypically inappropriate for men.

97. All other Defendants named herein supported, condoned and allowed the animus to continue by ignoring the disgusting, bizarre and outrageous drawings Defendant Cianciotto published in the office, and all Defendants refused a retraction regarding the AIDs statement directed to Plaintiff, but instead asked Plaintiff to leave his job.

THIRD CAUSE OF ACTION: Federal Constructive Discharge

98. All of the foregoing paragraphs are incorporated here as if set forth here in their entirety.

99. The Corporate Defendants and Defendants Hempel and Brown deliberately created intolerable work conditions for Plaintiff by knowing the Defendant Cianciotto bullied Plaintiff with his bizarre sketches directed to Plaintiff's sexuality which had no rational relation to Defendant Cianciotto's nor anyone's work there and his AIDs accusation against Plaintiff, and then all Defendants insist on forcing Plaintiff to work with Defendant Cianciotto as his supervisor knowing Cianciotto admits he has a sickness of fearing communicable diseases which correspondingly he resents gay men.

100. That resentment is clear as Defendant Cianciotto's harassment directed towards Plaintiff has an evil and malicious purpose as evidenced by his disturbing pictures, Facebook posting, accusing Plaintiff of AIDs and everything else as alleged herein where Defendants choose to ignore Defendant Cianciotto's evil motives directed at a gay man.

101. In efforts to cover-up his resentment towards homosexuals, Defendant Cianciotto claims that he supports the gay community or he gave Plaintiff positive work evaluations fail as his feigned gay support is contradicted by his overt actions of humiliating, harassing and bullying Plaintiff as a gay man, accusing him of AIDs, refusing to get him his monetary raise and refusing to dignify Plaintiff as a human being by ignoring his request to remove the Facebook post that had not business being published publicly.

102. Defendants' contempt and scorn towards Plaintiff as a gay man deserving of no rights is obvious when they even lied to the EEOC that they never received notice of Plaintiff's requests to remove the offensive Facebook post, then they demand he resign after he complains to the EEOC.

103. Defendants discriminated against and constructively discharged Plaintiff because of his opposition to the disability discrimination in violation of 42 U.S.C. §12203 and under 42 U.S.C. §2000e-3 by requesting he resign without any basis, and only after he reported the Defendants' misconduct to the EEOC.

104. Defendants unreasonably failed to take corrective action to either terminate Defendant Cianciotto or remove him as Plaintiff's supervisor, and instead Defendants made the conditions more intolerable and force Plaintiff to work with this admittedly sick and

unprofessional man. When Plaintiff did not resign, Defendants contacted his counsel to request that he resign.

FOURTH CAUSE OF ACTION: NY CLS Exec §290 et. seq. Sexual Orientation Discrimination

105. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

106. Throughout the course of Plaintiff's employment with Defendants, Plaintiff has endured outrageous and severe harassment on account of his sexual orientation.

107. The harassment and abuse plaintiff was forced to endure, on account of his sexual orientation, was in willful violation of the New York Human Rights Law, N.Y. Exec. Law 290, *et seq*.

FIFTH CAUSE OF ACTION: NY CLS Exec §296 Disability Discrimination

108. All of the foregoing paragraphs are incorporated here as if set forth in their entirety

109. The harassment and abuse Plaintiff was forced to endure by Defendant Cianciotto perceiving Plaintiff to have AIDs because he was an effeminate gay man is detailed hereinabove, to the point Defendants request Plaintiff to leave on account of his HIV disability while they retain **JOE**, and they perceive him with AIDS constitutes an unlawful discriminatory practice in willful violation of the New York Human Rights Law, N.Y. Exec. Law 290, *et seq.*

SIXTH CAUSE OF ACTION: NYC Human Rights Law Harassment

110. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

111. Plaintiff was forced to work in a hostile and abusive work environment.

112. Plaintiff was continually, routinely and frequently subjected to offensive, vulgar and crude comments and pictures depicting his sexual orientation by Defendants.

113. The offensive, vulgar and crude comments and pictures were directed at Plaintiff because of his sexual orientation and disability.

114. The outrageous harassment was both unwelcome and pervasive.

115. The Corporate Defendants knew or should have known about the harassment yet failed to take any action designed to stop it.

116. The harassment and abuse Plaintiff was forced to endure, on account of his sexual orientation and disability was in willful violation of the New York City Human Rights Law, N.Y.C. Admin. Code 8-101,8-107*et seq*.

SEVENTH CAUSE OF ACTION: Aiding & Abetting

117. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

118. The Defendants by engaging in the conduct described above, incited, compelled, aided and abetted in the violation of the New York Human Rights Law, N.Y. Exec. Law 290, et seq. and New York City Human Rights Law, N.Y.C. Admin. Code 8-101, et seq.

EIGHTH CAUSE OF ACTION: Slander PER SE

119. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

120. At the May, 2013 business meeting with some 20 colleagues and other professionals in Plaintiff's industry present, Defendant Cianciotto falsely stated and imputed that Plaintiff had AIDs when he does not. Plaintiff also discovered in Mat, 2015 for the first time that Defendant Cianciotto routinely accused him of having AIDs to another employee named Ryan.

121. In addition to these false statements of accusing him of a communicable disease he does not have, it was meant to and clearly did expose Plaintiff to hatred, contempt, ridicule, and obloquy because it falsely accuses and depicts Plaintiff as having a disease most people fear.

122. The statement was so understood by those who heard it that Plaintiff has a communicable disease of AIDs.

123. The defamatory statement was published with reckless disregard for the truth of the matter, and Defendants knew at the time the statement was made that it was false and injurious to Plaintiff as they had no proof he had AIDs.

124. The defamatory statement was intended by Defendants, and each of them, to directly injure the Plaintiff with respect to his reputation, character and business.

125. Defendants, and each of them, jointly or separately, without due regard for the truth, falsity, or malicious nature of the statement, refused to publicly retract it.

126. As a consequence of the foregoing misconduct of the Defendants, Plaintiff has been injured in his good name and reputation as a creative director in the general industry, he has suffered great pain and mental anguish and has been held up to ridicule and contempt by coworkers, acquaintances and the public.

127. By engaging in the misconduct alleged above, the Defendants each engaged in "despicable" conduct with the willful and conscious disregard for the rights of plaintiff. Defendants were aware of the probable dangerous consequences of their misconduct and willfully and deliberately failed to avoid those consequences, including subjecting Plaintiff to cruel and

unjust hardship, in conscious disregard of plaintiff's rights. Thus, an award of exemplary and punitive damages is justified.

128. That as a consequence of the foregoing misconduct of Defendants, the career and future employability of Plaintiff has been damaged in an amount exceeding $ 20,000,000.00.

NINTH CAUSE OF ACTION: Emotional Distress

129. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

130. Defendants openly and flagrantly engaged in outrageous offensive conduct and verbal abuse directed at Plaintiff.

131. The Corporate Defendants and Defendants Brown and Hempel were aware of, tolerated and condoned the offensive conduct that Defendant Cianciotto subjected Plaintiff to and disregarded the substantial possibility that the offensive, outrageous conduct and language would cause Plaintiff severe emotional distress.

132. Defendants disregarded the substantial probability that their conduct, comments and language would cause Plaintiff severe emotional distress.

133. Defendants' conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.

134. Defendants' conduct was more than mere insults, indignities and annoyances but was so shocking and outrageous as to exceed all reasonable bounds of decency of permitting personal attacks upon Plaintiff by the offensive pictures to the point that Defendant Joe Cianciotto publicly accused Plaintiff of having AIDs because he is a gay man while the Corporate Defendants shielded Defendant Cianciotto's misconduct with the excuse that he himself is a sick man who fears communicable diseases, then continued their indifference to Plaintiff by lying that they never received his notices to remove the Facebook posting and then asked him to resign after he complained to the EEOC.

135. As a result of Defendants' conduct, Plaintiff has suffered, among other consequences, conscious pain and suffering, physical injury, great mental distress, great emotional distress, depression, sleeplessness, shock, fright, humiliation and anxiety.

TENTH CAUSE OF ACTION: Negligent Supervision/Retention of an Unfit Employee

74. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

75. The Corporate Defendants had a duty to provide Plaintiff with a safe workplace, free of discrimination and harassment.

76. The Corporate Defendants had both actual and imputed knowledge of the Defendant Joe Cianciotto's harassing, discriminatory acts and statements towards another co-worker prior to his unlawful conduct directed to Plaintiff and had actual and imputed knowledge of his similar unlawful conduct while he engaged in the harassing, discriminatory acts and statements towards Plaintiff, and the undue risk of harm to which they were exposing Plaintiff.

77. Despite the foregoing, the Corporate Defendants failed to take adequate steps to determine the fitness of Defendant Joe Cianciotto, failed to adequately supervise him and deliberately retained him.

78. As a proximate result of Defendants' duty to supervise, Plaintiff has been injured and has incurred damages thereby.

79. The actions of the Corporate Defendants were wanton and reckless, with malice and without reason or basis and were arbitrary, capricious, and unfounded.

ELVENTH CAUSE OF ACTION: BREACH OF CONTRACT

80. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

81. In April of 2011, Plaintiff was hired at DDB as an Associate Creative Director for $180,000 with the verbal promise to be reviewed for a promotion to Creative Director in 18 months.

82. In October 2012, Plaintiff was promoted to Creative Director ("CD") with more responsibilities and verball promised by Defendants that came with a raise in salary.

83. Over the course of the next year, Defendants omitted the raise from each pay period check. Plaintiff would follow-up with with Defendants CINACIOOTO and HEMPEL for information regarding his promised raise, but Defendants avoided responding.

84. The following are some communications Plaintiff made to enforce the promise of his raise:

March 28, 2013 EMAILS: Plaintiff's partner sent CIANCIOTTO a calculation of lost wages from the day of review to the first day of 2013, explaining the verbal promise of salary increase in October, 2012, and Plaintiff expecting a raise of some $25,000.00 based on that date.

June 14, 2013 EMAIL: Plaintiff asks CIANCIOTTO about the raise.

June 26, 2013 EMAIL: Human Resources' Wendy Raye informs that Defendant HEMPEL was working on Plaintiff's raise as : "Matt—I spoke with Peter Hempel and he wanted me to assure you that he is working on your and Bob Davies salary increases.
This is not an easy task but you guys are his priority. W-"

August 26, 2013 EMAIL: Wendy Raye apologizes that the raise is taking so long and confirms that Defendant HEMPEL was submitting a request.

September 30th, 2013 EMAIL: Plaintiff emails Defendant HEMPEL for an update.

85. Defendants breached their promise to pay Plaintiff his salary increase for an entire year from October, 2012 since he was promoted to October, 2013.

86. On October 31, 2013, Plaintiff received a check with a pay increase of $25,000.00 which was withheld for an entire year before when he was actually promoted and promised that raise.

87. Plaintiff is damaged from Defendants' breach of their promise by working in a promoted position with more responsibility on the promise of being paid more but never paid such for an entire year while he worked in the promoted position based upon that promise of a raise. Plaintiff is due all retroactive pay of the $25,000 from October, 2012 to the date he is paid.

TWELFTH CAUSE OF ACTION: VIOLATIONS OF LABOR LAW §§190-198

88. All of the foregoing paragraphs are incorporated here as if set forth in their entirety.

89. Plaintiff brings this cause of action under §190 et seq. He was promised by Defendants a pay increase for his promotion but never was paid the increase upon being promoted. Plaintiff is an employee and the pay increase is wages as both are defined in §190.

82. All attorney fees and costs and penalties under §190 et seq. are demanded in this action.

DAMAGES AS TO ALL CLAIMS

As a result of all of the Defendants' conduct alleged herein Plaintiff has suffered, among other consequences, conscious pain and suffering, physical injury, great mental distress, great emotional distress, depression, sleeplessness, shock, fright, humiliation and anxiety and his career and future employability is damaged by his colleagues and other professionals believing, questioning or suspecting that Plaintiff has AIDs wherein Plaintiff will never know if he is denied future employment because of that fear of third parties. He is effectively prevented from leaving his present employment because he may never get hired again, and is maliciously forced by Defendants to continue to work under Defendant Joe Cianciotto in their hopes that Plaintiff will leave. By engaging in the misconduct alleged above, Defendants each engaged in "despicable" conduct with the willful and conscious disregard for the rights of plaintiff. Defendants were aware of the probable dangerous consequences of their misconduct and willfully and deliberately failed to avoid those consequences, including subjecting plaintiff to cruel and unjust hardship, in conscious disregard of plaintiff's rights. Thus, an award of exemplary and punitive damages is justified.

WHEREFORE, on all of the above counts, Plaintiff demands the following relief, including the relief as permitted under any statutory count alleged above:

That Defendants are permanently and forever enjoined from any further prohibited discrimination against Plaintiff,

That Plaintiff is awarded compensatory, actual, and special damages in an amount to be determined at trial in this matter and as requested in the above causes of action, including $20 Million Dollars with respect to the Libel,

That Plaintiff is awarded punitive damages in an amount to be determined at trial in this matter,

That Plaintiff is awarded his attorney fees, including litigation expenses and costs pursuant to Section 505 of the ADA, 42 U.S.C. §12205 and all other counts alleged herein above that permit fees, costs and expenses, and

Such other and further relief as the Court deems just and proper.

Dated: June 22, 2015

Yours, etc
LAW OFFICES OF SUSAN CHANA LASK

_____
BY: Susan Chana Lask, Esq.
Attorney for Plaintiff
244 Fifth Avenue, Suite 2369
New York, NY 10001
(917) 300-1958

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN,

Plaintiff,

-against-

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

Defendants.

15 Civ. 3440 (KPF)

DECLARATION OF ANDY TARRADATH

ANDY TARRADATH certifies as follows:

1. I am over the age of 21, live in New York and am a gay African American male. I worked at DDB from June, 2010 to July, 2014. I witnessed Joe Cianciotto's harassment at the workplace.
2. Joe's drawing board in his office always had people fornicating, and showed men with genitalia having gay sex. Joe drew men fornicating always involving a gay employee with another employee. There was one picture with a red marker of stick figures with penises that he narrated the stories using employee names. These drawings were posted so whenever there were meetings in his office the employees had to uncomfortably see these pictures.
3. In the Summer of 2011 during a creative meeting in Joe's office, I was present along with an employee named Luke and about 2-3 other people. Joe looked at Luke and said what happened to your hair? Luke said he got a haircut which was a buzz cut closely shaven to his head. Joe said "You look like an Aids patient." Everyone was shocked and Joe just continued the meeting. Joe would give perverted Christmas gifts. He gave me a leotard thong. He gave another woman a President Obama statute with his penis out. I know that a female employee named Karina complained about Joe. I witnessed him talking to Shawna Laken in a very unprofessional and degrading manner. She eventually left the job and the EEOC contacted me regarding her complaint about the hostile conditions there.
4. The company's response about complaints was that's just Joe and he's harmless. Joe's behavior affected my work, cased me anxiety and depression and I wanted to get away from that environment as a gay man who feared being harassed by him. DDB did nothing despite our complaints and in fact promoted Joe twice, so we felt powerless. I never knew there was any other place to complain such as the EEOC.

5. Joe harassed me on many occasions as a black gay male. Once in his office with a group of people he was reviewing stock imagery, then directed his racial and sexual orientation comment at me as "I don't want this to be too black, too gay, you know what I mean."

6. I worked with Matthew on a State Farm project. In about 2012, I was sitting in Matthew's office when Joe came by to discuss work. I saw Matthew was uncomfortable in the presence of Joe. He was fidgety and tense when Joe was near him. I know Matthew as a gregarious guy and I could tell he was uncomfortable and tense near Joe.

7. I saw the Muscle Beach poster. It was deliberate to put Matthew on his back with his legs on the air to harass him for being gay. It connotes Matthew as a gay sissy bottom.

9. I am aware that employees were routinely promised raises when they were promoted but never received the raise as promised. They promoted me, gave me more job responsibilities and work but never paid me six months of my. I finally quit working there because I could no longer tolerate the sexual and racist abusive environment there and their not paying us promised wages.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 18, 2015

ANDY TARRADATH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN, **15 Civ. 3440 (KPF)**

Plaintiff,

-against-

DECLARATION OF RYAN MURPHY

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

Defendants.

RYAN MURPHY certifies as follows:

1. I am over the age of 21, live in Brooklyn, New York and am a gay male. I worked at DDB from February 2005 to March of 2014. Joe Cianciotto was my direct supervisor for about the last 6 years of that time.

2. I witnessed Joe create a hostile workplace on a number of levels, including sexuality, gender, gender expression, race, national origin, religion and disability. I complained to Wendy Raye in Human Resources over the last few months of my employment. I did not complain before then out of fear of repercussions to my job because Joe was my supervisor. Joe often talked about his power to fire people who he thought had crossed him.

3. The EEOC contacted me in about July, 2014 to discuss a female employee's complaints about the hostile workplace she experienced at DDB. She was pursuing a wrongful termination case. She had complained about Joe's sexual comments at an offsite shoot and was fired soon after. I witness countless incidents where Joe had made sexually inappropriate comments directed towards female coworkers. Many female colleagues complained to me about it, but expressed hopelessness about complaining.

4. Because I am gay, I received a daily interrogation from Joe about gay sex and how it worked. To target me as a gay man, Joe would say in front of other employees that I took children to my cabin in Pennsylvania and had sex with them and killed them.

5. Joe talked about sex inappropriately all the time. He would ask Ryan about gay sex. If there were 10 people in his office, he would ask the men "You do anal" or ask the women "You give blow jobs, right."

6. When Matthew Christiansen I witnessed Joe repeatedly asking about his sexuality and accusing him of having AIDs and speculating about his HIV status. When Matt first started working at DDB Joe approached me and repeatedly asked me if he [Matt] had HIV. He asked "Yes, you're gay, but Matt is super gay, he sleeps with everyone. He must have HIV, right?" Joe told me that Matthew was a stereotypical gay who talked and dressed gay. Joe would also refer to Matt as a "poof", which is a British word for a gay man, or a fairy. Joe repeated asked if Matthew was a "bottom", or submissive during sex, and frequently asked me to identify bottoms

among his staff. He would also talk about women's anatomy in a derogatory manner at work. I did not engage in the conversation, so Joe made fun of me at work for being uptight.

7. I never told Matthew about Joe accusing him of having AIDs and being HIV positive.

8. Joe would create posters to humiliate employees by photoshopping their faces from Facebook into pictures that mocked their sexuality, gender, religion or race. For instance, an Arab employee was placed on a flying carpet. I absolutely believe the Muscle Beach poster Joe created deliberately depicted Matthew as a gay sissy with his legs in the air. It is consistent with a theme of Joe humiliating gay men, particularly Matthew as a bottom with AIDs.

9. In the time I worked with Joe, he had a lot of power to promote employees, assign projects and control the quality of their jobs. He often would keep people late for no apparent reason when he knew they had plans. He spoke often about having the authority to fire employees at will, so we feared complaining. It was known that DDB would not do anything regarding Joe's harassment. There was another senior executive named Eric Silver who also sexually harassed women in front of many employees for a long time, so it was a systemic problem at DDB. I believe Joe was protected by senior leadership.

10. After I complained and then left the job, DDB did not offer to give me an exit interview.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 22, 2015

RYAN MURPHY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN, **15 Civ. 3440 (KPF)**

Plaintiff,

-against-

DECLARATION OF TABOR THERIOT

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

Defendants.

TABOR THERIOT certifies as follows:

1. I am over the age of 21, live in New York and am a gay male. I worked at DDB from October, 2012 to March of 2015. Joe Cianciotto managed me during that time. Matthew was my creative director on the State Farm account.

2. Joe was obscene, a bully and unprofessional. In a group meeting, a woman asked to make her requests for a project to another female employee, and Joe said "No one is putting anything into that project manager" with a hand gesture to make it clear that he meant putting it into her body, her physical self. I heard stories about Shawna Laken leaving because Joe sexually harassed her. I witnessed Joe harassing other females until they would cry, then he would humiliate them for crying. One female co-worker told me he threw a Pepsi can at her once. I witnessed Joe running down the hallways screaming for no reason except to make a scene to let us know he was around. I was born with cerebral palsy that caused a permanent limp. Joe made fun of my disability by calling me a "creepster lurking around the creative department" and that I had a "creepster look" and he did not want me to creep out the other employees.

3. Joe would constantly tell me, "I feel like a gay man in a straight man's body" and "Oh god, if only I was gay, I would sleep with you now", or other times, "What are you doing tonight, call me sometime." On a number of occasions, Joe said to me that he is the "gayest straight guy you know," that I look sexually appealing to him, and, if he were gay, he would have gay intercourse with me. On one occasion, he commented on my snappy wardrobe and said "It's growing a little...", meaning his penis. His behavior was pervasive and offensive, but we all operated under an unspoken fear because we knew corporate would not do anything to Joe. Employees were very distressed under this environment.

4. I witnessed Joe bully Matthew. Matthew appeared to remain calm and professional, but it was obvious that Matthew was deeply disturbed by Joe's harassment. Joe would embarrass Matthew in front of colleagues by saying "Everyone, look at Matt's muscles" and tell Matthew how big his muscles were. It was obvious that Matthew never felt comfortable being around Joe. Joe often talked about his personal life to the employees and about how much he disliked his wife and was sure she wanted to divorce him. He said he stayed in the office to avoid his family, then he would abuse everyone there because of his personal issues. During my first week at work, Joe turned played a song on his computer during a meeting with many of my colleagues and insisted that before he starts the meeting that we guess the song to win a prize to sleep with his wife because he said he hates her. To get the meeting started, Matthew guessed the song and Joe mocked him to everyone as "How does it feel to be beat by the gay guy?"

5. At a State Farm May, 2013 meeting with some twenty people present, I coughed, then Joe said he had a nagging cough too, and he looked directly at Matthew and said "It feels like I have AIDs. You know what that's like, Matt." I saw Matthew turn red and he was visibly upset. I thought that Joe had just divulged Matthew's private medical information and I was concerned that Joe would next accuse me of AIDs since I was also gay. I was shocked that Joe accused someone of a health risk; whether it was true or not, it affirmed to me that Joe had a complete disregard for any employee's life. Subsequently, Matthew told me that he was very upset because he had many friends who lived with and died of AIDs, and he was horrified that Joe would mock gay men as having AIDs.

6. I saw pictures of Matthew that Joe would draw to mock him as a gay man. I thought it was a compete disregard for humanity. In no uncertain terms, I believe the Muscle Beach poster Joe created with Matthew in a bikini on his back with his legs in the air was meant to depict him as a gay submissive sissy. There were many meetings that Matthew did not attend because he was so disoriented by Joe's attacks on his sexuality and being accused of having AIDs.

7. Joe barged into a meeting I was attending at DDB in June 2013 with about four co-workers and he drew a picture of me on a female dog's body urinating with a co-employee on my back, captioned "Mush". I was very upset by that action.

8. People who worked directly with Joe for a decade at DDB always defended him when people would complain saying, "Well, that's just how Joe operates so we have to do what we have to do", meaning put up with it. In June of 2013, I complained to Wendy Raye of Human Resources about Joe's harassment. She told me "I am sorry you are going through this" and she told me while they investigate my complaint I would have to remain working with Joe and she asked "are

you comfortable with that?", but provided no alternative for me. At some point thereafter, a meeting was held where Joe briefly said he may not have been handling himself in the most professional way, but no apology for his abuse was made. Peter Hempel approached me and said "Are you going to be OK? We are going to get through this." I believed I was to get fired for my complaints because DDB was not firing Joe for his egregious behavior, which was frightening and pathological, yet DDB would not do anything when we complained.

9. Joe continued his abuse after that. He would make lewd comments to the employees. He was so disgusting, he would talk about his "shitting" in hotels and breaking their toilets. At meetings he would intimidate us by saying he had to leave early because he was being pulled into executive level meetings and he was in trouble or that he was being closely monitored.

10. Although I complained to DDB, no one there ever told me I could complain to a third party such as the EEOC. I never knew that was an option and if I knew I would have complained there too. Because the entire digital creative department specific to State Farm funneled through Joe, we feared him as he held our careers in his hands, so we had to accept his bullying until we could find other jobs because DDB made it clear they would not do anything to him.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 18, 2015

TABOR THERIOT


FB
TRAFFIC
I fucking
hate you all....
Bob doesn't
mean it...really...

EXHIBIT A

EXHIBIT B


Im so pumped for marriage equality
I fucking hate being pumped...

EXHIBIT B

WEDNESDAY
JULY 20TH

5TH FLOOR
OPEN SPACE

6 P.M. til'

SHARIF COMES BACK.

FREE BEER

MUSCLE BEACH PARTY

I hate you all.

A43

EXHIBIT B

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN, *Plaintiff*, -against- OMNICOM GROUP, INC., DDB WORLDWIDE COMMUNICATIONS GROUP, INC., JOE CIANCIOTTO, PETER HEMPEL and CHRIS BROWN, *Defendants.*	15 Civ. 3440 (KPF) **NOTICE OF MOTION**

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law, dated July 31, 2015, and Declaration of Daniel A. Feinstein, dated July 31, 2015, and exhibits attached thereto, Defendants Omnicom Group Inc., DDB Worldwide Communications Group Inc., Peter Hempel and Chris Brown (collectively, "Defendants"), by their attorneys, Davis & Gilbert LLP, will move this Court, before the Honorable Katherine Polk Failla, at the United States District Court, Southern District of New York, 40 Foley Square, Courtroom 618, New York, New York 10007, at a date and time to be determined by the Court, for an Order pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) granting Defendants' Motion to Dismiss Plaintiff's First Amended Complaint in its entirety, with prejudice, and granting such other and further relief as may be just and proper.

Dated: New York, New York
July 31, 2015

Respectfully submitted,

DAVIS & GILBERT LLP

By: /s/ Howard J. Rubin
Howard J. Rubin
Daniel A. Feinstein
Shira Franco

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Attorneys for Defendants Omnicom Group Inc., DDB Worldwide Communications Group Inc., Peter Hempel and Chris Brown

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN,

Plaintiff,

-against-

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

Defendants.

15 Civ. 3440 (KPF)

DECLARATION OF DANIEL A. FEINSTEIN

DANIEL A. FEINSTEIN, hereby declares under penalty of perjury:

1. I am a member of the law firm of Davis & Gilbert LLP, attorneys for defendants Omnicom Group Inc., DDB Worldwide Communications Group Inc. ("DDB"), Peter Hempel and Chris Brown (collectively, "Defendants"). I submit this Declaration in support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (the "Complaint").

2. Attached as Exhibit A is a true and accurate copy of a press release dated June 24, 2014 reflecting that Chris Brown was named President and CEO of DDB New York and would transition into the role in September 2014.

3. Attached as Exhibit B is a true and accurate copy of an e-mail sent by Joe Cianciotto on July 18, 2011 to numerous DDB employees, including Plaintiff, attaching the "Muscle Beach Party" parody poster referenced in the Complaint.

4. Attached as Exhibit C is a true and accurate copy of a Notice of Charge of Discrimination from the Equal Employment Opportunity Commission ("EEOC") enclosing Plaintiff's EEOC Charge.

5. Attached as Exhibit D is a true and accurate copy of a letter from the New York State Division of Human Rights ("NYSDHR"), dated January 13, 2015, enclosing Plaintiff's NYSDHR Complaint.

6. Attached as Exhibit E is a true and accurate copy of a letter from the NYSDHR, dated March 10, 2015, stating that the NYSDHR is "contemplating dismissing" the NYSDHR Complaint because Plaintiff submitted a request for an "administrative convenience dismissal" on March 9, 2015.

7. Attached as Exhibit F is a true and accurate copy of my letter to the NYSDHR, dated March 24, 2015, containing Defendants' objections to Plaintiff's request for an administrative convenience dismissal of the NYSDHR Complaint.

8. Attached as Exhibit G is a true and accurate copy of an Annulment Determination issued by the NYSDHR, dated July 21, 2015, dismissing the NYSDHR Complaint and annulling Plaintiff's election of remedies.

9. Pursuant to the Court's instruction at the Pre-Motion Conference on July 21, 2015 that we engage in meaningful discussion with Plaintiff's counsel concerning the claims in the Complaint, my colleague Judith Kong sent an e-mail message to Plaintiff's counsel on July 22, 2015. In this e-mail message, we requested that Plaintiff's counsel advise us by July 27, 2015 at 12:00 pm if any claims are being withdrawn by Plaintiff, so that Defendants do not unduly burden the Court by addressing claims in their motion to dismiss that will be withdrawn.

10. Plaintiff's counsel responded by asking Ms. Kong if she is admitted to practice in the Southern District of New York. A true and accurate copy of the e-mail

correspondence between Ms. Kong and Plaintiff's counsel is attached as Exhibit H.

11. After my partner Howard Rubin (counsel of record for Defendants in this case), informed Plaintiff's counsel that Ms. Kong sent the e-mail message under his supervision, Plaintiff's counsel advised us that she will not be responding to communications from Ms. Kong and would be removing Ms. Kong from her e-mail list. A true and accurate copy of the e-mail correspondence between Mr. Rubin and Plaintiff's counsel is attached as Exhibit I.

12. Following the correspondence on July 22, 2015, we have not received any communication from Plaintiff's counsel indicating that Plaintiff is withdrawing any of the claims in the Complaint.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 31, 2015
New York, New York

DANIEL A. FEINSTEIN

DDB®

Press Release

DDB New York Names Chris Brown President and CEO

New Group Structure Created; Peter Hempel Elevated to Chairman and CEO, DDB Group New York

Date: June 24, 2014

Location: New York, NY

DDB Worldwide, part of Omnicom Group, today announced Chris Brown has been named President and Chief Executive Officer of DDB New York. He currently serves as Chief Executive Officer of DDB Group Australia, and will transition into the new role in September 2014.

Additionally, a new group structure in New York has been created and will encompass: DDB New York, Uproar@DDB, DDB Remedy, Tribal Worldwide New York, Roberts & Langer DDB and Spike DDB. Peter Hempel, current Chief Executive Officer of DDB New York, will assume the new position of Chairman and CEO, DDB Group New York, overseeing the entire group to ensure the agencies are collaborating and exploring joint opportunities.

Brown will report jointly to Hempel and Mark O'Brien, President of DDB North America. Hempel will continue to report to O'Brien.

O'Brien said, "We need to make sure we are looking across all of our resources in New York to bring even more talent into the organization and provide our clients with complete marketing solutions."

Brown brings to his new position 17 years of experience with DDB Worldwide, both in the UK and Australia. He was promoted to Chief Executive Officer of DDB Group Australia in 2012, after serving as Group Managing Director of DDB Sydney from 2007 to 2012.

"Chris has a proven track record of success and growth and I'm thrilled for him to join us in North America," added O'Brien. "Over the years, I've watched him become a strong, effective leader who is admired by the industry, his clients and his staff. He truly embodies what makes DDB special in that he is both talented and nice."

437 Madison Avenue New York NY 10022 T 212 415 2000 F 212 415 3414 info@ny.ddb.com www.ddb.com

DDB®

Under his leadership, Brown created a nationally integrated offering centered around creativity, data and technology, effectively merging DDB Sydney and DDB Melbourne to form DDB Group Australia. The Group went on to win accolades from the IAB, including: Agency of the Year, PR Agency of the Year, Experiential Agency of the Year, Ad of the Year, Campaign of the Year and Best in Show. In 2012 the agency won the prestigious Spikes Agency of the Year honor for Asia Pacific.

"This new structure allows us to get more from all the talent that we have within the various groups that are part of DDB in New York," said Hempel. "After 11 years at DDB New York, I am looking forward to working with Chris to see what kinds of synergies can be created across our operations."

"The opportunity to run DDB's New York office with the ambition to be one of the best agencies in the world is an opportunity I couldn't refuse," said Brown. "These are exciting times and I am passionate about continually looking at how we evolve as a business to ensure we are delivering outstanding creative solutions for our clients. The talent, culture and clients at DDB New York inspire me, and I look forward to working closely with the team."

Brown has worked with a range of leading brands in his career, including Sony, Telstra, Tourism Australia, Unilever, J&J and Volkswagen. He was promoted to the Board of Management and Managing Partner of DDB Sydney at the age of 30, and Group Managing Director of DDB Sydney at the age of 33, with overall responsibility for DDB, RAPP, Mango, DDB Remedy and Tribal Worldwide. Brown has produced award-winning campaigns that have been recognized at the top shows around the world such as the Cannes Lions Festival of Creativity, One Show, D&AD, IPA and AFA Effectiveness awards. He was featured in *AdNews* 40 under 40 in 2008 and *Campaign Asia-Pacific's* 40 under 40 in 2013. Brown currently sits on the National Communications Council Board in Australia and is one of the participants in the "Male Champions of Change" initiative, committed to promoting gender equality within the industry.

"With this new leadership structure in New York, we are getting the best of all worlds," said O'Brien. "Chris's ability to grow and transform the business and Peter's management skills ensure that DDB Group New York will be a force to be reckoned with."

About DDB

DDB Worldwide (www.ddb.com) is one of the world's largest and most awarded advertising and marketing networks. In 2012 DDB was named Advertising Network of the Year by *Campaign,* as well as Agency of the Year and Digital Agency of the Year by *Strategy* magazine. At the prestigious 2013 Cannes International Festival of Creativity, DDB won 93 Lions, the most ever for the network. In addition, *The Gunn Report* has listed DDB as one of the Top 3 Global Networks for the last 12 years. The agency's clients include Volkswagen, McDonald's, Unilever, Mars, Johnson & Johnson, and Exxon Mobil, among others.

Founded in 1949, DDB is part of the Omnicom Group (NYSE) and consists of more than 200 offices in over 90 countries with its flagship office in New York, NY.

DDB®

About Omnicom Group Inc.
Omnicom Group Inc. (NYSE-OMC) is a leading global marketing and corporate communications company. Omnicom's branded networks and numerous specialty firms provide advertising, strategic media planning and buying, digital and interactive marketing, direct and promotional marketing, public relations and other specialty communications services to over 5,000 clients in more than 100 countries.

For further information on Omnicom and its brands, please visit www.omnicomgroup.com

Contact:

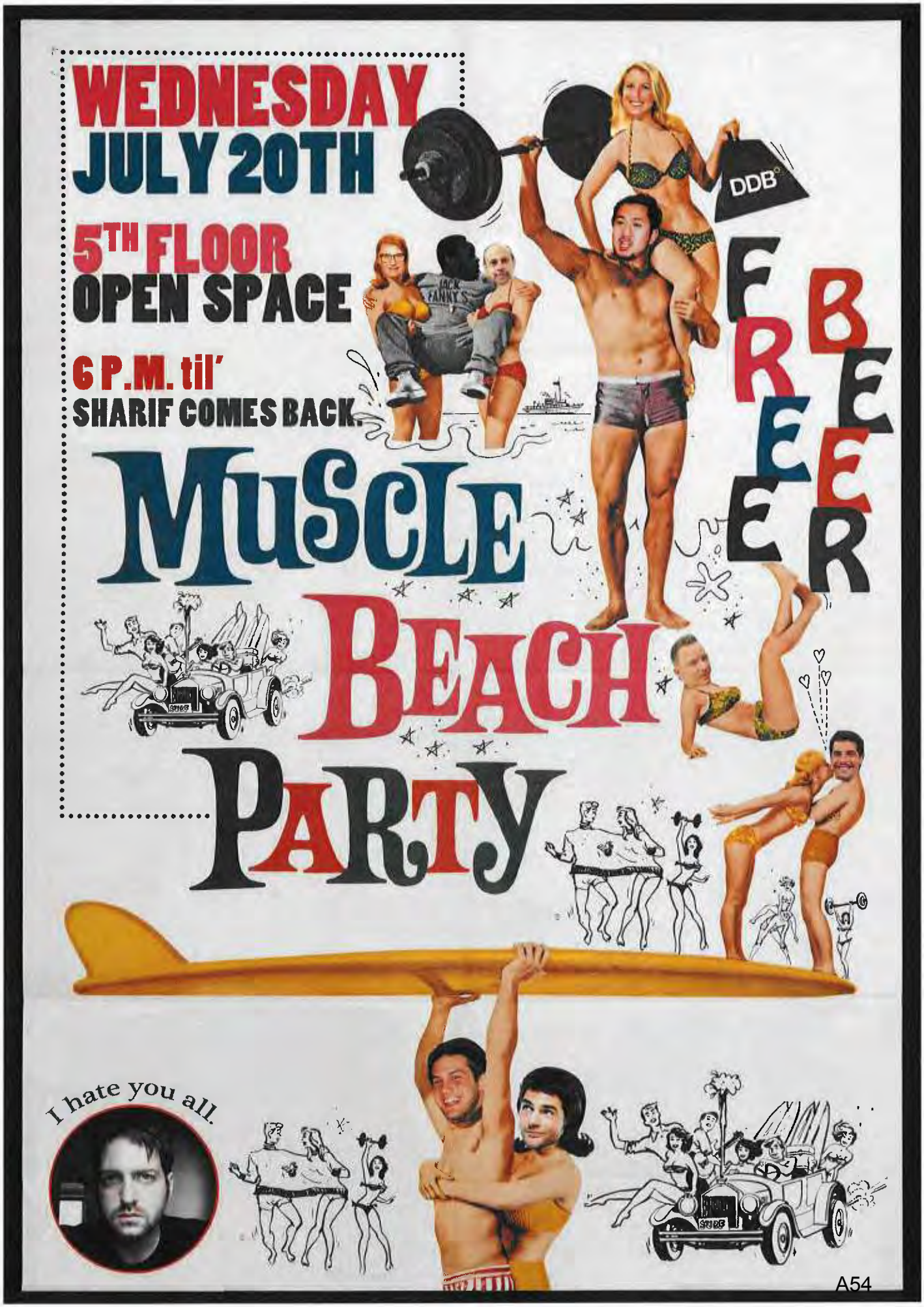
Christie Giera
Director of Corporate Communications and North American Public Relations, DDB Worldwide
Email: Christie.giera@ddb.com
Office: 212-415-2186

EXHIBIT B

From: Joseph Cianciotto
Sent: Monday, July 18, 2011 4:13 PM
To: Joseph Cianciotto; Colin Lapin; Phil MacLaren; Mario Azzi; Amy Rakowski; Stacey Averbuch; Todd Perelmuter; Ryan Murphy; Klane Harding; Johnny Galbraith; Dan Young; kimberly Luisi; Adil Masood; Bruce Frisch; Haley Fulop; Cassandra Anderson; Aron Fried; Carlos Wigle; Katie Riddle; Leah Renbaum; Paul Sundue; Heather Gorman; Stacey Mellus; Ellen Kim; Audrey Aloi; Carly Ferguson; Amanda Schneider; Ehud Paz; Andy Tarradath; Alise Bellina; Emily Muntz; Charlotte Housel; James Genero; Kelvin Lin; Pami Borek; Trac Nguyen; Whitney Knecht; Peter Nish; Rhonda Williams; Tanya Jennings; Andrew Miller; Eduardo Petersen; Markus Winkler; Kim Bharrat; Douglas Reed; Ralph Navarro; Lauren Roberts; R Abramski; Jodee Garber; Kelly Gehrlein; Ashley Dolliver; Keren Marshal; Lori Cereda; Jillian Booty; Brian Quirke; Janet Guillet; Sara Cox; Larry Sillen; Peggy Squazzo; Jessica Haselkorn; Mike Sullivan; Richard Sharp; Pat Carella; Lori Cereda; Jennifer Gilbert; Jennifer Fox; Marilyn Kam; Tanya Jennings; Janet Guillet; Sharif El Rabiey; Chris Bonanni; Deborah Broda; Meredith Moffat; Kristin Volz; Leo Mamorsky; Zulay Tomasiello; Mary Bakarich; Rustom Dastoor; Mike Medeiros; Rebecca Rehder; Lori Eisenberg; Heather Olson; Jodee Garber; Lauren Roberts; Elizabeth Shirley; Ryan Hoagland; Caroline Bruemmer; Kelly Gorsky; Tracy Power; Jennifer Levin; Robin Marra-Placke; George Wright; Colleen Easley; Veronica Parker; Alexis Dorenter; Heidi Frank; Monica McGhie; Andrew Miller; Christine Cianni; Jennifer Pearse-Haran; Teri Altman; Brett Fisher; Ed Zazzera; Ralph Navarro; Steven Banchik; Peter Hempel; Matt Eastwood; Matthew Christiansen; Bob Davies; Jeff Scardino; Laura Perrotta; Jesse Gottlieb; Sam Shepherd; Carina Alves; Lauren Brooks; Thomas Ahn; Quaison Carter; Diego Rionda; Katie Riddle; Ahyoung Park; Rachel Newell; Brian Lio; Mark Ledermann; Lori Cereda; Menno Kluin; Melanie Manghinang; Deborah Chusid; Ron Thomas; Kimberly Rosenberg; Catherine East; James Wasenius; James McLaine; Chelsey Waldman; Chris Duggan; Scott Cooney
Cc: Joseph Cianciotto
Subject: You're Invited: Wednesday July 20th: Free Drinks Open Space

If you see someone not on this email...please invite them, I am crap with these email lists...

[cid:3393850386_276014541]


WEDNESDAY
JULY 20TH
5TH FLOOR
OPEN SPACE
6 P.M. til'
SHARIF COMES BACK.
MUSCLE
BEACH
PARTY
FREE BEER
DDB
I hate you all.

EEOC FORM 131 (11/09)

U.S. Equal Employment Opportunity Commission

DDB
Attn: Director of Human Resources
437 Madison Avenue
New York, NY 10022

PERSON FILING CHARGE

Matthew F. Christiansen

THIS PERSON *(check one or both)*

[X] Claims To Be Aggrieved

[ ] Is Filing on Behalf of Other(s)

EEOC CHARGE NO.

520-2015-00415

NOTICE OF CHARGE OF DISCRIMINATION

(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

[X] Title VII of the Civil Rights Act (Title VII) [ ] The Equal Pay Act (EPA) [ ] The Americans with Disabilities Act (ADA)

[ ] The Age Discrimination In Employment Act (ADEA) [ ] The Genetic Information Nondiscrimination Act (GINA)

The boxes checked below apply to our handling of this charge:

1. [ ] No action is required by you at this time.
2. [ ] Please call the EEOC Representative listed below concerning the further handling of this charge.
3. [X] Please provide by **08-DEC-14** a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
4. [ ] Please respond fully by to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
5. [ ] EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by to

If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Jose T. Vega,
Investigator
EEOC Representative

Telephone (212) 336-3682

New York District Office
33 Whitehall Street
5th Floor
New York, NY 10004
Fax: (212) 336-3625

Enclosure(s): [X] Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

[ ] Race [ ] Color [ ] Sex [ ] Religion [ ] National Origin [ ] Age [ ] Disability [ ] Retaliation [ ] Genetic Information [ ] Other

See enclosed copy of charge of discrimination.

A perfected charge (EEOC Form 5) will be mailed to you once it has been received from the Charging Party.

Date	Name / Title of Authorized Official	Signature
November 19, 2014	Kevin J. Berry, District Director	Kevin J. Berry

520-2015-00415

Law Offices of
SUSAN CHANA LASK

244 Fifth Avenue, Suite 2369
New York, N.Y. 10001

(917) 300-1958

www.appellate-brief.com

October 29, 2014

U.S. Equal Employment
Opportunity Commission
33 Whitehall Street, 5th Floor
New York, NY 10004

Attn: Emily Haimowitz

Re: DDB/Matt Christiansen

Dear Ms. Haimowitz:

I represent Matthew Francis Christiansen. Mr. Christiansen incorporates this Complaint as his own by his signature at the end of this letter. His contact information is 888 8th Avenue Apt 9J New York, NY 10019, 347-924-3327. His employer subject to this complaint is DDB, 437 Madison Avenue, New York, NY 10022, 212.415.2000. DDB is a creative agency with about 300 employees at its NYC office.

Mr. Christiansen works at DDB in the creative department. He is a gay man, known to be gay at DDB. His supervisor is Joe Cianciotto. In about June, 2011, Joe started drawing offensive sketches of Matt and circulating them throughout the office. He circulated a picture in May 2011 with Matt and his creative partner, Bob, saying "I fucking hate you all," and Matt commenting therein. Another picture in May 2011 has Matt talking to Bob while he is urinating and defecating. Another picture in late June 2011 circulated around the time when New York allowed for marriage equality for same-sex couples. That picture has Bob pumping Matt with a manual air pump, giving Matt an erect penis. In July 2011, Mr. Cianiotto took the liberty of drawing a "Muscle Beach Party" poster that featured Matt's head attached to a female body in a bikin, where he is on his back with his legs up in the air. Considering the prior gay slanders against Matt in Mr. Cianiotto's pictures, this one undoubtedly shows him in the gay receiving position.

In May, 2013, there was a Monday morning status meeting where some 20 people or more attended for the State Farm account, including the account team, the Director of Operations, the creative team, project managers, Matt and his creative partner, and Mr. Cianiotto, who was now Chief Digital Officer at DDB. Tabor Theriot, a project manager, was sitting behind Matt. When Mr. Theriot coughed, Joe commented that it sounded like a very bad cough. He proceeded to get up from his desk and as he approached Matt he informed everybody that he

was also ill all weekend with a cold, cough, sinus and body aches. Then he sat beside Matt, looked at him and said, "It feels like I have AIDS. Sorry, you know what that's like, Matt." Matt went into fear and shock of now being exposed as a gay man with Aids. After that meeting, Joe continued to draw more graphic pictures of Matt in compromising positions, including a dog urinating with Mr. Tabor's head on it.

Matt complained to human resources about the AIDS statement and the compromising pictures of him. On July 26, 2013, Joe gave a public apology but nothing directed to Matt. In fact, Joe is still his supervisor. Joe admitted later that he has a phobia of communicable diseases. Matt was never transferred away from Joe despite his phobia. For the past year he has been left in the position of being supervised by Joe who relates AIDS to Matt.

Considering the severity of DDB's supervisor accusing Matt of having AIDS just because he is gay, it would be reasonable that the lewd drawings of Matt would cease; however, it did not. Recently, on September 27, 2014 Matt discovered the Joe's "Muscle Beach" poster on Joe's Facebook page showing Matt in the gay receiving position. It appears to have been up there since 2011.

On October 21, 2014, I requested by letter that DDB direct their manager Joe to remove the offensive posting pursuant to their Employee Handbook that social media should not be unprofessional (pp. 11-12). For an employer to ridicule Matt for years as a gay man in pictures distributed throughout the office, accuse him of having AIDS in public and post him on Facebook in the gay receiving position on a woman's body in a bikini is severe; yet DDB has not responded to remove the picture from Facebook.

If you can determine rapidly that you are not proceeding against DDB, then kindly issue a right to sue letter as soon as possible, **before** 90 days. Please e-mail any communications directly to me at susanlesq@verizon.net or fax to (917) 210-4269 as I do not use hard mail.

Your prompt attention to this matter is appreciated in advance

Very truly yours,
LAW OFFICES OF SUSAN CHANA LASK

Susan Chana Lask

SUSAN CHANA LASK

Dated: October 29, 2014
I accept the above complaint as filed

Matthew Francis Christiansen

NEW YORK STATE
DIVISION OF HUMAN RIGHTS
ADAM CLAYTON POWELL STATE OFFICE BUILDING
163 WEST 125TH STREET, ROOM 401
NEW YORK, NEW YORK 10027

(212) 961-8650
Fax: (212) 961-4425
www.dhr.ny.gov

ANDREW M. CUOMO
GOVERNOR

HELEN DIANE FOSTER
COMMISSIONER

January 13, 2015

DDB Needham Worldwide
437 Madison Ave.
New York, NY 10022

Re: Matthew Francis Christiansen v. DDB Needham Worldwide
Case No. 10173016

Enclosed is a copy of a verified complaint filed with the Division of Human Rights against you. This complaint, which alleges an unlawful discriminatory practice in violation of the New York State Human Rights Law, is being served upon you pursuant to Section 297.2 of the Human Rights Law (N.Y. Exec. Law, art. 15).

Please submit a response **in duplicate** to each and every allegation in the complaint, complete the enclosed Respondent Information Sheet, and return the response and Information Sheet to the Division, at the address above, **within fifteen (15) calendar days from the date of this letter.** The Division will not extend the time for this response, unless good cause is shown in a written application, submitted at least five (5) calendar days prior to the time the response is due. **Failure to respond could result in an adverse finding against you, which would be shared with, among others, the Secretary of State and the applicable State licensing agencies that govern your business.**

The Human Rights Law prohibits retaliation against any person because he or she has opposed discriminatory practices, filed a discrimination complaint, or participated in any proceeding before the Division. Human Rights Law § 296.7.

Anyone who willfully resists, prevents, impedes or interferes with the Division's investigation shall be guilty of a misdemeanor punishable by imprisonment, by fine, or by both. Human Rights Law § 299.

As the enclosed information sheet provides, the Division will conduct a prompt investigation, based on the complaint and your response, which may include interviews with your representatives and the collection of documents. The Division expects your full cooperation in this investigation. After the investigation is completed, the Division will make a determination as to whether there is probable cause to believe that unlawful discrimination has occurred. You will be notified of this determination.

Protection of personal privacy: In most cases, you will be expected to submit documents in support of your response to the complaint. The Division observes a personal privacy protection policy consistent with Human Rights Law § 297.8 which governs what information the Division may disclose, and the N.Y. Public Officer's Law § 89 and § 96-a, which prohibit disclosure of social security numbers and limit further disclosure of certain information subject to personal privacy protection. Please redact or remove personal information from any documentation submitted to the Division, unless and until the Division specifically requests any personal information needed for the investigation. The following information should be redacted: the first five digits of social security numbers; dates of birth; home addresses and home telephone numbers; any other information of a personal nature. The following documentation should not be submitted unless specifically requested by the Division: medical records; credit histories; resumes and employment histories. The Division may return your documents if they contain personal information that was not specifically requested by the Division. If you believe that inclusion of any such personal information is necessary to your response, please contact me to discuss before submitting such information.

If you have any questions about the process generally, or how to submit your response, please call me at (212) 961-8650.

Very truly yours,

David E. Powell

David E. Powell
Regional Director

Enclosures:
Verified Complaint
Respondent Contact Information Form
Information for Respondents

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of

MATTHEW FRANCIS CHRISTIANSEN,
Complainant,

v.

DDB NEEDHAM WORLDWIDE,
Respondent.

VERIFIED COMPLAINT
Pursuant to Executive Law, Article 15

Case No.
10173016

Federal Charge No. 16GB501200

I, Matthew Francis Christiansen, residing at 888 8th Avenue, #91, New York, NY, 10019, charge the above named respondent, whose address is 437 Madison Ave., New York, NY, 10022 with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York (Human Rights Law) because of disability, sexual orientation, opposed discrimination/retaliation.

Date most recent or continuing discrimination took place is 12/15/2014.

The allegations are:

1. I am a Gay Male who suffers from a condition considered to be a disability under the meaning of the New York State Human Rights Law (AIDS-infected) . Because of this, I have been subject to unlawful discriminatory actions.

SEE ATTACHED

Based on the foregoing, I charge respondent with an unlawful discriminatory practice relating to employment because of disability, sexual orientation, opposed discrimination/retaliation, in violation of the New York State Human Rights Law (Executive Law, Article 15), Section 296.

I also charge the above-named respondent with violating the Americans with Disabilities Act (ADA) (covers disability relating to employment). I hereby authorize SDHR to accept this verified complaint on behalf of the U.S. Equal Employment Opportunity Commission (EEOC) subject to the statutory limitations contained in the aforementioned law(s).

New York State Division of Human Rights
Complaint Form

CONTACT INFORMATION

My contact information:

Name: Matthew Francis Christiansen

Address: 888 8th Avenue Apt or Floor #: 9J

City: New York State: NY Zip: 10019

REGULATED AREAS

I believe I was discriminated against in the area of:

- ☒ Employment
- ☐ Education
- ☐ Volunteer firefighting
- ☐ Apprentice Training
- ☐ Boycotting/Blacklisting
- ☐ Credit
- ☐ Public Accommodations *(Restaurants, stores, hotels, movie theaters amusement parks, etc.)*
- ☐ Housing
- ☐ Commercial Space
- ☐ Labor Union, Employment Agencies

I am filing a complaint against:

Company or Other Name: DDB

Address: 437 Madison Avenue

City: New York State: NY Zip: 10022

Telephone Number: 212 (area code) 415 2000

Individual people who discriminated against me:

Name: Joe Cianciotto
Title: Supervisor

Name: Chris Brown
Title: CEO

DATE OF DISCRIMINATION

The most recent act of discrimination happened on: 12 (month) 15 (day) 2014 (year)

BASIS OF DISCRIMINATION

Please tell us why you were discriminated against by checking one or more of the boxes below.

You do not need to provide information for every type of discrimination on this list. Before you check a box, make sure you are checking it only if you believe it was a reason for the discrimination. Please look at the list on Page 1 for an explanation of each type of discrimination.

Please note: Some types of discrimination on this list do not apply to all of the regulated areas listed on Page 3. (For example, Conviction Record applies only to Employment and Credit complaints, and Familial Status is a basis only in Housing and Credit complaints). These exceptions are listed next to the types of discrimination below.

I believe I was discriminated against because of my:

☐ **Age** *(Does not apply to Public Accommodations)* Date of Birth:	☐ **Genetic Predisposition** *(Employment only)* Please specify:
☐ **Arrest Record** *(Only for Employment, Licensing, and Credit)* Please specify:	☐ **Marital Status** Please specify:
☐ **Conviction Record** *(Employment and Credit only)* Please specify:	☐ **Military Status:** Please specify:
☐ **Creed / Religion** Please specify:	☐ **National Origin** Please specify:
■ **Disability** Please specify: aids AIDS	☐ **Race/Color or Ethnicity** Please specify:
☐ **Domestic Violence Victim Status:** *(Employment only)* Please specify:	☐ **Sex** Please specify: ☐ Female ☐ Male ☐ **Pregnancy** ☐ **Sexual Harassment**
☐ **Familial Status** *(Housing and Credit only)* Please specify:	■ **Sexual Orientation** Please specify: I am a gay man
☒ **Retaliation** *(if you filed a discrimination case before, or helped someone else with a discrimination case, or reported discrimination due to race, sex, or any other category listed above)* Please specify: My supervisor has several times approached me to initimidate me from complaining.	

Before you turn to the next page, please check this list to make sure that you provided information ***only*** for the type of discrimination that relates to your complaint.

EMPLOYMENT DISCRIMINATION

Please answer the questions on this page only if you were discriminated against in the area of employment. If not, turn to the next page.

How many employees does this company have?

☐ a) 1-3 ☐ b) 4-14 ☐ c) 15 or more ☑ d) 20 or more ☐ e) Don't know

Are you currently working for the company?

■ **Yes**

Date of hire: (04 Month / 25 day / 2011 year) What is your job title? Associate Creative Director

☐ **No**

Last day of work: (_____ Month / _____ day / _____ year) What was your job title? _____

☐ **I was not hired by the company**

Date of application: (_____ Month / _____ day / _____ year)

ACTS OF DISCRIMINATION

What did the person/company you are complaining against do? Please check all that apply.

☐ Refused to hire me

☐ Fired me / laid me off

☐ Did not call me back after a lay-off

☐ Demoted me

☐ Suspended me

☐ Sexually harassed me

■ Harassed or intimidated me (other than sexual harassment)

☐ Denied me training

☐ Denied me a promotion or pay raise

☐ Denied me leave time or other benefits

☐ Paid me a lower salary than other workers in my same title

☐ Gave me different or worse job duties than other workers in my same title

☐ Denied me an accommodation for my disability

☐ Denied me an accommodation for my religious practices

☐ Gave me a disciplinary notice or negative performance evaluation

☐ Other: _____

DESCRIPTION OF DISCRIMINATION - for all complaints *(Public Accommodation, Employment, Education, Housing, and all other regulated areas listed on Page 3)*

Please tell us more about each act of discrimination that you experienced. Please include dates, names of people involved, and explain why you think it was discriminatory.
PLEASE TYPE OR PRINT CLEARLY.

Within one month of my commencing work at DDB, in May 2011, my supervisor Joe Cianciotto drew and circulated throughout the office offensive pictures of me in compromising positions as a gay man. Some had me partially nude, muscle-bound with an erect penis either urinating or defecating. In late June 2011, during the marriage equality passage in NY for same-sex couples, he circulated a picture of my creative partner Bob, who is not gay, pumping me with a manual air pump, giving me an erect penis and having me make statements that "I'm so pumped for marriage equality." In July 2011, Mr. Cianciotto created a "Muscle Beach Party" poster that featured my head from a photograph of me attached to a female body in a bikini, on my back with my legs up in the air in the gay sexual receiving position. In May, 2013, there was an office meeting with some 20 people present, including my colleagues and other professionals. There Mr. Cianciotto accused me of having AIDS because I am a gay man, stating he was so sick over the weekend that he felt like he had AIDS, then he sat next to me in front of everyone and stated "Sorry, you know what that's like, Matt"; meaning that because I am gay that I have HIV/AIDS. I complained to human resources. They did nothing to correct that incident or retract that. In September, 2014, I discovered that Mr. Cianciotto posted on Facebook the Muscle Beach poster with my picture in a bikini in the gay receiving position for hundreds if not thousands of people to see. I had my attorney write several letters demanding Mr. Cianciotto and DDB have that removed. They refuse to remove that posting. Considering the years of DDB harassing me because I am gay and publicly accusing me of having AIDS, it is offensive that they permit that picture of me to be posted on Facebook. Also, they have an employee handbook that states such offensive postings are not tolerated; yet they do nothing to remediate this. In July, 2013 and recently in November, 2014, Mr. Cianciotto has approached me to let me know he is aware of my complaints by sheepishly referring to someone complaining about him or he questions me regarding how I feel, but he never does anything to remediate the issues of removing the Facebook posting that makes me uncomfortable after his years of harassing me for my sexual orientation and publicly accusing me of AIDS. Upon information and belief, DDB has access to my health insurance records that indicates that I have a disability of HIV/AIDS. Mr. Cianciotto admitted to me that he fears AIDS and he clearly discriminates against my sexual orientation. It has been a continuing violation of my rights to be free from disability and sexual orientation discrimination in the workplace when DDB and their supervisor post me depicted in a bikini in the gay receiving position to this date, and their refusal to remove that when I have demanded its removal since November, 2014 after I discovered it in September, 2014.

If you need more space to write, please continue writing on a separate sheet of paper and attach it to the complaint form. **PLEASE DO NOT WRITE ON THE BACK OF THIS FORM.**

NOTARIZATION OF THE COMPLAINT

Based on the information contained in this form, I charge the above-named Respondent with an unlawful discriminatory practice, in violation of the New York State Human Rights Law.

By filing this complaint, I understand that I am also filing my employment complaint with the United States Equal Employment Opportunity Commission under the Americans With Disabilities Act (covers disability related to employment), Title VII of the Civil Rights Act of 1964, as amended (covers race, color, religion, national origin, sex relating to employment), and/or the Age Discrimination in Employment Act, as amended (covers ages 40 years of age or older in employment), or filing my housing/credit complaint with HUD under Title VIII of the Federal Fair Housing Act, as amended (covers acts of discrimination in housing),as applicable. This complaint will protect your rights under Federal Law.

I hereby authorize the New York State Division of Human Rights to accept this complaint on behalf of the U.S. Equal Employment Opportunity Commission, subject to the statutory limitations contained in the aforementioned law and/or to accept this complaint on behalf of the U.S. Department of Housing and Urban Development for review and additional filing by them, subject to the statutory limitations contained the in aforementioned law.

I have not filed any other civil action, nor do I have an action pending before any administrative agency, under any state or local law, based upon this same unlawful discriminatory practice.

I swear under penalty of perjury that I am the complainant herein; that I have read (or have had read to me) the foregoing complaint and know the contents of this complaint; and that the foregoing is true and correct, based on my current knowledge, information, and belief.

Sign your full legal name

JOEL MATIAS
Notary Public - State of New York
NO. 01MA6280080
Qualified in New York County
My Commission Expires 04/15/17

Subscribed and sworn before me
This 17 day of December 14

Signature of Notary Public

County: New York Commission expires: April 15, 2017

Please note: Once this form is notarized and returned to the Division, it becomes a legal document and an official complaint with the Division of Human rights. After the Division accepts your complaint, this form will be sent to the company or person(s) whom you are accusing of discrimination.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10004-2112

TO:
DDB Needham Worldwide
437 Madison Ave.
New York, NY 10022

PERSON FILING CHARGE:
Matthew Francis Christiansen
THIS PERSON (Check one):
Claims to be aggrieved [x]
Files on behalf of other(s)[ ]
DATE OF ALLEGED VIOLATION:
12/15/2014
PLACE OF ALLEGED VIOLATION:
New York County
EEOC CHARGE NUMBER:
16GB501200
FEPA CHARGE NUMBER:
10173016

NOTICE OF CHARGE OF DISCRIMINATION WHERE AN FEP AGENCY WILL INITIALLY PROCESS

YOU ARE HEREBY NOTIFIED THAT A CHARGE OF EMPLOYMENT DISCRIMINATION UNDER

[ ] Title VII of the Civil Rights Act of 1964
[ ] The Age Discrimination in Employment Act of 1967 (ADEA)
[X] The Americans with Disabilities Act (ADA)

HAS BEEN RECEIVED BY: The New York State Division of Human Rights (FEP Agency) and sent to the EEOC for dual filing purposes.

While the EEOC has jurisdiction (upon expiration of any deferral requirements if this I a Title VII or ADA charge) to investigate this charge, EEOC may refrain from beginning an investigation and await the issuance of the FEP Agency's final findings and orders. These final findings and orders will be given weight by EEOC in making its own determination as to whether or not reasonable cause exists to believe that the allegations made in the charge are true.

You are therefore encouraged to cooperate fully with the FEP Agency. All facts and evidence provided by you to the Agency in the course of its proceedings will be considered by the Commission when it reviews the Agency's final findings and orders. In many instances the Commission will take no further action, thereby avoiding the necessity of an investigation by both the FEP Agency and the Commission. This likelihood is increased by your active cooperation with the Agency.

As a party to the charge, you may request that EEOC review the final decision and order of the above named FEP Agency. For such a request to be honored, you must notify the Commission in writing within 15 days of your receipt of the Agency's issuing a final finding and order. If the Agency terminates its proceedings without issuing a final finding and order, you will be contacted further by the Commission.

For further correspondence on this matter, please use the charge number(s) shown.

[ ] An Equal Pay Act investigation (29 U.S.C. §206(d)) will be conducted by the Commission concurrently with the FEP Agency's investigation of the charge.

[X] Enclosure: Copy of the Charge

BASIS FOR DISCRIMINATION: Disability, Sexual Orientation, Opposed Discrimination/Retaliation

CIRCUMSTANCES OF ALLEGED VIOLATION:
SEE ATTACHED N.Y.S. DIVISION OF HUMAN RIGHTS COMPLAINT

DATE: January 13, 2015

TYPED NAME OF AUTHORIZED EEOC OFFICIAL:
Kevin J. Berry

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10004-2112

Matthew Francis Christiansen
888 8th Avenue, #91
New York, NY 10019

EEOC Charge Number: 16GB501200
NYSDHR Case Number: 10173016

NOTICE

This office has been informed that you filed a complaint of employment discrimination with the New York State Division of Human Rights (NYSDHR). The purpose of this notice is to inform you of your federal rights pursuant to one or more of the statutes under which you may have filed. Please be advised that your complaint will be investigated by the New York State Division of Human Rights, not the Federal Equal Employment Opportunity Commission (EEOC). All questions, correspondence and status reports with regard to your case must be directed to the New York State Division of Human Rights office where your complaint was filed.

YOUR FEDERAL RIGHTS (if you filed under):

[ ] Title VII of the Civil Rights Act of 1964, as amended – If you want to file a private lawsuit in federal district court with your own private attorney because you do not want the New York State Division of Human Rights to conduct an investigation, you may request from the EEOC a Notice of Right to Sue, 180 days after you have filed your complaint. Once the EEOC grants your request, it is only valid for ninety (90) days from the date the Notice was issued, after which your time to sue expires. If you want the New York State Division of Human Rights to conduct an investigation, you do not need to make this request, or to contact or write either agency. The New York State Division of Human Rights will contact you and/or advise you in the near future of their investigation and determination findings.

[X] The Americans with Disabilities Act of 1990 (ADA) – Same as Title VII, above.

[ ] The Age Discrimination in Employment Act of 1967, as amended(ADEA) – If you want to file a private lawsuit with your own private attorney, you could do so any time after 60 days from the date you filed your complaint with the New York State Division of Human Rights. This is only if you do not want the New York State Division of Human Rights to conduct an investigation, otherwise you do not need to do anything at this time. The New York State Division of Human Rights will contact you and/or advise you in the near future of their investigation and determination findings.

Date: January 13, 2015

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10004-2112

EEOC REVIEW PROCEDURE

If you want the EEOC to review the New York State Division of Human Rights final determination, because you are not satisfied with their final findings, you may request that the EEOC conduct a substantial weight review. This request must be done in writing to the EEOC and within fifteen (15) days from the date you received the New York State Division of Human Rights final determination. Otherwise, we will adopt the state findings.

You review request must specify the reason(s) why you do not agree with the New York State Division of Human Rights final determination.

Mail your request for substantial weight review to:

Equal Employment Opportunity Commission
Attn: State and Local Unit
33 Whitehall Street, 5th Floor
New York, New York 10004-2112

This address is for review purposes only. Remember, if you have questions concerning the status of your case, you must contact the New York State Division of Human Rights.

Date: January 13, 2015

NEW YORK STATE
DIVISION OF HUMAN RIGHTS
OFFICE OF SEXUAL HARASSMENT ISSUES
55 HANSON PLACE, ROOM 900
BROOKLYN, NEW YORK 11217

(718) 722-2060
Fax: (718) 722-4525
www.dhr.ny.gov

ANDREW M. CUOMO
GOVERNOR

HELEN DIANE FOSTER
COMMISSIONER

March 10, 2015

Re: Matthew Francis Christiansen v. DDB Worldwide Communications Group Inc.
Case No. 10173016

To the Parties Listed Below:

PLEASE BE ADVISED that the Division of Human Rights is contemplating dismissing the above-referenced complaint for administrative convenience for the following reason:

On March 10, 2015, the Division received from the Complainant's attorney, a faxed request dated March 9, 2015, for an administrative convenience dismissal of the instant complaint so that the Complainant can litigate all issues related to the questions of disability, sexual orientation and retaliation/opposition to discrimination.

Objections to such action may be submitted by any party within fifteen (15) days of the date of this letter, and will be considered prior to the Division determining whether to dismiss the matter.

Any response should be addressed to the undersigned.

Very truly yours,

Joyce Yearwood-Drury
Director O.S.H.I.

TO:

Complainant
Matthew Francis Christiansen
888 8th Avenue #91
New York, NY 10019

Complainant Attorney
Susana Chana Lask, Esq.
Law Office
244 Fifth Avenue, Suite 2369
New York, NY 10001

Respondent
DDB Worldwide Communications Group Inc.
Director of Human Resources
437 Madison Avenue
New York, NY 10022

Respondent Attorney
Daniel A. Feinstein, Esq.
Law Office
1740 Broadway
New York, NY 10019

EXHIBIT F

D&G | DAVIS & GILBERT LLP
ATTORNEYS AT LAW

1740 Broadway
New York, NY 10019
T: 212.468.4800
F: 212.468.4888
www.dglaw.com

Direct Dial: 212.468.4885
Personal Fax: 212.468.4888
Email: dfeinstein@dglaw.com

March 24, 2015

BY FEDERAL EXPRESS

Joyce Yearwood-Drury
Director O.S.H.I.
New York State Division of Human Rights
55 Hanson Place, Room 900
Brooklyn, New York 11217
Fax: 718-722-4525

Re: Matthew Christiansen v. DDB Worldwide Communications Group Inc.
Case No. 10172229

Dear Ms. Yearwood-Drury:

The firm represents DDB Worldwide Communications Group Inc. ("DDB") in the above-referenced matter.

By notice dated March 10, 2015, the Division informed that parties that it was contemplating dismissal because of Complainant's attorney's March 9, 2015 request to the Division for an "administrative convenience dismissal so that the Complainant can litigate all issues related the questions of disability, sexual orientation and retaliation/opposition to discrimination." The Division's notice indicates that objections to the request for an administrative convenience dismissal may be submitted within 15 days of the date of the notice. For the reasons set forth below, DDB objects to an administrative convenience dismissal.

By way of review, on or about October 29, 2014, Complainant filed his complaint for sexual orientation discrimination with the EEOC. DDB responded by submitting a position statement to the EEOC in which it demonstrated that the EEOC charge must be dismissed because (1) Title VII of the Civil Rights Act of 1964 does not apply to claims of sexual orientation discrimination or harassment, (2) it is time barred by Title VII's 300 day statute of limitations, (3) much of the alleged conduct was simply unprofessional conduct that was intended to be funny and had nothing to do with Complainant's sexual orientation, and, in any case, the conduct did not rise to the level of a hostile work environment.

Complainant then filed the instant complaint with the Division. On or about February 25, 2015, DDB responded by submitting a position statement to the Division in which it demonstrated that his complaint with the Division must be dismissed because (1) it is time barred by the Division's 1-year statute of limitations, (2) the conduct at issue does not rise to the level of an unlawful hostile work environment, the Company acted promptly and appropriately to address his manager's conduct, and his manager has not engaged in any further instances of

unprofessional conduct in over 1½ years, (3) Complainant's disability claim fails because his manager did not know or regard Complainant as having AIDS or any other disability, and (4) Complainant's retaliation claim fails because he does not – and cannot – allege that any adverse action was taken against him.

Complainant, who has been represented by counsel all along, has now undoubtedly come to the realization that his election to pursue these claims with the Division was a mistake, as was his decision to file with the EEOC, and is trying to get what DDB believes to be an unprecedented third bite at the apple by requesting an "administrative convenience dismissal," presumably so he can bring a complaint in state court which has a 3-year statute of limitations. As such, it is plain that this request represents little more than an attempt to circumvent the New York State Human Rights Law's election of remedies provisions and the Division's statute of limitations.

Under the election of remedies doctrine, a party has a choice of pursuing administrative remedies with the Division or bringing legal action in a court of law; he cannot do both. N.Y.Exec.Law § 297(9); *Hernandez v Edison Prop.*, 2013 N.Y. Misc. LEXIS 6529, at *3-4 (N.Y. Sup. Ct. Mar. 31, 2013) ("The remedies for violation of the New York Human Rights Law available through commencement of a judicial action and available through DHR's administrative process are mutually exclusive. Petitioner must elect one avenue of redress or the other.") Moreover, while an exception to this "election of remedies" doctrine exists where the Division dismisses the administrative complaint on the ground of "administrative convenience," such a dismissal in this instance is unwarranted and would be highly prejudicial to DDB, given that it already has expounded significant time and resources defending Complainant's baseless claims in two separate forums.

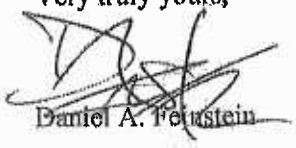
Dismissal for administrative convenience is "a narrow category limited to cases where the dismissal is for the convenience of the agency." *York v. Ass'n of the Bar*, 2001 U.S. Dist. LEXIS 9457, at *14 (S.D.N.Y. July 9, 2001) (internal citations and punctuation omitted). Moreover, a change in the Complainant's litigation strategy rather than a true inconvenience to the Division is plainly an insufficient ground upon which to grant an administrative convenience dismissal, particularly where, as here, Complainant seeks to change his strategy for the third time.

Even more so, it would be inappropriate to grant an administrative convenience dismissal where it is apparent that the only reason for the request is because the Complainant now realizes that his claims are time barred, even though he has been represented by counsel all along. Indeed, as set forth above, Complainant initially filed his complaint with the EEOC, and DDB had to incur the time and expense of preparing a position statement demonstrating that the EEOC charge must be dismissed because it is time barred by Title VII's 300 day statute of limitations and the EEOC does not have jurisdiction over claim for sexual orientation discrimination. Complainant then filed his complaint with the Division, and DDB again had to incur the time and expense of preparing a position statement demonstrating that the complaint should be dismissed because, among other things, it was time barred by the Division's 1-year state of limitations.

Now Complainant seeks an administrative convenience dismissal because he wants a third chance to assert his claims. It would be unfair and highly prejudicial for the Division to administratively dismiss this matter under these circumstances. The Division should hold Complainant and his attorney accountable for their actions to date.

For the foregoing reasons, we urge that the Division deny the request for an administrative convenience dismissal. If you have any questions or require additional information, please do not hesitate to contact me at (212) 468-4885.

Very truly yours,



Daniel A. Feinstein

cc: DDB Worldwide Communications Group Inc.

EXHIBIT G

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of

MATTHEW FRANCIS CHRISTIANSEN,
Complainant,

v.

DDB WORLDWIDE COMMUNICATIONS GROUP INC.,
Respondent.

ANNULMENT DETERMINATION

Case No. 10173016

Federal Charge No. 16GB501200

On 1/13/2015, Matthew Francis Christiansen filed a verified complaint with the New York State Division of Human Rights ("Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment because of disability, sexual orientation, opposed discrimination/retaliation in violation of N.Y. Exec. Law, art 15 ("Human Rights Law").

Pursuant to Section 297.9 of the Human Rights Law, a Complainant, at any time prior to a hearing before a hearing officer, may request that the Division dismiss the complaint and annul the election of remedies so that the case may be pursued in court, and the Division may, upon such request, dismiss that case on the grounds that the Complainant's election of an administrative remedy is annulled.

The above named Complainant has made such a request. The complaint is ordered dismissed, on the grounds that the Complainant's election of an administrative remedy is annulled.

Section 297.9 of the Human Rights Law provides that:

> ... where the Division has dismissed such complaint on the grounds ... that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed. ... [I]f a complaint is so annulled by the division, upon the request of the party bringing such complaint before the Division, such party's rights to bring such cause of action before a court of

appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division.

PLEASE TAKE NOTICE that any party to this proceeding may appeal this Determination to the New York State Supreme Court in the County wherein the alleged unlawful discriminatory practice took place by filing directly with such court a Notice of Petition and Petition within sixty (60) days after service of this Determination. A copy of this Notice and Petition must also be served on all parties including General Counsel, State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. DO NOT FILE THE ORIGINAL NOTICE AND PETITION WITH THE STATE DIVISION OF HUMAN RIGHTS.

Dated: 7/21/05
Brooklyn, New York

STATE DIVISION OF HUMAN RIGHTS

By: _____
Joyce Yearwood-Drury
Director O.S.H.I.

EXHIBIT H

From: SCL <susanlesq@verizon.net>
Sent: Wednesday, July 22, 2015 5:09 PM
To: Kong, Judith
Subject: Re: Anonymous v. Omnicom Group Inc. et al, Case No. 1:15-cv-03440-KPF

Ms.Kong,

Are you admitted in the SDNY?

Susan Chana Lask, Esq.
www.appellate-brief.com
917.300-1958

From: "Kong, Judith" <jkong@dglaw.com>
Date: Wednesday, July 22, 2015 at 5:06 PM
To: "scl@appellate-brief.com" <scl@appellate-brief.com>, "Susan Chana Lask, Esq." <susanlesq@verizon.net>
Cc: "Rubin, Howard" <HRubin@dglaw.com>, "Gilman, Gregg" <GGilman@dglaw.com>, "Feinstein, Daniel" <DFeinstein@dglaw.com>, "Franco, Shira" <sfranco@dglaw.com>
Subject: Anonymous v. Omnicom Group Inc. et al, Case No. 1:15-cv-03440-KPF

Counsel:

Based on the discussions during the pre-motion conference yesterday, several issues were raised with respect to certain of the claims alleged in Plaintiff's First Amended Civil Complaint (the "Amended Complaint"). Per Judge Failla's instructions to the parties to confer and engage in meaningful discussions regarding the continued viability of such claims, please let us know which causes of action, if any, are being withdrawn by Plaintiff, so that we do not unduly burden Judge Failla by addressing them in our motion to dismiss. If we do not receive a response from you by **12:00 p.m. (noon) on Monday, July 27, 2015**, specifically indicating which causes of action (if any) will be withdrawn, we will be moving to dismiss all of the claims in the Amended Complaint.

Additionally, you represented to the Court during the pre-motion conference on Tuesday that the New York State Division of Human Rights ("DHR") complaint filed in connection with the Fourth, Fifth, Sixth, and Seventh Causes of Action asserted in the Amended Complaint (the "state and city claims") have been dismissed for administrative convenience by the DHR and that such dismissal constituted grounds to proceed with the state and city claims in this action. After the conference, we spoke to you and showed you the most recent (and only) document we have received from the DHR in this regard, stating that the DHR is "contemplating dismissing [Plaintiff's] complaint for administrative convenience" and inviting Defendant / Respondent DDB ("DDB") to respond with any objections within 15 days of the DHR's letter (*see* attached) (emphasis added). DDB objected to the dismissal of Plaintiff's complaint with the DHR within the 15-day time frame and has not received further communications from the DHR since. (DDB's objection, filed with the DHR on or around March 24, 2015, is attached for your reference). Based on our conversation with you, it is our understanding that you have not received a dismissal of Plaintiff's DHR complaint. Please confirm that you have not received a document from the DHR indicating that the DHR complaint was in fact dismissed for administrative convenience. If that is the case we expect that you will withdraw the claims that are based on the fact that there has been such a dismissal and that you will inform the judge of the correct version of the facts so that the record before the Court is corrected.

EXHIBIT I

From: SCL <susanlesq@verizon.net>
Sent: Wednesday, July 22, 2015 5:38 PM
To: Rubin, Howard; scl@appellate-brief.com
Cc: Gilman, Gregg; Feinstein, Daniel; Franco, Shira; Kong, Judith
Subject: 7-22-15 Omnicom 1:15-cv-03440-KPF

The Judge did not make clear that "she wanted" Ms. Kong involved. The Judge responded politely that Ms. Kong could sit there that day as an observer, and nothing more, after she asked why so many people were sitting at your table and you informed Ms. Kong is not admitted. I hope you are not saying that the Judge violated the rules and ethics.

I object to anyone not admitted to be involved as it muddies the purpose of the rules.
She and you should know better than to engage in a case in a court she is not admitted in.

I'll respond to an attorney who is admitted in the court. After this communication, I am removing her from my email list.

Also, please remove my scl@appellate-brief.com address as there is no need for you to send me e-mails twice to two different addresses.

Susan Chana Lask, Esq.
www.appellate-brief.com
917.300-1958

From: "Rubin, Howard" <HRubin@dglaw.com>
Date: Wednesday, July 22, 2015 at 5:26 PM
To: "scl@appellate-brief.com" <scl@appellate-brief.com>, "Susan Chana Lask, Esq." <susanlesq@verizon.net>
Cc: "Gilman, Gregg" <GGilman@dglaw.com>, "Feinstein, Daniel" <DFeinstein@dglaw.com>, "Franco, Shira" <sfranco@dglaw.com>, "Kong, Judith" <jkong@dglaw.com>
Subject: RE: Anonymous v. Omnicom Group Inc. et al, Case No. 1:15-cv-03440-KPF

In response to your email to Ms. Kong I asked her to send the below email to you on my behalf and I am admitted in the SDNY. The Judge made clear that she wanted Ms. Kong to be involved in the case so in response to that I asked her to send the email.

HOWARD J. RUBIN

hrubin@dglaw.com
T: 212.468.4822
F: 212.621.0919
vCard | Bio

DAVIS & GILBERT LLP

From: Kong, Judith
Sent: Wednesday, July 22, 2015 5:06 PM
To: scl@appellate-brief.com; susanlesq@verizon.net
Cc: Rubin, Howard; Gilman, Gregg; Feinstein, Daniel; Franco, Shira
Subject: Anonymous v. Omnicom Group Inc. et al, Case No. 1:15-cv-03440-KPF

Counsel:

Based on the discussions during the pre-motion conference yesterday, several issues were raised with respect to certain of the claims alleged in Plaintiff's First Amended Civil Complaint (the "Amended Complaint"). Per Judge Failla's instructions to the parties to confer and engage in meaningful discussions regarding the continued viability of such claims, please let us know which causes of action, if any, are being withdrawn by Plaintiff, so that we do not unduly burden Judge Failla by addressing them in our motion to dismiss. If we do not receive a response from you by **12:00 p.m. (noon) on Monday, July 27, 2015**, specifically indicating which causes of action (if any) will be withdrawn, we will be moving to dismiss all of the claims in the Amended Complaint.

Additionally, you represented to the Court during the pre-motion conference on Tuesday that the New York State Division of Human Rights ("DHR") complaint filed in connection with the Fourth, Fifth, Sixth, and Seventh Causes of Action asserted in the Amended Complaint (the "state and city claims") have been dismissed for administrative convenience by the DHR and that such dismissal constituted grounds to proceed with the state and city claims in this action. After the conference, we spoke to you and showed you the most recent (and only) document we have received from the DHR in this regard, stating that the DHR is "contemplating dismissing [Plaintiff's] complaint for administrative convenience" and inviting Defendant / Respondent DDB ("DDB") to respond with any objections within 15 days of the DHR's letter (*see* attached) (emphasis added). DDB objected to the dismissal of Plaintiff's complaint with the DHR within the 15-day time frame and has not received further communications from the DHR since. (DDB's objection, filed with the DHR on or around March 24, 2015, is attached for your reference). Based on our conversation with you, it is our understanding that you have not received a dismissal of Plaintiff's DHR complaint. Please confirm that you have not received a document from the DHR indicating that the DHR complaint was in fact dismissed for administrative convenience. If that is the case we expect that you will withdraw the claims that are based on the fact that there has been such a dismissal and that you will inform the judge of the correct version of the facts so that the record before the Court is corrected.

JUDITH KONG

jkong@dglaw.com
T: 212.468.4851
F: 212.468.4888
vCard | Bio

DAVIS & GILBERT LLP
1740 Broadway, New York NY 10019
www.dglaw.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MATTHEW CHRISTIANSEN,

Plaintiff,

-against-

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

Defendants.

----------x

DOCKET NO.: 15 cv 3440 (KPF)

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law, dated August 14, 2015, attached thereto, Defendant, Joe Cianciotto, by his attorneys, Leeds Brown Law, P.C., will move this Court, before the Honorable Katherine Polk Failla, at the United States District Court, Southern District of New York, 40 Foley Square, Courtroom 618, New York, New York 10007, at a date and time to be determined by the Court, for an Order pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) granting Defendant's Motion to Dismiss Plaintiff's First Amended Complaint in its entirety, with prejudice, and granting such other and further relief as may be just and proper.

Dated: New York, New York
August 14, 2015

Respectfully submitted,

LEEDS BROWN LAW, P.C.
By: /s/ Rick Ostrove
Rick Ostrove
Attorneys for Defendant Joe Cianciotto
One Old Country Road, Suite 347
Carle Place, New York 11514
Tel: (516) 873-9550
Fax: (516) 747-5024
rostrove@leedsbrownlaw.com

UNITED STATES DISTRICT
SOUTHERN DISTRICT COURT OF NEW YORK

MATTHEW CHRISTIANSEN,

Plaintiff, **CASE NUMBER: 15 CV 3440**

-against-

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

DECLARATION OF SUSAN CHANA LASK, ESQ.

Defendants.

Susan Chana Lask, Esq., certifies as follows:

1. Plaintiff voluntarily withdrawals the THIRD and TENTH Causes of Action for Constructive Discharge and Negligent Supervision/Retention.

2. Attached hereto are true and correct copies of the following documents referenced in the Memorandum of Law simultaneously filed herewith:

Exhibit "A" – October 21, 2014 Plaintiff's counsel's letter to Defendant Brown.
Exhibit "B" – November 20, 2014 Plaintiff's Counsel's letter to Defendant Cianciotto.
Exhibit "C" – December 19, 2014 Defendants' Federal EEOC Response.
Exhibit "D" – February 25, 2015 Defendants' State EEOC Response.
Exhibit "E" – July 15, 2015 EEOC Foxx Decision, Appeal No. 0120133080
Exhibit "F" - EEOC recent Pamphlet from the Foxx Decision Citing Nationwide Cases Supporting Sexual Orientation Under Title VII
Exhibit "G" - EEOC recent Pamphlet from the Foxx Decision Explaining that Sexual Orientation is a Title VII Case.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 24, 2015

Yours, etc
LAW OFFICES OF SUSAN CHANA LASK

/s Susan Chana Lask

BY: Susan Chana Lask, Esq.
Attorney for Plaintiff
244 Fifth Avenue, Suite 2369
New York, NY 10001
(917) 300-1958

EXHIBIT A

Law Offices of
SUSAN CHANA LASK

244 Fifth Avenue, Suite 2369
New York, N.Y. 10001

(917) 300-1958 **www.appellate-brief.com**

CONFIDENTIAL

VIA EMAIL chris.brown@ny.ddb.com
October 21, 2014

Mr. Chris Brown, CEO
DDB
437 Madison Avenue
New York, NY 10022

Re: Matt Christiansen/ Joe Cianciotto

Dear Mr. Brown:

I represent Matt Christiansen. On November 1, 2014, I am filing a complaint against DDB, Joe Cianciotto and other parties at DDB, including causes of actions for hostile work environment, discrimination, harassment, invasion of privacy, false light and other causes of action. In an effort to mitigate the damages, kindly inform your management, Joe, to immediately remove the muscle beach picture from his Facebook page. It is a constant reminder of the harassment and hostility towards Matt from Joe, and an invasion of his privacy and false light; particularly as it remains after the AIDs statement. Moreover, we have snapshots showing Joe's Facebook friends are Matt's colleague's and other professionals who view this offensive picture in light of the facts below that makes it harassing to Matt. That includes Patti Dirker Morris, Tammy Miller White, Jeff Greenberg and Tim Thomas, who are the main DDB clients at State Farm that Matt works with and are Facebook friends with Joe. Also, Matt does not give permission for his likeness to be used in that DDB picture created by its management.

I only provide the below facts to support my request for the immediate removal of the muscle beach picture from FaceBook. As it is related to DDB's function and done without his permission, you need to at least direct its removal. It is up to Joe if he wants to face more damages by keeping it up after this notice.

Facts

In about June 2011, Joe Cianciotto, Matt's supervisor, started drawing offensive sketches of Matt and circulating them throughout the office. The drawings had no legitimate purpose in the work environment. Mr. Cianiotto as the supervisor had no business to circulate such absolute stupidity and ignorance having nothing to do with Matt's work, but showing a very disturbed employee in a supervisory position obcessed with urinating and defecating to harass Matt by projecting his own inadequacies, that he later revealed he is clinically diagnosed with the issues he projects on Matt. He circulated a picture in May 2011 with Matt and his creative partner, Bob, saying "I fucking hate you all," and Matt commenting therein. Another picture in May 2011 has Matt talking to Bob while he is urinating and defecating. Another picture in late June

2011 circulated around the time when New York allowed for marriage equality for same-sex couples. That picture has Bob pumping Matt with a manual air pump, giving Matt an erect penis.

In July 2011, Mr. Cianiotto took the liberty of drawing a muscle Beach party poster that featured maps had attached to a female body, where he is on his back in a bikini with his legs up in the air. Considering the prior gay slanders against Matt in Mr. Cianiotto's pictures, this one undoubtedly shows him in the gay receiving position.

In May, 2013, there was a Monday morning status meeting where some 20 people or more attended for the State Farm account, including the account team, the Director of Operations, the creative team, project managers, Matt and his creative partner, and Mr. Cianiotto, who was now Chief Digital Officer at DDB. Tabor Theriot, a project manager, was sitting behind Matt. When Mr. Theriot coughed, Joe commented that it sounded like a very bad cough. He proceeded to get up from his desk and as he approached Matt he informed everybody that he was also ill all weekend with a cold, cough, sinus and body aches. Then he sat beside Matt, looked at him and said, "It feels like I have AIDS. Sorry, you know what that's like, Matt." Matt went into fear and shock of now being exposed as a gay man with Aids. Joe continued to draw more graphic pictures of Matt in compromising positions, including a dog urinating with Mr. Tabor's head on it.

On or about June 25, 2013, Wendy Raye, former Director of Human Resources, contacted Matt "to discuss an issue". Matt was paralyzed with fear. He thought he would lose his job because he was singled-out for having Aids by DDB's management, Joe. Also, he feared further public disclosure of his constitutionally private protected medical facts from DDB's management. Matt met her to express his concern regarding Joe's drawings and his AIDs statement.

Subsequently, Joe approached Matt to ask if he reported him about the pictures and AIDs statement. Matt told him he was upset about Joe's harassment. Joe then revealed that he has a severe phobia of communicable diseases such as AIDS and herpes, and he has severe Attention Deficit Disorder. He said it is so bad that his doctor advises him to carry around cards in his pocket that read "AIDS" and "herpes" so he can pull them out and read them when he starts to obsess about contracting these diseases. He said that his fear is so bad that his doctor recommends he "say it out loud" when he begins to obsess over having AIDS or herpes so that he can process the absurdity of it. He offered to play a voicemail from his doctor where he revealed the recent results of an HIV test to show Matt how overly fearful he was of having it.

On July 26, 2013, a meeting was called with the then CEO, the Director of HR, and the Chief Creative Officer present. Joe gave a public apology in hopes noone was offended and you gave a speech that DDB does not tolerate inappropriate behavior. Joe was not transferred away from Matt nor was anyone held accountable for that serious accusation and the offensive pictures.

Matt has been in fear of the consequences of losing his job, raises and promotions while he is forced to work under Joe for years who terrorized him with lewd pictures and AIDS accusations, then admits he has an aversion against gay men and AIDS. Also, the State Farm account key persons are witness to this, wherein we need to discover just how far this statement that Matt has AIDS has gone to tarnish his career. Matt has no choice but to file suit to protect

his career and himself that DDB has jeopardized. Gay bashers kill people for having AIDS, yet Joe attributed AIDS to Matt and made it public to haram, humiliate and harass him. More disturbing is that DDB management has access to Matt's health insurance information, which those records may reveal he has AIDS. Whether anyone has AIDS or not, DDB's management through Joe should have never made such a statement and once made he should have been terminated as it is beyond the pale of a slur-it is outright dangerous to Matt and his career. There are now 20 people in that meeting to whom that statement was published to and those 20 people could have republished it to another twenty people and that multiplies. The consequences are widespread and permeate Matt's career now as a Gay man with AIDS. Furture employment is tarnished.

Your Employee Handbook prohibits harassment at page therein, to wit:

"Harassing conduct includes but is not limited to:
• Epithets
• Slurs
• Negative stereotyping
• Threatening, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, sexual orientation or disability or any other protected category
• Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, national origin, ancestry, gender, sexual orientation, gender identity and/or expression, age, veteran status, disability or any other protected characteristic and that is placed on walls, bulletin boards, the internet, websites, blogs, etc. or elsewhere on the employer's premises, or circulated in the workplace"

Yet it was ongoing with the disgusting pictures of Matt in compromising positions and was actually condoned that led to Joe to even certify before everyone that Matt has AIDS. More concerning is how DDB still employs Joe after his misconduct directed at a Gay employee, and then revealing he fears communicable diseases such as AIDS as the excuse for his hostility towards Matt in the work place.

CONCLUSION

Making matters worse, any reasonable person would think that Joe would at least remove himself from anything related to Matt after the AIDS incident, but he is so arrogant that he uploaded the Muscle Beach Party poster to his Facebook for the public and Matt's colleague's to see and keeps it posted there to this date. On September 27, 2014 Matt discovered the poster on Joe's Facebook showing Matt in the gay receiving position. It appears to have been up there since 2011.

Has DDB considered the more serious issue of whether Matt, a gay man, actually has Aids and how even more disturbing that statement was to single him out and paralyze him with fear and shame since then?

I am appalled at this history and how strange your manager Joe is to circulate juvenile pictures of a gay man in compromising positions and accuse a gay man of AIDs because of his

own, according to his admission, sick obsessions. I am sure a jury of his peers would be as appalled. Matt's position is that the public should know how disturbing and unacceptable Joe's conduct was to him as a gay man and DDB as the employer is as wrong to condone this. Joe should have been held accountable by a direct apology, a public retraction of the statement and terminating Joe for such intolerable behavior.

In the interim of the lawsuit, **please immediately remove the muscle beach poster from Facebook as it violates your Employee Handbook social media terms as in the least unprofessional (pp. 11-12)**

If you have any response, kindly e-mail it to susanlesq@verizon.net or feel free to call me at anytime before November 1, 2014 to discuss an amicable resolution. As you know, no one is to communicate with Matt about this any further. All communications shall be directed to me.

Very truly yours,
LAW OFFICES OF SUSAN CHANA LASK

SUSAN CHANA LASK

cc: Matt Christiansen

Law Offices of
SUSAN CHANA LASK

244 Fifth Avenue, Suite 2369
New York, N.Y. 10001

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EXHIBIT B

CONFIDENTIAL

VIA EMAIL Joseph.cianciotto@ny.ddb.com

November 20, 2014

Mr. Joseph Cianciotto
DDB
437 Madison Avenue
New York, NY 10022

Re: Matt Christiansen/ Joe Cianciotto

Dear Mr. Cianciotto:

I represent Matt Christiansen.

I respectfully request that you immediately remove the muscle beach poster from your Facebook page or remove my client's likeness from that picture. That poster depicts him in a way he does not condone. Particularly, it is objectionable as his sexual orientation was at issue at DDB in the pictures you drew of him and circulated, and you accused him before his colleagues of having AIDS.

If you have any response, kindly e-mail it to susanlesq@verizon.net. Kindly do not discuss this matter with my client as I represent him on this issue. All such discussions shall be directed to me, not Mr. Christiansen.

Very truly yours,
LAW OFFICES OF SUSAN CHANA LASK

Susan Chana Lask

SUSAN CHANA LASK

cc: Matt Christiansen

EXHIBIT C

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December 19, 2014

By Federal Express

Mr. Jose Vega
Federal Investigator
United States Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10004

Re: Christiansen v. DDB Worldwide New York, Charge No. 520-2015-00415

Dear Mr. Vega:

This position statement is submitted on behalf of DDB Worldwide Communications Group Inc. ("DDB" or the "Company") in response to the above-referenced charge (the "Charge") filed by Complainant Matthew Christiansen ("Complainant") with the United States Equal Employment Opportunity Commission ("EEOC"). In submitting this position statement, DDB in no way waives its right to present new or additional facts and arguments. Further, this position statement, which is believed to be correct in all respects, does not constitute an affidavit and is not intended to be used as evidence of any kind in any subsequent adjudicative proceeding. Any allegations in the Charge not specifically addressed in this position statement are denied.

Complainant alleges a series of unprofessional conduct by his manager and claims that his manager directed this conduct toward him because he is gay and that he found the conduct to be offensive. Complainant's Charge must be dismissed for several reasons.

First, Title VII of the Civil Rights Act of 1964 does not apply to claims of sexual orientation discrimination or harassment. While the Notice of Charge does not identify a type of discrimination or harassment, a plain reading of the Charge makes clear that his claim is for sexual orientation discrimination or harassment. Second, the conduct alleged took place long before January 2, 2014 (300 days prior to the date Complainant filed the Charge on October 29, 2014). As such, the Charge is time barred. Third, the conduct at issue does not rise to the level of an unlawful hostile work environment. And finally, the Company acted promptly and appropriately after Complainant discussed his supervisor's conduct with the Human Resources Department in June 2013, and neither Complainant nor any other employee has alleged that his supervisor has engaged in further instances of unprofessional conduct since June 2013.

Under these circumstances, the Charge must be dismissed for lack of probable cause.

1. The Claim Is Not Covered By Title VII

Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The plaintiff bears the initial burden of establishing a prima facie case of discrimination. *McDonell Douglas v. Green*, 411 U.S. 792, 802-03 (1973). It is well-settled law that Title VII does not prohibit sexual orientation discrimination. *See e.g.*, *Jantz. v. EmblemHealth*, 2012 U.S. Dist. LEXIS 14977, 19 (S.D.N.Y., Feb. 6, 2012).

While Complainant's Notice of Charge does not identify a type of discrimination, Complainant alleges that he believes the conduct at issue was directed at him because he is gay. And he does not indicate or even suggest that he was discriminated against or harassed based on any other protected characteristic. It is therefore clear that Complainant's claim is for sexual orientation discrimination or harassment, and, as such, Complainant "cannot satisfy the first element of a prima facie case ... because the statute does not recognize homosexuals as a protected class." *Id.* at 217-18 (affirming summary judgment for employer on Title VII sexual orientation claim). The Charge must therefore be dismissed.

2. The Charge Is Time Barred

Under Title VII of the Civil Rights Act of 1964, an employee must file a charge within 180 calendar days from the day the discrimination took place. *Pryor v. Nat'l Grid*, 2011 U.S. Dist. LEXIS 82853, 6 (S.D.N.Y. Jun. 29, 2011). The 180 day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. As set forth above, Title VII does not prohibit employment discrimination on the basis of sexual orientation. Regardless, even assuming the 300 day period was to apply, it is clear that Complainant's Charge is time barred.

In the Charge, Complainant alleges that his supervisor, Joe Cianciotto, circulated several offensive pictures referencing Complainant within the Company in 2011, and made an offensive comment to him in May 2013. He then alleges that when Mr. Cianciotto apologized for his behavior to employees in the Creative Department in July 2013, but that he did not direct an apology toward him specifically. Complainant does not allege that Mr. Cianciotto engaged in any instances of offensive conduct since then. The only fact alleged in the Charge that occurred since July 2013 was that Complainant discovered a poster on

Mr. Cianciotto's Facebook page. However, Complainant admits that the poster was drawn by Mr. Cianciotto in July 2011 and that he was aware of the poster in July 2011. [1]

All of Complainant's allegations therefore relate to conduct that occurred long before January 2, 2014, which is 300 days before Complainant filed the Charge with the EEOC on October 29, 2014. Accordingly, the Charge must be dismissed.

3. Complainant Has Not Been Subjected To A Hostile Work Environment

Even if Title VII covered this type of discrimination, and even if the Charge was not time barred, the conduct that Complainant alleges does not rise to the level of actionable discrimination or harassment.

A hostile work environment exists under Title VII when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the condition of the victim's employment and create an abusive working environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993). The Supreme Court of the United States has stated that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." *Id.* at 21. To determine whether the conduct alleged rises to the level, factors to be analyzed include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 22-23.

Complainant alleges that Mr. Cianciotto drew several offensive pictures of him in 2011, and that he made an offensive comment to him in May 2013. Much of the alleged conduct is plainly unprofessional behavior that had nothing to do with Complainant's sexual orientation (e.g., Mr. Cianciotto sketching a picture and including the words "I fucking hate you all" and Mr. Cianciotto drawing a picture of Complainant talking to another employee while he is urinating).

There are two primary allegations that relate to Complainant's sexual orientation. The first is the poster that Complainant drew in July 2011 that included a picture of Complainant's head attached to a female body in a bikini. The poster was created by Mr. Cianciotto on July 18, 2011 and sent by email to DDB employees and posted to Facebook to promote a DDB happy hour that had been planned as a social event. The poster was intended to serve as a humorous parody of a campy beach poster for the happy hour with

[1] Complainant alleges that on October 21, 2014 he requested by letter that DDB direct Mr. Cianciotto to remove the poster from his Facebook page. DDB is not aware of any such letter being sent to it or any such request. If DDB had received such a letter, it would have looked into Complainant's request and addressed the matter. In any case, after receiving the Charge and learning for the first time that Complainant found the poster to be offensive, Mr. Cianciotto promptly removed it from his Facebook page.

numerous DDB employees. (Attached as Exhibit A is both the original (Frankie Avalon and Annette Funicello) poster and the one that Mr. Cianciotto had parodied for the happy hour with various employees' faces.) The poster contained pictures of the heads of 4 male DDB employees who appeared in female bathing suits, including Complainant. Of the 4 men, Mr. Cianciotto's understanding is that the other 3 men depicted as women besides Complainant are heterosexual. As such, the inclusion of Complainant in the poster clearly had nothing to do with his sexual orientation. Neither Mr. Cianciotto nor DDB received any complaints about the poster until Complainant filed the Charge.

And the second primary allegation was a comment that Mr. Cianciotto made in May 2013 about having AIDS. Mr. Cianciotto had gone through a period of time during which he had a profound fear of having AIDS and dealt with that fear by joking about contracting AIDS. Complainant himself has joked with Mr. Cianciotto about his sexual orientation and the sexual conduct of his gay friends, and Mr. Cianciotto did not think Complainant would be offended by his comment about AIDS.

Complainant's conduct – while certainly unprofessional – does not rise to the level actionable discrimination or harassment. Indeed, Complainant himself essentially acknowledged as such when he spoke with Wendy Raye, DDB's Director of Human Resources for the New York office, in June 2013 about Complainant. At the time, he indicated that he felt that Mr. Cianciotto acts "like a little kid" and an "asshole." (Attached hereto as Exhibit B is a copy of Ms. Raye's interview notes.) Moreover, Complainant did not initiate a complaint about Mr. Cianciotto to the Human Resources Department in June 2013, as he claims, nor any other time. Instead the Human Resources Department reached out to him to discuss Mr. Cianciotto as part of its investigation into Mr. Cianciotto's conduct generally.

In any case, the Company acted promptly and appropriately in addressing Mr. Cianciotto's behavior. It issued him strong verbal and written warnings, it required that he attend individualized harassment training, and it provided him with ongoing professional coaching. Further, Mr. Cianciotto recognized that his unprofessional behavior had upset several employees and, as a result, he arranged a meeting with the creative department staff in July 2013 during which he apologized for his behavior. The apology was well received.

In the Charge, Complainant claims that Mr. Cianciotto never apologized to him and suggests that his apology to the team was somehow deficient. However, immediately after Mr. Cianciotto's apology, Complainant sent him a text message in which he stated as follows:

> "I just want to say, I truly appreciated what you did this morning. Thank you for doing that."

(Annexed hereto as Exhibit C is a copy of Complainant's text message to Mr. Cianciotto on July 26, 2013.) This contemporaneous text message speaks for itself and demonstrates that Complainant did not in fact feel the apology was deficient but instead "truly appreciated" it.

Significantly, Mr. Cianciotto has not engaged in any conduct of the type alleged by Complainant since his July 2013 apology. Indeed, neither Complainant nor any other DDB employee has reported any claims of inappropriate conduct by Mr. Cianciotto since that time. And Complainant does not even allege that Mr. Cianciotto has engaged in any inappropriate conduct toward him or any other employee since then. In other words, Complainant has effectively acknowledged that Mr. Cianciotto has not engaged in any conduct in the past 15 months that he considers to be offensive. It is therefore apparent that DDB's handling of this matter was effective as the conduct has completely ceased.

CONCLUSION

For the foregoing reasons, we urge that the Charge be dismissed for lack of probable cause.

If you have any questions or require additional information, please do not hesitate to contact me at (212) 468-4885. If Complainant submits anything to the EEOC, please provide me with a copy.

Very truly yours,

Daniel A. Feinstein

Exhibits

cc: DDB Worldwide Communications Group Inc.

EXHIBIT D

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February 25, 2015

RECEIVED
FEB 26 2015
O.S.H.I.

BY FEDERAL EXPRESS

Joyce Yearwood-Drury
Director O.S.H.I.
New York State Division of Human Rights
55 Hanson Place, Room 900
Brooklyn, New York 11217
Fax: 718-722-4525

Re: Matthew Christiansen v. DDB Worldwide Communications Group Inc.
Case No. 10172229
3016

Dear Ms. Yearwood-Drury:

This position statement is submitted on behalf of DDB Worldwide Communications Group Inc. ("DDB" or the "Company") in response to the above-referenced complaint (the "Complaint") filed by Complainant Matthew Christiansen ("Complainant") with the New York State Division of Human Rights (the "Division"). In submitting this position statement, DDB in no way waives its right to present new or additional facts and arguments. Further, this position statement, which is believed to be correct in all respects, does not constitute an affidavit and is not intended to be used as evidence of any kind in any subsequent adjudicative proceeding. Any allegations in the Complaint not specifically addressed in this position statement are denied.

Complainant alleges a series of unprofessional acts by his manager and claims that his manager directed these acts toward him because he is gay and has AIDS and that he found the conduct to be offensive. The Complaint must be dismissed for several reasons. First, it is plainly time barred by the Division's statute of limitations since all of conduct at issue occurred well more than 1 year before Complainant filed the Complaint with the Division. Second, the conduct at issue does not rise to the level of an unlawful hostile work environment, the Company acted promptly and appropriately to address his manager's conduct, and his manager has not engaged in any further instances of unprofessional conduct in over 1½ years (and Complainant does not even allege otherwise). Third, Complainant's disability claim fails because his manager did not know or regard Complainant as having AIDS or any other disability. And finally, Complainant's retaliation claim fails because he does not – and cannot – allege that any adverse action was taken against him.

Under these circumstances, the Complaint must be dismissed for lack of probable cause.

I. FACTUAL BACKGROUND

DDB is an advertising agency and hired Complainant as an Associate Creative Director on or about April 27, 2011, reporting to Joe Cianciotto.

Complainant and Mr. Cianciotto maintained a friendly and playful relationship. Mr. Cianciotto's background is as a cartoonist and Complainant, along with other employees in the Creative Department at DDB, regularly encouraged Mr. Cianciotto to draw funny caricatures and other pictures that were sometimes off color. Complainant never informed or even suggested to Mr. Cianciotto that he found any of his drawings to be offensive.

Likewise, Complainant frequently joked with Mr. Cianciotto and other employees at DDB about his sexual orientation and other things of a sexual nature. For example, in 2012, in response to an email that Mr. Cianciotto sent to a number of Creative Department employees, including Complainant, thanking them for their hard work for a particular client and informing them that as a result they could take a half day off that Friday and jokingly stated that instead he could give them another hug, Complainant stated "Can I get a minge instead of a hug?" According to the Urban Dictionary, a "minge" is "not the actual [female] vagina, but the hair surrounding the area." Complainant apparently introduced the word "minge" to colleagues at DDB, including Mr. Cianciotto, and explained that he and his friends would hide their genitalia between their legs to recreate the appearance of a "minge". (Annexed as Exhibit A is a copy of Complainant's email to Mr. Cianciotto.)

A. Complainant Originally Filed An EEOC Charge

On or about October 29, 2014, Complainant filed a discrimination charge with the EEOC in which he alleged that he found a number of Mr. Cianciotto's 2011 drawings, as well as a comment he made in 2013, to be offensive as a gay man (the "EEOC Charge").

DDB submitted a position statement in response to the EEOC Charge in which it demonstrated that the EEOC Charge must be dismissed because (1) Title VII of the Civil Rights Act of 1964 does not apply to claims of sexual orientation discrimination or harassment, (2) it is time barred by Title VII's 300 day statute of limitations, (3) much of the alleged conduct was simply unprofessional conduct that was intended to be funny and had nothing to do with Complainant sexual orientation, and, in any case, the conduct did not rise to the level of a hostile work environment.

Complainant then filed this Complaint with the Division on or about December 17, 2014. In his Complaint with the Division, Complainant tries to fine tune his allegations in an unsuccessful attempt to satisfy New York state law.

B. Complainant's Allegations Of Unprofessional Conduct

There are three allegations in the Complaint that arguably relate to Complainant's sexual orientation or medical condition.

The first is a cartoon Mr. Cianciotto drew in 2011 on a whiteboard in Complainant's office that showed Complainant with bulging muscles. (Complainant regularly lifts weights and has a muscular appearance.) Mr. Cianciotto does not recall that the cartoon included an erect penis but, regardless, it was part of the ongoing reciprocal playful banter between Complainant and Mr. Cianciotto. Complainant in no way intended the drawing to be offensive, and Complainant himself appeared to have thought the drawing was funny and enjoyed it because he left it up on his whiteboard for an extended period of time.

The second is a poster that Mr. Cianciotto created in July 2011 and sent by email to DDB employees and posted to Facebook to promote a DDB happy hour that had been planned as a social event. The poster was intended to serve as a humorous parody of the 1964 Frankie Avalon and Annette Funicello movie "Muscle Beach Party" and contained the faces of numerous DDB employees photoshopped onto the bodies of characters in the movie poster. The poster contained pictures of the faces of 4 male DDB employees who appeared in female bathing suits, including Complainant. Of the 4 men, Mr. Cianciotto's understanding is that the other 3 men depicted as women besides Complainant are heterosexual. As such, the inclusion of Complainant in the poster clearly had nothing to do with his sexual orientation. Moreover, the poster was not altered in any way to suggest sexual conduct. The body positions of the characters remain exactly as they were in the 1964 movie poster, and the only changes were the photoshopping of the faces of the various DDB employees onto the bodies of the movie characters and the verbiage to promote the happy hour. (Annexed as Exhibit B is a side-by-side comparison of the original movie poster and the one that Mr. Cianciotto had parodied for the happy hour.) Complainant did not complain about the poster to Mr. Cianciotto or DDB's Human Resources Department, and Mr. Cianciotto and DDB's Human Resources Department did not receive any complaints from any other DDB employees about the poster.[1]

The third was a comment that Mr. Cianciotto made in May 2013 about being sick over the prior weekend and feeling like he had AIDS. Mr. Cianciotto had gone through a period of time during which he had a severe case of obsessive compulsive disorder and profound fear of having AIDS and, consistent with the treatment he was receiving from medical professionals who were treating him at the time, he dealt with that fear in part by joking about contracting AIDS. As set forth above, Complainant himself joked with Mr. Cianciotto about his sexual orientation and other things of a sexual nature, and Mr. Cianciotto did not think Complainant would be offended by his comment about AIDS. Mr. Cianciotto did not know or regard Complainant as having AIDS or any other medical conditions, and the first time he learned of Complainant's apparent medical condition was after receiving the Complaint in January 2015.

[1] Complainant alleges that in October 2014 his attorney sent DDB several letters requesting that Mr. Cianciotto remove the poster from his Facebook page. DDB is not aware of any such letters being sent to it or any such request. If DDB had received such a letter, it would have looked into Complainant's request and addressed the matter. DDB and Mr. Cianciotto learned for the first time that Complainant allegedly found the poster to be offensive after receiving the EEOC Charge on or about November 19, 2014. Mr. Cianciotto then promptly removed it from his Facebook page.

C. DDB Responded Appropriately And The Conduct Has Completely Ceased

Complainant never initiated a complaint about Mr. Cianciotto to the Human Resources Department in June 2013, as he claims, or at any other time. Instead the Human Resources Department reached out to him in June 2013 to discuss Mr. Cianciotto as part of its investigation into Mr. Cianciotto's conduct generally in response to a complaint that another employee had made.

In any case, the Company acted promptly and appropriately in addressing Mr. Cianciotto's conduct. It issued him strong verbal and written warnings, it required that he attend individualized harassment training, and it provided him with ongoing professional coaching. Further, Mr. Cianciotto recognized that his unprofessional behavior had upset several employees and, as a result, he arranged a meeting with the creative department staff in July 2013 during which he apologized for his behavior. The apology was well received.[2]

In Complainant's EEOC Charge, he claimed that Mr. Cianciotto never apologized to him and suggests that his apology to the team was somehow deficient. However, immediately after Mr. Cianciotto's apology, Complainant sent him a text message in which he stated as follows:

> "I just want to say, I truly appreciated what you did this morning. Thank you for doing that."

(Annexed as Exhibit C is a copy of Complainant's text message to Mr. Cianciotto on July 26, 2013.) This contemporaneous text message speaks for itself and demonstrates that Complainant did not in fact feel the apology was deficient but instead "truly appreciated" it. Having been caught making this false allegation in his EEOC Charge, Complainant does not repeat the allegation in his Complaint with the Division.[3]

Significantly, Mr. Cianciotto has not engaged in any conduct of the type alleged by Complainant since his July 2013 apology. Indeed, neither Complainant nor any other DDB employee has reported any claims of unprofessional conduct by Mr. Cianciotto since that time. And Complainant does not even allege that Mr. Cianciotto has engaged in any offensive conduct toward him or any other employee since then. In other words, Complainant has effectively acknowledged that Mr. Cianciotto has not engaged in any conduct in over 1½ years that he considers to be offensive. It is therefore apparent that DDB's handling of this matter was effective as the conduct has completely ceased.

[2] Mr. Cianciotto also apologized individually to Complainant both in 2013 and again more recently after receiving the EEOC Charge.

[3] A copy of the EEOC Charge in which Complainant makes this false allegation is annexed as Exhibit D.

D. Mr. Cianciotto Has Been a Longstanding Supporter of Complainant at DDB and Gay Rights Generally

Not only did Complainant and Mr. Cianciotto have a friendly and playful relationship, but Mr. Cianciotto was very supportive of Complainant's career at DDB. In this regard, Mr. Cianciotto was largely responsible for the decision to promote Complainant from an Associate Creative Director to a Creative Director in early 2013. Further, in April 2013, Complainant was 1 of only 2 employees in Mr. Cianciotto's creative group of over 20 employees to receive a bonus. And, in August 2013, Complainant was 1 of only 4 employees in Mr. Cianciotto's creative group to receive a salary increase. (Complainant's raise was $25,000, which represented a 12% increase.) Needless to say, Mr. Cianciotto's support of Complainant through this promotion and salary increases wholly belies any claim that Complainant discriminated against Complainant because of his sexual orientation or any other protected characteristic.

Mr. Cianciotto has also been a longstanding supporter of gay rights. For example, in March 2013, Mr. Cianciotto's profile picture on his Facebook page was changed to include the "red equal sign" demonstrating his support for gay marriage. And since January 2012, Mr. Cianciotto has donated his time pro bono to combat bullying by creating the "Be More than a Bystander' TV and online campaign, partnering with the Ad Council (the leading provider of public service communications). Likewise, in May 2012, Mr. Cianciotto partnered with Dr. Eliza Byard, Executive Director of the Gay, Lesbian and Straight Education Network, to create a support module addressing bullying for parents. And again in October 2013, Mr. Cianciotto donated his time pro bono to create a third public service TV commercial in partnership with the Ad Council and the Bully Project that focused on the plight of the LGBT (Lesbian, Gay, Bisexual, and Transgender) community and a young boy who was bullied for having two mothers. Once again, Mr. Cianciotto's actions demonstrate that he is a strong supporter of gay rights and undermine Complainant's allegations of discrimination.

II. COMPLAINANT'S LEGAL CLAIMS HAVE NO MERIT

A. The Complaint Is Time Barred

The NYSHRL provides for a one-year statute of limitations. N.Y. Exec. Law §297(5).[4] Complainant filed his complaint with the NYSDHR on or about December 17, 2014.

In the Complaint, Complainant alleges that Mr. Cianciotto, circulated several offensive pictures referencing Complainant within the Company in 2011, and made an offensive comment to him in May 2013. Complainant does not allege that Mr. Cianciotto engaged in any instances of offensive conduct since then. The only fact alleged in the Charge that occurred since May 2013 was that Complainant discovered the muscle beach party poster to promote the DDB happy

[4] Complainant's claim of discrimination under the ADA is subject to a 300 day statute of limitations period. *See Tewksbury v. Ottaway Newspapers, Inc.*, 192 F.3d 322, 325-29 (2d Cir. 1999).

hour on Mr. Cianciotto's Facebook page. However, Complainant admits that the poster was drawn by Mr. Cianciotto in July 2011 and he was indisputably aware of the poster in July 2011.

All of Complainant's allegations therefore relate to conduct that occurred long before December 17, 2013, which is 1 year before Complainant filed the Complaint with the Division on December 17, 2014. Accordingly, the Complaint must be dismissed.

B. Complainant Has Not Been Subjected To A Hostile Work Environment

To prevail on a claim of hostile work environment under the New York State Human Rights Law ("NYSHRL"), a complainant must show that the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Mahoney v. Metropolitan Tr. Auth.*, 2014 N.Y. Misc. LEXIS 4690, at *15 (N.Y. Sup. Ct. Oct. 22, 2014), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To be actionable, the incidents of harassment "must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Mahoney*, 2014 N.Y. Misc. LEXIS 4690, at *15, quoting *Kotcher v Rosa & Sullivan Appliance Ctr.*, 957 F2d 59, 62 (2d Cir 1992). "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Mahoney*, 2014 N.Y. Misc. LEXIS 4690, at *15, quoting *Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 310-11 (2004).

Even assuming arguendo that the Complaint is not time barred, Mr. Cianciotto's conduct – while unprofessional – does not rise to the level of actionable discrimination or harassment. Indeed, Complainant himself essentially acknowledged as such when he spoke with Wendy Raye, DDB's Director of Human Resources for the New York office, in June 2013 about Complainant. At the time, he indicated that he felt that Mr. Cianciotto acts "like a little kid" and an "asshole." (Annexed as Exhibit E is a copy of Ms. Raye's interview notes.)

Moreover, given that Complainant himself regularly joked with Mr. Cianciotto and other employees at DDB about his sexual orientation and other things of a sexual nature, including, for example, the "minge" email to Mr. Cianciotto referenced above, Mr. Cianciotto certainly had no reason to believe that Complainant would be offended by his attempts at similar humor. Indeed, it is well settled under New York law that where a complainant himself or herself engaged in the alleged "harassing" conduct, no claim will lie. *See, e.g., Giudice v. Red Robin Int'l, Inc.*, 2013 U.S. Dist. LEXIS 26972, at * 26 (W.D.N.Y. Feb. 27, 2013) (dismissing claims brought under Title VII and the NYHRL noting that "[w]here an employee has admitted that he participated in the alleged 'harassing' conduct, and did not find that alleged behavior 'unwelcome,' no reasonable juror could conclude that he had an objectively reasonable and good faith belief that the same conduct constituted sexual harassment").

Finally, as set forth above, DDB took appropriate action to address Mr. Cianciotto's conduct, and Mr. Cianciotto has not engaged in any conduct since May 2013 that Complainant or

any other employee has complained about or indicated he or she found to be offensive. Indeed, it is apparent that DDB handled the matter effectively, and Complainant has himself for all intents and purposes acknowledged that he has not been subjected to any offensive conduct for more than 1 ½ years. *Porfilio v. Mt. St. Mary's Hospital, et. al.,* Case No. 10107052 (NYSDHR Feb. 29, 2008) (dismissing complaint finding that male doctor's offensive sexual jokes to female nurse did not create a "hostile work environment" and that hospital successfully remedied the situation by severely warning the doctor which caused the offensive behavior to cease).

C. Mr. Cianciotto Had No Knowledge Of Complainant's Medical Situation

In order to state a *prima facie* claim for disability discrimination, a complainant must show that he suffers from a disability and that the disability engendered the behavior for which he was discriminated against in the terms, conditions, or privileges of his employment. *See Garcia v Peninsula New York Partners*, 2008 N.Y. Misc. LEXIS 9150, at *6 (N.Y. Sup. Ct. Aug. 20, 2008) (dismissing complaint where plaintiff failed to demonstrate that he was discriminated against or otherwise subject to a hostile work environment due to any disability). It is, of course, axiomatic that in order to sustain a claim for disability discrimination, the alleged discriminator must have known or regarded the plaintiff as having a disability.

In this instance, Mr. Cianciotto did not know or regard Complainant as having AIDS or any other medical conditions, and the first time he learned of Complainant's apparent medical condition was after receiving a copy of this Complaint in January 2015. Moreover, Complainant's claim that DDB has access to his medical records indicating that he has AIDS is simply not true. Complainant's personnel file at DDB does not indicate in any way that he has AIDS or any other medical conditions, and DDB does not have access to any health insurance records indicating that Complainant has AIDS. In this regard, for privacy purposes, DDB has maintained a longstanding practice of having employees and/or their medical providers submit medical claims directly to the insurance company and DDB does not receive a copy of or have access to such claims.

Under these circumstances, any disability claim by Complainant clearly must fail. *See Idlisan v. Mount Sinai Med. Ctr.*, 2015 U.S. Dist. LEXIS 3241, at *13-14 (S.D.N.Y. Jan. 9, 2015) (dismissing disability discrimination claim because there was no evidence that defendant was even aware of plaintiff's disability, let alone that it discriminated against plaintiff because of it); *Klemme v. W. Irondequoit Cent. Sch. Dist.*, 2014 U.S. Dist. LEXIS 164132, at *13 (W.D.N.Y. Nov. 24, 2014) (same).

D. Complainant Has Not Been Retaliated Against

In order to establish a *prima facie* retaliation claim under NYSHRL, "a plaintiff must show that (1) [he] was engaged in protected activity, (2) [his] employer was aware that [he] participated in such activity, (3) [he] suffered an adverse employment action based upon [his] activity, and (4) there is a casual connection between the protected activity and the adverse action." *See Williams v Columbia University*, 2014 N.Y. Misc. LEXIS 109, at *10-11 (N.Y.

Sup. Ct. Jan. 13, 2014) (dismissing retaliation claim under the NYSHRL where plaintiff failed to allege any adverse action was taken against her).

An "adverse employment action" under the NYSHRL is defined as "a materially adverse change in the terms and conditions of an individual's employment. It is more disruptive than a mere inconvenience, and might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Chin v New York City Hous. Auth.*, 2011 N.Y. Misc. LEXIS 3444, at *22-23 (N.Y. Sup. Ct. July 7, 2011) (dismissing retaliation claim where employer's alleged retaliatory conduct amounted to nothing more than "inconveniences" and where plaintiff "did not lose any salary or benefits").

Complaint does not – because he cannot – allege that any adverse action has been taken against him. It appears he is attempting to support his unfounded retaliation claim by referencing Mr. Cianciotto's apologies to him. Needless to say, a manager apologizing to a subordinate when he became aware that he said something that he did not mean to be offensive but the subordinate apparently found to be offensive is plainly insufficient to support a retaliation claim.

In any case, it is indisputable that Complainant has not suffered any demotions or decreases in salary or any other adverse changes in the terms of conditions of his employment. To the contrary, as stated above, Complainant has been promoted and was 1 of only 2 employees in Mr. Cianciotto's creative group at DDB to receive a bonus and significant salary increase in 2013. And Mr. Cianciotto was largely responsible for those decisions. Under these circumstances, he cannot establish a prima facie retaliation claim under the NYSDHRL.

CONCLUSION

For the foregoing reasons, we urge that the Complaint be dismissed for lack of probable cause.

If you have any questions or require additional information, please do not hesitate to contact me at (212) 468-4885. If Complainant submits anything to the Division, please provide me with a copy pursuant to the Freedom of Information Law of the State of New York ("FOIL"). We will pay for all copying costs.

Very truly yours,

Daniel A. Feinstein

Exhibits

cc: DDB Worldwide Communications Group Inc.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[redacted]
Complainant
v.

Anthony Foxx,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120133080

Agency No. 2012-24738-FAA-03

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e–2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency's final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant's initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission's jurisdiction. [1]

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency's Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida.

On August 28, 2012, Complainant contacted an EEO counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on

[1] This decision addresses only the timeliness and jurisdiction questions raised on appeal. We take no position on the merits of Complainant's claim of discrimination. That is for the Agency to determine upon remand.

July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

The Agency accepted the complaint for investigation. When the investigation was completed, Complainant was given his notice of right to request a hearing before an EEOC administrative judge or an immediate final decision by the Agency based on the investigative report. On May 21, 2013, Complainant requested an immediate final decision from the Agency. The Agency issued its Final Agency Decision (FAD) on July 12, 2013.

The evidence developed during the investigation shows that in October 2010, Complainant was selected for and accepted a temporary FLM position at the Miami facility. The record further reflects that the Agency issued a vacancy announcement for a permanent FLM position in June 2012.

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as well as his familiarity with the Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor who was involved in the selection process for the permanent position made several negative comments about Complainant's sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on a number of occasions that he was "a distraction in the radar room" when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant's claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO counselor, as required by EEOC regulations. The Agency reasoned that the 45-day limitation period in which Complainant should have contacted a counselor started to run in October 2010, the date on which the Complainant was aware that his temporary FLM position would expire after two years and he would be returned to his previous position. Therefore, the Agency found that Complainant's EEO counselor contact in August 2012 was made well beyond the 45-day limitation period.

The FAD also notified Complainant that, pursuant to the "Secretary's Policy on Sexual Orientation" and the "Departmental Office of Civil Rights' March 7, 1998 Procedures for

Complaints of Discrimination based on Sexual Orientation," the "sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)]."

Complainant appealed the Agency's decision to the Commission.

ANALYSIS AND FINDINGS

Timeliness of EEO Counselor Contact

EEOC's regulations require that complaints of discrimination be brought to the attention of an Equal Employment Opportunity Counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). The Commission has long applied a "reasonable suspicion" standard, viewed from the perspective of the complainant, to determine when the 45-day limitation period is triggered. See e.g., Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120093169, 2014 WL 2999934 (EEOC June 27, 2014) (citing Howard v. Dep't of the Navy, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999), citing Ball v. U.S. Postal Serv., EEOC Appeal No. 01871261, 1988 WL 921053 (EEOC July 6, 1988), req. for recon. den., EEOC Request No. 05980247 (July 15, 1988)). Thus, the time limitation is not triggered until a complainant should reasonably suspect discrimination, even if all the facts that might support the charge of discrimination have not yet become apparent.

Further, it is well-settled that when, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Williams v. Dep't of Def., EEOC Request No. 05920506, 1992 WL 1374923, *3 (EEOC Aug. 25, 1992). We conclude the Agency has not met this burden and erred in dismissing the complaint for untimely EEO counseling.

In its FAD, the Agency stated that it considered the date of the alleged adverse action to be October 2010, when Complainant assumed his temporary FLM position and, according to the Agency, knew that he would be returned to his former position at the expiration of the appointment. However, the Agency acknowledged in its FAD that "the date of the incident for the instant complaint is in dispute." It is clear that a permanent FLM vacancy was posted in June 2012 and a selection was made in July 2012, although the selectee later declined the position and the certificate of eligibles expired without any further selection being made.

The Agency argued that Complainant did not apply for the position, but Complainant claims that he did not formally apply because of his understanding that all temporary FLMs were automatically considered for vacant, permanent FLM positions. Further, Complainant stated that his desire for promotion was well known in the Miami facility. Whether, under the facts of this case, Complainant was or was not required to submit an application in order to be considered for the vacant permanent position goes to the merits of his complaint. At this stage of the proceedings, the inquiry is limited to whether Complainant has met the procedural

requisites to bring his EEO complaint in the Part 1614 process and if he has the legal right to come before the Commission. See, e.g., Complainant v. U.S. Equal Employment Opp. Commn., EEOC Appeal No. 0120120403, 2013 WL 6145999 (EEOC Nov. 13, 2013) (citing Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642, 1991 WL 1189594 (EEOC Aug. 15, 1991). We find that he has done so.

According to the affidavits of Complainant's first-level supervisor (S1) and second-level supervisor (S2): Individuals, including Complainant, competed for the temporary FLM appointments. The vacancy announcement for Complainant's temporary FLM appointment stated that appointment could "be extended, terminated, or become permanent without further competition." In February 2012, an announcement was made that a temporary FLM (Employee 1) had been converted to permanent status. Employee 1 did not compete for the permanent position. Subsequently, a second temporary FLM (Employee 2) had been converted to permanent status without competing for the position.[2] Neither S1 nor S2 explained the process by which temporary FLMs were converted to permanent status in their affidavits, although S2 stated that it was a matter of managerial discretion.

It is not reasonable for the Agency to argue that Complainant knew or should have known that he was being discriminated against with regard to conversion to a permanent position at the time he was appointed to a temporary FLM position. Complainant had no reason to know or to suspect at the time of his temporary appointment that he subsequently would not be selected for a permanent FLM position, let alone for discriminatory reasons. As the elevation of the two temporary FLMs demonstrates, conversion to a permanent FLM position was a realistic possibility for Complainant if a vacancy arose during his tenure. The Agency's position might have merit if Complainant's claim were that, when he was given a temporary appointment, other individuals outside of his protected group were given permanent appointments. But that is not the claim at bar. Rather, the claim is whether Complainant was treated disparately when he was not converted to permanent status nearly two years after his appointment.

The standard we apply to determine timeliness is when Complainant *reasonably* should have first suspected discrimination. Here, we find that Complainant could only reasonably have suspected that discrimination occurred after he learned he was not selected for conversion to the permanent FLM position on July 26, 2012, near the end of his two-year temporary assignment. See Howard, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999). Complainant's contact with an EEO Counselor on August 28, 2012, therefore, fell within the 45-day limitation period and was timely. Accordingly, we remand the complaint for further processing by the Agency consistent with the ruling below.

[2] While Employee 2 was converted to permanent status to resolve an EEO complaint he had filed, there is no indication that the reason for his conversion to permanent status was common knowledge. S1 averred that Employee 2 would have qualified for conversion to permanent status in any event.

EEOC Jurisdiction over Complainant's Sex Discrimination Claim

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").

Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions. See Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 241–42 (1989); Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (quoting Price Waterhouse, 490 U.S. at 239).[3] This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.[4]

[3] As used in Title VII, the term "sex" "encompasses both sex- that is, the biological differences between men and women - and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.") (plurality opinion). We do the same in this decision.

[4] As we observed in Macy, 2012 WL 1435995 at *6:

In the case before us, we conclude that Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. The Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that 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. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/ sexuality-definitions.pdf ("*Sexual orientation* refers to the *sex* of those to whom one is sexually and romantically attracted." (second emphasis added). It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a

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"'Title VII . . . identif[ies] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise."' Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."' [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring) "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.

legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

The court in Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he "experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." Id. at *2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. See also Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller's manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.") (internal citations omitted).[5]

[5] Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See Videckis v. Pepperdine Univ., ___ F. Supp. 3d ___, No. 15-298, 2015 WL 1735191 (C.D. Cal., 2015) ("[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); Lawson v. Kelly, ___ F. Supp. 3d ___, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification," and it violates the Equal Protection Clause); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), aff'd sub nom., Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); cf. Obergefell v. Hodges, 576 U.S. ___, 2015 WL 2473451, *19 (2015) ("[I]t must be further acknowledged that [laws prohibiting same-sex marriage] abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.").

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as an interracial marriage or friendship. See, e.g., Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009) ("This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race."); Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008) ("We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.").[6] This is because an employment action based on an employee's relationship with a person of another race necessarily involves considerations of the employee's race, and thus constitutes discrimination because of the employee's race.

This analysis is not limited to the context of race discrimination. Title VII "on its face treats each of the enumerated categories"—race, color, religion, sex, and national origin—"exactly the same." Price Waterhouse, 490 U.S. at 243 n.9 ("[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin."); see also Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir. 1982) ("[T]he standard for proving sex discrimination and race discrimination is the same."); Horace v. City of Pontiac, 624 F.2d 765, 768 (6th Cir. 1980)

[6] See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir.1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . ."); Hancock v. Dep't of Transp., EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), req. for recon. den., EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) ("[A]n individual may be entitled to protection by virtue of association with a member of a protected class . . . ."); Robertson v. U.S. Postal Serv., EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n. 1 (association discrimination may be established where evidence permits the inference that an agency's act or omission would not have occurred if the complainant and associate were of the same race).

("Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination.").

Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, "by definition," discrimination because of the employee or applicant's sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race [in violation of Title VII]."); Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) ("Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.").

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently "masculine" or "feminine."[7] But as the Commission[8] and a number

[7] See Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) ("It follows [from Price Waterhouse] that employers who discriminate against men because they . . . act femininely[ ] are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); EEOC v. Boh Brothers, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) ("[A] jury could view Wolfe's behavior as an attempt to denigrate Woods because — at least in Wolfe's view — Woods fell outside of Wolfe's manly-man stereotype" and that would constitute sex discrimination in violation of Title VII).

[8] See Veretto v. United States Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); Baker v. Social Security Administration, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC January 11, 2013) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-conforming behavior); Dupras v. Dep't of Commerce, EEOC Request No. 0520110648, 2013 WL 1182329 (EEOC March 15, 2013) (complainant's allegation that she was subjected to stereotyping on

of federal courts[9] have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

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the basis of sex because of her sexual orientation is sufficient to state a claim of sex discrimination under Title VII); Culp v. Dep't of Homeland Security, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC May 7, 2013) (complainant's allegation of sexual orientation discrimination states a claim of sex discrimination because it was an allegation that her supervisor was motivated by stereotypes that women should only have relationships with men); Brooker v. U.S. Postal Service, EEOC Request No. 0520110680 , 2013 WL 4041270 (EEOC May 20, 2013), (complainant's allegation that coworkers were spreading allegations about his sexual orientation was properly framed as a claim of sex discrimination); Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0120110576, 2014 WL 4407457 (EEOC August 19, 2014) (reaffirming the analysis in the cases cited above).

[9] See Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Heller, 195 F. Supp. 2d at 1224 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); Koren v. Ohio Bell, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) ("And here, Koren chose to take his spouse's surname—a "traditionally" feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name."); Terveer v. Billington, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he "alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, and that his orientation as homosexual had removed him from Mech's preconceived definition of male.") (internal citations and quotes omitted); Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. 2014) (denying an employer's motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); Deneffe v. SkyWest, Inc., 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying employer's motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male "braggadocio" about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights) cf. Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory."); Id. at 495 (Berzon, J. concurring) ("[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.").

Sexual orientation discrimination and harassment "[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms." Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The Centola court continued:

> In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real" men should date women, and not other men.

Id.

Those deeper assumptions and stereotypes about "real" men and "real" women were similarly noted by the court in Terveer v. Library of Congress in rejecting the government's motion to dismiss:

> Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Here, Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor's] supervision or at the LOC," and that "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male." As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (citations omitted) (first quoting Pl.'s Am. Compl.; then quoting Fed. R. Civ. P. 8(a)).

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above.[10] Indeed, many courts

[10] A review of cases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. For example,

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 v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the "borders [between the two classes] are . . . imprecise." Id. (alteration in original).[11]

Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) ("Congress had only the traditional notions of 'sex' in mind" when it passed Title VII and those "traditional notions" did not include sexual orientation or sexual preference.) abrogated by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001).[12]

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in a brief to the Seventh Circuit Court of Appeals requesting rehearing based on various broad declaratory statements that Title VII does not cover sexual orientation, the EEOC pointed out that only one previous Seventh Circuit case had analyzed the question of coverage of sexual orientation discrimination under Title VII and that case, decided in 1984, had not been reviewed in light of subsequent decisions such as Price Waterhouse. Instead, a string of Seventh Circuit panel decisions had simply reiterated the holding in the first case without any further discussion. Br. EEOC Supp. Reh'g 8-9, Muhammad v. Caterpillar Inc., ECF No. 49, No. 12-1723 (7th Cir. Oct. 7, 2014). The Seventh Circuit denied the request for rehearing but reissued its decision without the statements that sexual orientation discrimination is not covered under Title VII. See Muhammad v. Caterpillar, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014).

[11] We do not view the borders between sex discrimination and sexual orientation as "imprecise." As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

[12] Indeed, the Equal Employment Opportunity Commission's own understanding of Title VII's application to sexual orientation discrimination has developed over time. Compare Johnson v. U.S. Postal Serv., EEOC Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991) (holding that Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and Morrison v. Dep't of the Navy, EEOC Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994) (affirming that Title VII's discrimination prohibition does not include sexual preference or orientation as a basis), with Morris v. U.S. Postal Serv., EEOC Appeal No. 01974524, 2000 WL 226001, at *1-2 (EEOC Feb. 9, 2000) (distinguishing Johnson and Morrison and holding that complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex). Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections to protect LGBT employees and explained that federal decisions have been inconsistent in this area. See Employment Non-Discrimination Act of 2009:

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in Oncale v. Sundowner Offshore Services, Inc., "statutory prohibitions often go beyond the principal evil [they were 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. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.[13] Nothing in the text of Title VII "suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone." Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.").[14] But 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) (citation omitted) (internal quotation marks omitted).

The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new

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Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor, 111th Cong. (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission).

[13] Title VII prohibits discrimination on the basis of "sex" without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, "[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress's province." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ___ (2015), 135 S.Ct. 2028, 2033, 2015 WL 2464053, *4 (2015).

[14] See also Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing Bibby and Simonton (see infra) with approval); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) ("Title VII has not been amended to prohibit discrimination based on sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent.").

protected class of "people in interracial relationships." See e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998), reinstated in relevant part, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of "masculine women." See Price Waterhouse, 490 U.S. at 239-40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of "non-believers." See e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word "mothers" in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant's allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm or expectation that individuals should be attracted only to those of the opposite sex.[15] Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process.

We recognize that many agencies also have separate complaint processes in place for claims of sexual orientation discrimination. Agencies may maintain, and employees may still utilize, these procedures if they wish. But the 1614 process is the most appropriate method for resolving these claims. Agencies should make applicants and employees aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.

CONCLUSION

Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title

[15] There may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.

VII. Furthermore, we conclude that Complaint's initial EEO counselor contact was timely. We remand the Complainant's claim of discrimination to the Agency for further processing to determine its validity on the merits.

ORDER

The Agency is ordered to continue processing the remanded claims. The Agency shall acknowledge to the Complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The Agency shall reissue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights within thirty (30) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision on the merits of his discrimination claims within sixty (60) days of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you instead wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) ("Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security"); the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

July 16, 2015
Date

EXHIBIT F

Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII

Supreme Court Decisions on the Scope of Title VII's Sex Discrimination Provision

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998). The Supreme Court held that same-sex harassment is sex discrimination under Title VII. Justice Scalia noted in the majority opinion that, while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . .statutory prohibitions often go beyond the principal evil [they were 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. Title VII prohibits 'discriminat[ion] . . . because of . . . sex.' [This] . . . must extend to [sex-based] discrimination of any kind that meets the statutory requirements." Id. at 79-80.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Supreme Court recognized that employment discrimination based on sex stereotypes (e.g., assumptions and/or expectations about how persons of a certain sex should dress, behave, etc.) is unlawful sex discrimination under Title VII. Price Waterhouse had denied Ann Hopkins a promotion in part because other partners at the firm felt that she did not act as woman should act. She was told, among other things, that she needed to "walk more femininely, talk more femininely, [and] dress more femininely" in order to secure a partnership. Id. at 230-31, 235. The Court found that this constituted evidence of sex discrimination as "[i]n the . . . 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. The Court further explained that Title VII's "because of sex" provision strikes at the "entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted)).

Federal Court Decisions Supporting Coverage for Transgender Individuals as Sex Discrimination

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). The plaintiff, a transgender female,

brought a claim under 42 U.S.C. § 1983 alleging unlawful discrimination based on sex in violation of the Equal Protection Clause when she was terminated from her position with the Georgia General Assembly. Relying on Price Waterhouse and other Title VII precedent, the court concluded that the defendant discriminated against the plaintiff based on her sex by terminating her because she was transitioning from male to female. The court stated that a person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes." As a result, there is "congruence" between discriminating against transgender individuals and discrimination on the basis of "gender-based behavioral norms." Because everyone is protected against discrimination based on sex stereotypes, such protections cannot be denied to transgender individuals. "The nature of the discrimination is the same; it may differ in degree but not in kind." The court further concluded that discrimination based on sex stereotypes is subject to heightened scrutiny under the Equal Protection Clause, and government termination of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination. Although in this case the defendant asserted that it fired the plaintiff because of potential lawsuits if she used the women's restroom, the record showed that the plaintiff's office had only single-use unisex restrooms, and therefore there was no evidence that the defendant was actually motivated by litigation concerns about restroom use. The defendant provided no other justification for its action, and therefore, the plaintiff was entitled to summary judgment.

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004). The plaintiff alleged that he was suspended based on sex after he began to express a more feminine appearance and notified his employer that he would eventually undergo a complete physical transformation from male to female. The court held that Title VII prohibits discrimination against transgender individuals based on gender stereotyping. The court determined that discrimination against an individual for gender-nonconforming behavior violates Title VII irrespective of the cause of the behavior. The court reasoned that the "narrow view" of the term "sex" in prior case law denying Title VII protection to transgender employees was "eviscerated" by Price Waterhouse, in which the Supreme Court held that Title VII protected a woman who failed to conform to social expectations about how women should look and behave.

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005). Plaintiff, who "was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty [and] had a reputation throughout the police department as a homosexual, bisexual or cross-dresser," alleged he was demoted because of his failure to conform to sex stereotypes. The court held that this stated a claim of sex discrimination under Title VII.

Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000). Citing Title VII case law, the court concluded that a transgender plaintiff, who was biologically male, stated a claim of sex discrimination under the Equal Credit Opportunity Act by alleging that he was denied a loan application because he was dressed in traditionally female attire.

Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000). Citing Title VII case law, the court concluded that a transgender woman stated a claim of sex discrimination under the Gender Motivated Violence Act based on the perception that she was a "man who 'failed to act like one.'" The court noted that "the initial approach" taken in earlier federal appellate

Title VII cases rejecting claims by transgender plaintiffs "has been overruled by the language and logic of Price Waterhouse."

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., ___ F. Supp. 3d ___, 2015 WL 1808308 (E.D. Mich. Apr. 21, 2015). Denying the employer's motion to dismiss a Title VII sex discrimination claim brought on behalf of a terminated funeral home employee who was a transgender woman, the court held: "[I]f the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint fails to state a claim under Title VII. But the EEOC's complaint also asserts that the Funeral Home fired Stephens 'because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes' (Compl. at ¶ 15). And binding Sixth Circuit precedent establishes that any person without - regard to labels such as transgender - can assert a sex-stereotyping gender-discrimination claim under Title VII, under a Price Waterhouse theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination. This Court therefore concludes that the EEOC's complaint states a claim as to Stephens's termination."

Lewis v. High Point Regional Health System, ___ F. Supp. 3d ___, 2015 WL 221615 (E.D.N.C. Jan. 15, 2015). Plaintiff, a certified nursing assistant, alleged she was denied hire for several positions because of her transgender status. At the time of her interviews, she was anatomically male, and was undergoing hormone replacement therapy in preparation for sex reassignment surgery in the future. Denying the employer's motion to dismiss her Title VII sex discrimination claim, the court ruled that Title VII's sex discrimination provision prohibits discrimination related to transgender status.

Finkle v. Howard Cnty., Md., 122 Fair Empl. Prac. Cas. (BNA) 861, 2014 WL 1396386 (D. Md. Apr. 10, 2014). Denying the county's motion to dismiss or for summary judgment on a Title VII claim brought by a volunteer auxiliary police officer, the court ruled that the officer was an "employee" for Title VII purposes, and that her claim that she was discriminated against "because of her obvious transgendered status" raised a cognizable claim of sex discrimination. The court reasoned: "[I]t would seem that any discrimination against transsexuals (as transsexuals) - individuals who, by definition, do not conform to gender stereotypes - is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by Price Waterhouse. As Judge Robertson offered in Schroer[v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008)], '[u]ltimately I do not think it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.'"

Parris v. Keystone Foods, 2013 WL 4010288 (N.D. Ala. Aug. 7, 2013), appeal docketed, No. 13-14495-D (Oct. 1, 2013). Plaintiff, a transgender female, alleged that she was discharged from her job at a chicken processing facility because of her "gender non-conformity." The district court, citing Glenn v. Brumby, recognized that the plaintiff's claims were covered by Title VII's sex discrimination prohibitions, but granted summary judgment to the employer on the ground that plaintiff's comparator evidence and evidence of discriminatory remarks by coworkers did not show that her discharge was motivated by her gender identity as opposed

to the legitimate non-discriminatory reason proffered by the employer.

Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye, & Dental Fund, 867 F. Supp. 2d 1023 (D. Minn. 2012). Assessing a claim under ERISA for wrongful termination of benefits to a legal spouse of a transgender individual, the court quoted the language from Smith v. City of Salem that the Supreme Court's decision in Price Waterhouse "eviscerated" the "narrow view" of "sex" articulated in earlier Title VII cases, and observed: "An individual's sex includes many components, including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual."

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). The plaintiff, a transgender female, was offered a position as a terrorism research analyst before she had changed her name and begun presenting herself as a woman. After the plaintiff notified the employer that she was under a doctor's care for gender dysphoria and would be undergoing gender transition, the employer withdrew the offer, explaining that the plaintiff would not be a "good fit." The court stated that since the employer refused to hire the plaintiff because she planned to change her anatomical sex by undergoing sex reassignment surgery, the employer's decision was literally discrimination "because of ... sex." The court analogized the plaintiff's claim to one in which an employee is fired because she converted from Christianity to Judaism, even though the employer does not discriminate against Christians or Jews generally but only "converts." Since such an action would be a clear case of discrimination "because of religion," Title VII's prohibition of discrimination "because of sex" must correspondingly encompass discrimination because of a change of sex. The court concluded that decisions rejecting claims by transgender individuals "represent an elevation of 'judge-supposed legislative intent over clear statutory text,'" which is "no longer a tenable approach to statutory construction."

Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008). The plaintiff alleged that she was subjected to sex discrimination when the employer rescinded its job offer after learning that she was transgender. Denying the employer's motion for summary judgment, the court concluded that the plaintiff's claim was actionable as sex discrimination under Title VII on the theory that she failed to comport with the employer's notions of how a male should look. A finder of fact might reasonably conclude that the employer's statement that the job offer was rescinded because she had "misrepresented" herself as female reflected animus against individuals who do not conform to gender stereotypes.

Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 WL 456173, at *2 (W.D. Pa. 2006). Plaintiff alleged sex-based harassment and termination in violation of Title VII after the employer learned that plaintiff had been diagnosed with gender identity disorder and plaintiff began presenting at work as a female after having presented as a male during the first four years of employment. Denying the employer's motion to dismiss, the court held that because the complaint "included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions, plaintiff has sufficiently pleaded claims of gender discrimination."

Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y. 2003). Relying on the reasoning in Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000), the court ruled that plaintiff's sex discrimination claims of hostile work environment harassment and discriminatory discharge arising from her transition and sex reassignment surgery were actionable under Title VII, based on factual allegations that she was discriminated against for "failing to act like a man." See also Doe v. United Consumer Fin. Servs., No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001).

Creed v. Family Express Corp., 101 Fair Empl. Prac. Cas. (BNA) 609, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007). The plaintiff, a transgender female, alleged facts permitting an inference that she was terminated because of gender stereotypes; specifically, that she was perceived by her employer to be a man while employed as a sales associate and was fired for refusing to present herself in a masculine way. See also Hunter v. United Parcel Serv., 697 F.3d 697 (8th Cir. 2012) (affirming summary judgment for the employer under both Title VII and state law, the court did not rule that such discrimination was not actionable under Title VII, but rather that there was no evidence that the prospective employer knew or perceived that plaintiff was transgender during the job interview, and therefore a prima facie case of sex discrimination was not established).

Miles v. New York Univ., 979 F. Supp. 248, 249-50 (S.D.N.Y. 1997). Noting that the phrase "on the basis of sex" in Title IX is interpreted in the same manner as similar language in Title VII, the court held that a transgender female student could proceed with a claim that she was sexually harassed "on the basis of sex" in violation of Title IX.

Federal Court Decisions Supporting Coverage of Sexual Orientation-Related Discrimination as Sex Discrimination

Muhammad v. Caterpillar Inc., 767 F.3d 694 (7th Cir. Sept. 9, 2014, as amended on denial of rehearing, Oct. 16, 2014). Plaintiff alleged that hostile work environment harassment relating to his perceived sexual orientation was sex-based harassment in violation of Title VII. Affirming the district court's grant of summary judgment to the employer, the appellate court ruled that the employer took prompt remedial action once on notice of the harassment. As urged by the EEOC in an amicus brief filed in connection with plaintiff's petition for rehearing, the court denied the petition but amended its original decision to delete language that had stated sexual orientation-related discrimination claims are not actionable under Title VII.

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014). The 9th Circuit Court of Appeals held that statutes and constitutional amendments in Idaho and Nevada prohibiting same-sex marriages and refusing to recognize same-sex marriages validly performed in other states violated the Equal Protection Clause. The opinion of the court held that the laws were invalid as they discriminated on the basis of sexual orientation without sufficient justification. It also noted that "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory." Id. at 474. A concurrence by Judge Berzon focused exclusively on the sex discrimination argument. Her opinion stated that she would have found that the Idaho and Nevada laws unlawfully discriminated on the basis of sex as, among other reasons, "the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in

large part, disapproval of their nonconformity with gender-based expectations." Id. at 495.

Videckis v. Pepperdine University, 2015 WL 1735191 (C.D. Cal. 2015). Pepperdine University filed a motion to dismiss plaintiff's Title IX claim, stating that the plaintiff alleged sexual orientation discrimination and not sex discrimination. The district court granted the motion but gave the plaintiff leave to amend the complaint, noting that "discrimination based on a same-sex relationship could fall under the umbrella of sex[] discrimination." Id. at 8. The court further stated that plaintiffs could frame an argument of sexual orientation discrimination as sex discrimination using either a gender-stereotype approach or a plain-text argument. To illustrate the plain-text example, the court noted that "a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender . . . the gender discrimination would be that female players would be prevented from entering into relationships with other females because their chosen partner was female." Id.

Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. Sept. 25, 2014). The court denied the employer's motion to dismiss a Title VII sex discrimination claim alleging adverse employment actions occurring after management learned of her sexual orientation. The allegation that plaintiff was "subjected to sexual stereotyping during her employment on the basis of her sexual orientation" was held actionable as sex discrimination under Title VII because it sets forth "a plausible claim that she was discriminated against based on her non-conforming gender behavior."

Hall v. BNSF Railway Co., 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014). Denying an employer's motion to dismiss a Title VII sex discrimination claim challenging the employer's policy of providing health insurance coverage for employees' legally married opposite-sex spouses but not same-sex spouses, the court found that the allegations were sufficient to allege discrimination based on the sex of the employee.

Terveer v. Billington, 2014 WL 1280301 (D.D.C. Mar. 31, 2014). Denying the employer's motion to dismiss the plaintiff's Title VII sex discrimination claims for denial of promotion and harassment because of non-conformance with sex stereotypes, the court found sufficient the plaintiff's allegations that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men [at his workplace]," and "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male."

Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002). In dicta, the court explained: "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."

Koren v. Ohio Bell Telephone Co., 2012 WL 3484825 (N.D. Ohio Aug. 14, 2012). Denying defendant's motion for summary judgment where plaintiff alleged his supervisor discriminated against him based on sex stereotypes because he is married to a man and took his husband's last name, the court held: "That *is* a claim of discrimination because of sex." (emphasis in original).

Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002). In a Title VII sex harassment case brought by a lesbian employee who was subjected to negative comments about her sex life, the court stated that the belief that men or women should only be attracted to or date persons of the opposite sex constitutes a gender stereotype. "If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller-including numerous unwanted offensive comments regarding her sex life-the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual." In this case, the court held, a jury could find that [the manager] repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."

Strong v. Grambling State University, 2015 WL 1401335 (W.D. La. Mar. 25, 2015). The court analyzed on the merits plaintiff's claim that he was subject to sex discrimination in violation of Title VII based on his "gender status as heterosexual" because "women and homosexuals earn higher salaries than he does and receive pay increases where he does not." Granting the employer's motion for summary judgment, the court found there was insufficient evidence to support an inference of discriminatory intent.

EXHIBIT G

About EEOC
Overview
The Commission
Meetings of the Commission
Open Government
Newsroom
Laws, Regulations, Guidance & MOUs
Budget & Performance
Enforcement & Litigation
Initiatives
Task Forces
Interagency Programs
Publications
Statistics
Outreach & Education
Legislative Affairs
FOIA & Privacy Act
Doing Business with EEOC
Jobs & Internships
EEOC History
Office of Inspector General

Home > About EEOC > Newsroom > What You Should Know

+ Share

What You Should Know About EEOC and the Enforcement Protections for LGBT Workers

Recent activities by EEOC, including the filing of lawsuits on behalf of transgender employees, the filing of amicus briefs related to coverage of sexual orientation and transgender status, and the issuance of federal sector decisions in these areas, have triggered increased interest about protections for lesbian, gay, bisexual and transgender (LGBT) individuals under federal employment-discrimination laws. The information below highlights what you should know about the EEOC's enforcement efforts on behalf of LGBT individuals.

Overview

The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. These federal laws also prohibit employers from retaliating against workers who oppose discriminatory employment practices - for example, by reporting incidents of sexual harassment to their supervisor or human resources department - or against those who file EEOC charges or cooperate with an EEOC investigation. Where these federal laws apply, they protect all workers, regardless of sexual orientation or gender identity.

Employers and employees often have questions about whether discrimination related to LGBT status is prohibited under the laws the EEOC enforces. While Title VII of the

See Also:

- Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII
- Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII
- Federal Sector Cases Involving LGBT Individuals
- Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities

Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with case law from the Supreme Court and other courts, interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.

The Commission's Strategic Enforcement Plan (SEP), adopted by a bipartisan vote in December of 2012, lists "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as an enforcement priority for FY2013-2016. This enforcement priority is consistent with positions the Commission has taken in recent years regarding the intersection of LGBT-related discrimination and Title VII's prohibition on sex discrimination.

In 2012, the EEOC held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is prohibited under Title VII. *See Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012). The Commission has also held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and therefore prohibited under Title VII. See *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).

Consistent with case law from the Supreme Court and other courts, the Commission takes the position that discrimination against an individual because that person is transgender is a violation of Title VII's prohibition of sex discrimination in employment. Therefore, the EEOC's district, field, area and local offices will accept and investigate charges from individuals who believe they have been discriminated against because of transgender status (or because of gender identity or a gender transition).

The Commission also takes the position, consistent with case law from the Supreme Court and other courts referenced at the previous link, that discrimination against an individual because of that person's sexual orientation is a violation of Title VII. The Commission accepts and investigates charges alleging sexual-orientation discrimination in employment.

Charge Data

In January 2013, the EEOC began tracking information on charges filed alleging discrimination related to gender identity and/or sexual orientation. In the final three quarters of FY 2013 (January through September), EEOC received 643 charges that included allegations of sex discrimination related to sexual orientation and 147 charges that included allegations of sex discrimination based on gender identity/transgender status. In FY 2014, the EEOC received 918 charges that included allegations of sex discrimination related to sexual orientation and 202 charges that included allegations of sex discrimination based on gender identity/transgender status. For the first two quarters of FY 2015, EEOC received 505 charges that included allegations of sex discrimination related to sexual orientation and 112 charges that included allegations of sex discrimination based on gender identity/transgender status.

The chart below shows charges received or resolved between January 2013 and March 31, 2015 that included an allegation of sex discrimination related to gender identity/transgender

or sexual orientation:

	FY2013*			FY2014	
	Total LGBT	Sex-Gender Identity/ Transgender	Sex-Sexual Orientation	Total LGBT	Sex-Gender Identity/ Transgender
Total Receipts	765	147	643	1,093	202
Total Resolutions	337	74	272	846	153
Settlements	2	2	2	2	2
% Settlements	9.2%	5.4%	9.9%	8.4%	9.2%
Withdrawal w/Benefits	17	2	15	46	7
% Withdrawal w/Benefits	5.0%	2.7%	5.5%	5.4%	4.6%
Administrative Closure	69	19	51	165	32
% Administrative Closure	20.5%	25.7%	18.8%	19.5%	20.9%
No Reasonable Cause	216	46	178	543	89
% No Reasonable Cause	64.1%	62.2%	65.4%	64.2%	58.2%
Reasonable Cause	4	3	1	21	11
% Reasonable_Cause	1.2%	4.1%	0.4%	2.5%	7.2%
Successful Conciliation	1	0	1	13	6
% Successful Conciliation	0.3%	0.0%	0.4%	1.5%	3.9%
Unsuccessful Conciliation	3	3	0	8	5
% Unsuccessful Conciliation	0.9%	4.1%	0.0%	0.9%	3.3%

Merit Resolutions	52	9	43	138	32
% Merit Resolutions	15.4%	12.2%	15.8%	16.3%	20.9%
Monetary Benefits	$897,271	$194,449	$702,822	$2,197,149	$540,995

***FY 2013 data covers 1/1/13-9/30/13**

****FY 2015 data covers 10/1/14-3/31/15**

Note: Charges may have multiple allegations under multiple statutes, so totals will not tally with breakdowns of specific bases or issues and are subject to updates. Monetary benefits include amounts which have been recovered exclusively or partially on non-LGBT claims included in the charge.

Further information on our charge receipts and resolutions under Title VII can be found here.

Litigation Activity

The Commission has begun to file LGBT-related lawsuits under Title VII challenging alleged sex discrimination.

- EEOC v. Lakeland Eye Clinic, P.A. (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014). The EEOC sued Lakeland Eye Clinic, a Florida-based organization of health care professionals, alleging that it discriminated based on sex in violation of Title VII by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. The EEOC's lawsuit alleged the employee performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her. On April 9, 2015, the U.S. District Court in Tampa approved an agreement in which Lakeland Eye Clinic will pay $150,000 to settle the lawsuit. Lakeland also agreed to implement a new gender discrimination policy and to provide training to its management and employees regarding transgender/gender stereotype discrimination.

- EEOC v. R.G. & G.R. Harris Funeral Homes Inc. (E.D. Mich. Civ. No. 2:14-cv-13710-SFC-DRG filed Sept. 25, 2014). The EEOC sued Detroit-based R.G. & G.R. Harris Funeral Homes Inc., alleging that it discriminated based on sex in violation of Title VII by firing a Garden City, Mich., funeral director/embalmer because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. The lawsuit alleges that an individual had been employed by Harris as a funeral Director/Embalmer since October 2007 and had always adequately performed the duties of that position. In 2013, the worker gave Harris a letter explaining she was undergoing a gender transition from male to female, and would soon start to present (e.g., dress) in appropriate business attire at work, consistent with her gender identity as a woman. Two weeks later, Harris's owner fired the transgender employee, telling her that what she was "proposing to do" was unacceptable.

Additionally the Commission has filed several amicus briefs and successfully conciliated charges involving these issues. A more detailed discussion of the Commission's lawsuits, amicus briefs and conciliations is available here.

Federal-Sector Enforcement

In the Federal Sector, EEOC has been implementing the SEP priority with regard to the coverage of LGBT individuals in a variety of ways:

- Tracking gender identity and sexual orientation appeals in the federal sector.
- Issuing federal sector decisions finding that gender identity-related complaints and sexual orientation discrimination-related complaints can be brought under Title VII through the federal sector EEO complaint process.
- Establishing an LGBT workgroup to further the EEOC's adjudicatory and oversight responsibilities, with the goal of issuing an LGBT federal sector report.
- Issuing guidance, including instructions for processing complaints of discrimination by LGBT federal employees and applicants available on EEOC's public web site.
- Providing technical assistance to federal agencies in the development of gender transition policies and plans.
- Providing LGBT related outreach to federal agencies through briefings, presentations and case law updates.

Training and Outreach

Finally, EEOC staff are addressing LGBT legal developments in numerous outreach and training presentations to the public. During FY 2014 and the first two quarters of FY 2015, field office staff conducted more than 900 events where LGBT sex-discrimination issues were among the topics discussed. In the federal sector during FY 2014, 21 presentations were delivered to different agencies or audiences. In FY 2015, 7 presentations have been delivered with at least 7 more currently scheduled. These events reached a wide variety of audiences, including employee advocacy groups, small employer groups, students and staff at colleges and universities, staff and managers at federal agencies and human resource professionals. To assist in this outreach the EEOC developed a brochure, Gender Stereotyping: Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Employees.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN,

Plaintiff,

-against-

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

Defendants.

15 Civ. 3440 (KPF)

DECLARATION OF DANIEL A. FEINSTEIN

DANIEL A. FEINSTEIN, hereby declares under penalty of perjury:

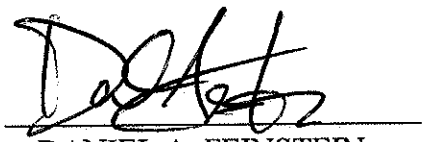
1. I am a member of the law firm of Davis & Gilbert LLP, attorneys for defendants Omnicom Group Inc., DDB Worldwide Communications Group Inc. ("DDB"), Peter Hempel and Chris Brown (collectively, "Defendants"). I submit this Declaration in further support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint.

2. In my Declaration dated July 31, 2015 and submitted in support of Defendants' Motion to Dismiss, I attached as Exhibit G a true and accurate copy of an Annulment Determination dated July 21, 2015, by which the NYSDHR dismissed Plaintiff's NYSDHR Complaint and annulled his election of remedies ("Annulment Determination").

3. The Annulment Determination was received by Davis & Gilbert LLP by regular mail after July 21, 2015.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 8, 2015
New York, New York



DANIEL A. FEINSTEIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN, Plaintiff, v. OMNICOM GROUP, INC., *et al.*, Defendants.	:	15 Civ. 3440 (KPF) OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

Plaintiff Matthew Christiansen, an openly gay man who is HIV-positive, brought suit against his employer, DDB Worldwide Communications Group Inc. ("DDB"); DDB's parent company, Omnicom Group, Inc. ("Omnicom"); his former supervisor, Joe Cianciotto; and DDB executives Peter Hempel and Chris Brown (together, "Defendants"). In his First Amended Complaint (or "FAC"), Plaintiff alleges claims for sexual stereotyping, disability-based discrimination, and retaliation in violation of federal, state, and local laws; as well as state-law claims for aiding and abetting discrimination, slander *per se*, intentional infliction of emotional distress, breach of contract, and labor law violations. Defendants, in two separate motions, now move to dismiss the FAC. As set forth in the remainder of this Opinion, Defendants' motions are granted in full.

BACKGROUND[1]

A. Factual Background

In April 2011, Plaintiff Matthew Christiansen began working as Associate Creative Director for the marketing communications firm DDB, a subsidiary of the global marketing network Omnicom. (FAC ¶¶ 17-18). From the start of his employment, Plaintiff worked under the supervision of Joe Cianciotto, who in turn worked under the management and supervision of Chris Brown and Peter Hempel. (*Id.* at ¶ 19). According to the FAC, Cianciotto frequently taunted and harassed both male and female co-workers, with behavior ranging from public name-calling, to telling a co-worker that "if he [Cianciotto] were gay, he'd like to have gay intercourse with him," to throwing a soda can at an employee. (*Id.* at ¶ 30). Plaintiff is an openly gay man, and alleges that Cianciotto subjected him to ridicule and abuse almost immediately due to Cianciotto's animosity toward homosexuals. (*Id.* at ¶ 2). Other employees had previously complained to Hempel, Brown, DDB, and Omnicom about Cianciotto's behavior, but "their

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[1] The majority of the facts contained in this Opinion are drawn from Plaintiff's FAC (Dkt. #4), and are taken as true for purposes of this motion. *See Faber* v. *Metro. Life Ins. Co.,* 648 F.3d 98, 104 (2d Cir. 2011) (when reviewing a complaint for failure to state a claim, the court will "assume all well-pleaded factual allegations to be true" (internal quotation marks omitted)). Additional facts are drawn from documents relied upon by or integral to Plaintiff's FAC; these are attached as exhibits to defense counsel's declaration, and are referred to as "Feinstein Decl. Ex." (Dkt. #23). *See Chambers* v. *Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). For convenience, the brief filed by Defendants DDB, Omnicom, Hempel, and Brown — in which Cianciotto joins — in support of their motion to dismiss (Dkt. #21, 22) will be referred to as "Def. Br."; Plaintiff's opposition (Dkt. #30) as "Pl. Opp."; Plaintiff's supporting exhibits (Dkt. #29) as "Lask Decl. Ex."; and Defendants' reply brief (Dkt. #31) as "Def. Reply." Defendant Cianciotto has additionally submitted a separate motion to dismiss and corresponding reply (Dkt. #24, 25, 33), which are referred to as "Cianciotto Br." and "Cianciotto Reply," respectively.

complaints to human resources and management were ignored for years." (*Id.* at ¶ 30 p.6).

Plaintiff alleges several instances of harassment specifically targeted at him. Shortly after Plaintiff began his employment with DDB, "Cianciotto became openly resentful and hostile towar[d] Plaintiff because of his sexual orientation." (FAC ¶ 33). This hostility was expressed in May 2011 through two drawings by Cianciotto on a company whiteboard: Both featured a shirtless, "muscle bound" Plaintiff, and one of the two images placed Plaintiff's torso on the body of a four-legged animal "with a tail and penis, urinating and defecating." (*Id.* at ¶ 34 & Ex. B). A third whiteboard drawing by Cianciotto, displayed in DDB's office space in June 2011, depicted Plaintiff naked, with an erect penis and exaggerated muscles. (*Id.* at Ex. B). The picture includes an air pump being manned by another employee and attached to Plaintiff's wrist, with text next to Plaintiff reading "I'm so pumped for marriage equality," while text by the other employee says, "I fucking hate being pumped." (*Id.*).

In July 2011, Cianciotto produced and circulated to the office an edited version of a poster for the movie "Muscle Beach Party," superimposing pictures of employees' faces onto the bodies of the swimsuit-clad characters. (FAC ¶ 34(D) & Ex. B). Plaintiff's face appears on the body of a woman, dressed in a bikini and reclining on her back with her legs in the air, in what Plaintiff describes as "the gay sexual receiving position." (*Id.*). Plaintiff alleges that an image of this poster was posted on Facebook, and — despite multiple requests

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from Plaintiff in October and November 2014 that it be taken offline — was not removed until January 2015. (*Id.* at ¶¶ 54-56).

In addition to the four images described, Plaintiff alleges two episodes of verbal harassment. In October 2012, Cianciotto invited employees at a meeting to play a game of "Name that Tune." (FAC ¶ 30 p.8). One employee guessed incorrectly, after which Plaintiff correctly named the song; Cianciotto then turned to the first employee and asked how it felt to be "beaten out by the gay guy." (*Id.*). Cianciotto then proceeded to tell Plaintiff that his "muscles [were] big," saying, "Everybody look at Matt's muscles." (*Id.* at ¶ 30 p.7). Plaintiff further alleges that several months later, at a large meeting in May 2013, a fellow employee coughed, prompting Cianciotto to comment that he too was feeling ill. (*Id.*). Cianciotto then turned to Plaintiff and added, "It feels like I ha[ve] AID[S], you know what that's like[,] Matt?" (*Id.*). Plaintiff alleges, upon information and belief, that DDB, Omnicom, Hempel, and Brown inferred that Plaintiff had Acquired Immunodeficiency Syndrome ("AIDS") from a combination of (i) the fact that he is gay, and (ii) Human Resources records reflecting his high monthly health insurance costs, and that they then shared their inferred diagnosis with Cianciotto. (*Id.* at ¶¶ 42-43).

On or about June 26, 2013, Plaintiff met with a representative of DDB's Human Resources Department to complain about Cianciotto's behavior. (FAC ¶ 47). Following this meeting, Cianciotto approached Plaintiff to ask whether Plaintiff had reported him to Human Resources. (*Id.* at ¶ 48). Cianciotto then explained to Plaintiff that he had "a severe phobia of communicable diseases,"

including AIDS, of such magnitude that his doctor had advised him on how to relieve his concerns. (*Id.* at ¶ 49).

A month after Plaintiff spoke to Human Resources about Cianciotto, DDB convened an employee meeting at which Hempel, the Director of Human Resources, and DDB's Chief Creative Officer were present. (FAC ¶ 51). Cianciotto provided a general apology at the meeting, "to the effect of hoping that no one was offended by anything he did," and Hempel gave a speech informing those present that "DDB does not tolerate inappropriate behavior." (*Id.* at ¶¶ 51-52). No further action was taken in regards to Plaintiff's complaints at that time.

Finally, Plaintiff alleges two acts of employment-related misconduct: (i) in October 2012, Plaintiff received a promotion from Associate Creative Director to Creative Director, but did not receive the corresponding salary increase until one year later (FAC ¶¶ 35-36), and (ii) on March 21, 2015, Defendants offered Plaintiff a three-month severance package in exchange for Plaintiff's resignation, which Plaintiff declined (*id.* at ¶ 58).[2] As of the filing of the FAC, Plaintiff continued to be employed by DDB. (*Id.* at ¶ 10).

Plaintiff alleges that experiences with sexual-orientation-based discrimination prior to his employment with DDB had caused him to develop post-traumatic stress disorder ("PTSD"), which was then compounded by the

[2] The inclusion of the severance offer as an example of misconduct by Defendants is surprising to the Court, since Plaintiff concedes that it occurred in the course of "a conciliatory process with the State and Federal EEOC because of complaints filed there by Christiansen in 2014." (Pl. Opp. 2).

physical stress caused by his HIV. (FAC ¶¶ 68-69). Plaintiff further alleges that Defendants' misconduct, in combination with these preexisting conditions, led him to seek therapy. (*Id.* at ¶ 78). On March 30, 2015, psychologist Dr. Stephen Reich diagnosed Plaintiff with PTSD, anxiety, and depression, stemming from the "'gay taunts and drawings' that Defendants subjected him to from 2013 to 2015." (*Id.* at ¶¶ 74-75). Plaintiff concludes that "[a]s a result of his physical and mental infirmities, [he] was incapable of filing any complaints against Defendants." (*Id.* at ¶ 76).

B. Procedural Background

On October 29, 2014, Plaintiff submitted a complaint to the Equal Employment Opportunity Commission (the "EEOC"), setting forth a Title VII claim against DDB based on allegations that Cianciotto had harassed Plaintiff and assumed Plaintiff had AIDS "because he is gay." (Feinstein Decl. Ex. C). Plaintiff subsequently filed a complaint against DDB with the New York State Division of Human Rights (the "NYSDHR"), stating that he had been discriminated against on the basis of perceived disability (AIDS) and sexual orientation. (*Id.* at Ex. D). The NYSDHR complaint additionally notes that Plaintiff suffered retaliation from his supervisor for complaining about the discrimination. (*Id.*). The complaint form provides a space to designate claims for discrimination based on "sex"; Plaintiff declined to check that box. (*Id.*).

A Notice of Charge of Discrimination was sent to DDB by the EEOC on January 13, 2015, indicating that Plaintiff had filed charges of employment discrimination against DDB under the ADA. (Feinstein Decl. Ex. D). On

March 10, 2015, the NYSDHR notified Plaintiff that it was contemplating dismissal of his administrative complaint, pursuant to his request, so that Plaintiff could pursue litigation related to the issues raised in that complaint. (*Id.* at Ex. E). Three days later, on March 13, 2015, Plaintiff received a Notice of Right to Sue from the EEOC. (FAC ¶ 6(b)). DDB submitted a letter in opposition to the proposed dismissal of Plaintiff's NYSDHR complaint on March 24, 2015 (Feinstein Decl. Ex. F); and on July 21, 2015, the NYSDHR notified the parties that Plaintiff's administrative complaint would be annulled (*id.* at Ex. G).

Plaintiff filed his initial Complaint in the instant matter on May 4, 2015 (Dkt. #1), and his FAC on June 22, 2015 (Dkt. #4). Defendants Omnicom, DDB, Hempel, and Brown jointly filed their motion to dismiss on July 31, 2015. (Dkt. #21, 22). Cianciotto filed a separate motion to dismiss on August 14, 2015. (Dkt. #24, 25). Plaintiff set forth his opposition to both motions in a single brief, filed on September 24, 2015 (Dkt. #30); Defendants Omnicom, DDB, Hempel, and Brown replied on October 8, 2015 (Dkt. #31); and Cianciotto concluded the briefing with the filing of his reply on October 8, 2015 (Dkt. #33).

DISCUSSION

A. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should "draw all reasonable inferences in [the plaintiff's] favor, assume all well-pleaded factual allegations to be true, and

determine whether they plausibly give rise to an entitlement to relief." *Faber* v. *Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks omitted). Thus, "[t]o 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) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). "While Twombly does not require heightened fact pleading of specifics, it does require enough facts to 'nudge [a plaintiff's] claims across the line from conceivable to plausible.'" *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 570). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Moreover, "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Id.* at 663.

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco* v. *MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint." *Chambers* v. *Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)

(quoting *Int'l Audiotext Network, Inc.* v. *Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (per curiam)).[3]

B. Plaintiff Has Adequately Pleaded That Omnicom Is His Employer

As an initial matter, Defendants contend that Plaintiff's claims against Omnicom must fail because Omnicom is not Plaintiff's employer. (Def. Br. 21-22). Plaintiff responds that DDB and Omnicom are functionally a "single employer," such that employment discrimination liability attaches to both entities. (Pl. Opp. 22-23).

An employer-employee relationship is a required element of an employment discrimination claim under the ADA, Title VII, or the NYSHRL. *See Gulino* v. *N.Y. State Educ. Dep't*, 460 F.3d 361, 370 (2d Cir. 2006) (Title VII); *Heller* v. *Consol. Rail Corp.*, 331 F. App'x 766, 768 (2d Cir. 2009) (summary order) (Title VII and the ADA); *Eisenberg* v. *Advance Relocation & Storage, Inc.*, 237 F.3d 111, 113 (2d Cir. 2000) (the NYSHRL). "To prevail in an employment action against a defendant who is not the plaintiff's direct employer, the plaintiff must establish that the defendant is part of an 'integrated enterprise' with the employer, thus making one liable for the illegal acts of the other." *Parker* v. *Columbia Pictures Indus.*, 204 F.3d 326, 341 (2d Cir. 2000).

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[3] Cianciotto alone seeks to dismiss the FAC for failing to comply with Rule 8's requirement of a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). (Cianciotto Br. 7-8). While the Court acknowledges that the FAC is frequently circuitous, it also recognizes that the Second Circuit has generally reserved dismissals under Rule 8 "for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Salahuddin* v. *Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Such is not the case here.

The Second Circuit has adopted a four-part test to determine when, for the purposes of a Title VII or ADA claim, a parent company may be considered the employer of a subsidiary's employee. *Brown* v. *Daikin Am. Inc.*, 756 F.3d 219, 226 (2d Cir. 2014). Under this test, a parent and subsidiary may be found to constitute a single employer where there is evidence of "[i] interrelation of operations, [ii] centralized control of labor relations, [iii] common management, and [iv] common ownership or financial control." *Id.* (quoting *Cook* v. *Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995)). In the main, "[w]hether two related entities are sufficiently integrated to be treated as a single employer is generally a question of fact not suitable to resolution on a motion to dismiss." *Id.* at 226.

In the present matter, Plaintiff has alleged sufficient facts to support Omnicom's employer liability for purposes of the instant motion. Plaintiff asserts that Omnicom "exercises extensive control" over DDB's "operations and personnel decisions." (FAC ¶ 12). Plaintiff further alleges that Omnicom "controlled [his] health, retirement and other benefits" (*id.* at ¶ 18), and that the policies contained in the DDB Employee Handbook were established and promulgated by Omnicom (*id.* at ¶ 22 (quoting the Employee Handbook as setting forth that "[a]s an employee of the Company, you have an obligation to conduct business according to the Omnicom Code of Business Conduct")). It is entirely possible that discovery will reveal an insufficient degree of integration for Omnicom and DDB to fairly be called a "single employer"; at this stage in the litigation, however, Plaintiff has alleged sufficient facts to establish

employment discrimination liability against Omnicom as part of an integrated enterprise with his direct employer, DDB.

C. Plaintiff Fails to State a Claim for Disability Discrimination in Violation of the ADA or the NYSHRL

1. Applicable Law

Courts analyze disability discrimination claims under the ADA and the NYSHRL in an identical manner. *See, e.g.*, *Kinneary* v. *City of New York*, 601 F.3d 151, 158 (2d Cir. 2010). A valid claim under either law requires that (i) the employer is subject to the relevant law, (ii) the plaintiff experiences or is perceived by his employer as experiencing a disability within the meaning of that law, (iii) the plaintiff was qualified for his position, (iv) he suffered an adverse employment action, and (v) the adverse action was motivated by the plaintiff's disability. *Davis* v. *N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015).

The ADA additionally prescribes the following procedural prerequisites to filing a federal suit: (i) "the claims forming the basis of [a federal suit] must first be presented in a complaint to the EEOC or the equivalent state agency," (ii) the charge must be filed with the EEOC within 180 days of the allegedly unlawful act, or with an equivalent state or local agency within 300 days, and (iii) the plaintiff must obtain a "Notice of Right to Sue" letter from the EEOC. *Williams* v. *N.Y.C. Hous. Auth.*, 458 F.3d 67, 69 (2d Cir. 2006); *see also* 42 U.S.C. § 12117 (incorporating Title VII exhaustion requirements into the ADA). The parties contest the first two of these requirements.

"A district court may only hear claims that are either included in the EEOC charge or are based on conduct which is reasonably related to conduct alleged in the EEOC charge." *Fiscina* v. *N.Y.C. Dist. Council of Carpenters*, 401 F. Supp. 2d 345, 356 (S.D.N.Y. 2005) (citation and internal alterations omitted); *see generally Legnani* v. *Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (noting that "claims that were not asserted before the EEOC may be pursued in a subsequent federal court action if they are reasonably related to those that were filed with the agency" (quoting *Shah* v. *N.Y. State Dep't of Civil Serv.*, 168 F.3d 610, 614 (2d Cir. 1999)). The Second Circuit further instructs that "[a] claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." *Williams*, 458 F.3d at 70 (quoting *Fitzgerald* v. *Henderson*, 251 F.3d 345, 359-60 (2d Cir. 2001).

"This exception to the exhaustion requirement is essentially an allowance of loose pleading and is based on the recognition that EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC to the discrimination that a plaintiff claims he is suffering." *Deravin* v. *Kerik*, 335 F.3d 195, 201 (2d Cir. 2003) (internal quotation marks omitted). To determine whether a claim is "reasonably related" to a claim included in an EEOC charge, courts should focus "on the factual allegations made in the EEOC charge itself, describing the discriminatory conduct about which a plaintiff is grieving," and ask the "central

question" of "whether the complaint filed with the EEOC gave the agency adequate notice to investigate discrimination on both bases." *Williams*, 458 F.3d at 70 (citation omitted).

2. Analysis

a. Plaintiff Satisfies the ADA's Exhaustion Requirement

Plaintiff alleges violations of the ADA against both DDB and Omnicom. (FAC ¶¶ 81-90). Defendants contend that Plaintiff failed to exhaust his administrative remedies in regards to his disability discrimination claim because his EEOC complaint neither identified such a claim (listing only his Title VII claim), nor asserted any underlying factual content that would give the EEOC "adequate notice to investigate discrimination" on the basis of his HIV-positive status or the perception that he had AIDS. (Def. Br. 7-8).[4] Plaintiff

[4] Defendants additionally argue that Plaintiff has failed to exhaust his remedies against Omnicom because Plaintiff did not name Omnicom in his administrative complaints. (Def. Br. 22-23). Plaintiff does not appear to respond to this contention.

Under the Second Circuit's "identity of interests" test, a court deciding whether the naming of a subsidiary in an EEOC complaint serves to exhaust administrative remedies against the parent company should consider "[i] whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; [ii] whether, under the circumstances, the interests of a named [party] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; [iii] whether its absence in the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; and [iv] whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party." *Cook* v. *Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241-42 (2d Cir. 1995). While the first of these factors weighs against Plaintiff, the pleading as to the remaining factors suggests that exhaustion of remedies against DDB would suffice to exhaust against Omnicom: Plaintiff alleges that counsel for Omnicom participated in a "conciliatory mediation process" with Plaintiff and has received notice of all charges filed (FAC ¶ 20); that Omnicom "exercises extensive control" over DDB's "operations and personnel decisions" (*id.* at ¶ 12); and that rules regarding employee conduct were directly established by Omnicom (*id.* at ¶¶ 21-22). Consequently, the Court finds that at this stage of the litigation, Plaintiff has pleaded sufficient facts to support his contention that naming DDB in his administrative complaints relieved him of his obligation to name Omnicom separately.

responds that his EEOC grievance letter set forth conduct "reasonably related" to his ADA allegations, and, furthermore, that his disability-based claim was clearly identified in his subsequent complaint filed with the NYSDHR. (Pl. Opp. 8-11).

The Court agrees with Defendants that Plaintiff's EEOC complaint fails to set forth sufficient information regarding Defendants' purported ADA violations. The only mentions of AIDS in the EEOC charge are in the context of Plaintiff's supervisor assuming that Plaintiff had AIDS because he is gay; in other words, they support Plaintiff's assertion of discrimination based on his sexual orientation, but do not provide notice of a claim for disability discrimination. *Cf. Peterson* v. *Ins. Co. of N. Am.*, 884 F. Supp. 107, 109 (S.D.N.Y. 1995) ("[C]ourts will not permit a claim that is based on a wholly different type of discrimination to be brought if it was not initially asserted in the EEOC charge.").

The substantive deficiency in Plaintiff's EEOC complaint is remedied, however, by his subsequently-filed NYSDHR grievance. ADA exhaustion requires that "the claims forming the basis of [a federal suit] must first be presented in a complaint to the EEOC *or the equivalent state agency*." *Williams,* 458 F.3d at 70 (emphasis added); *see also Pimentel* v. *City of New York*, No. 00 Civ. 326 (SAS), 2000 WL 1576871, at *1 (S.D.N.Y. Oct. 23, 2000) (declining to dismiss a plaintiff's ADA claim for failure to exhaust where plaintiff raised the claim in a complaint to the NYSDHR); *see generally Ofori-Awuku* v. *Epic Sec.*, No. 00 Civ. 1548 (AGS), 2001 WL 180054, at *3 (S.D.N.Y.

Feb. 23, 2001) (stating that the NYSDHR may grant or seek relief for ADA employment discrimination violations).

In the present matter, Plaintiff filed a complaint with the NYSDHR explicitly asserting a claim of disability discrimination, and received, on January 13, 2015, a confirmation letter from the EEOC providing the EEOC Charge Number and indicating that his charge under the ADA had been received. (Feinstein Decl. Ex. D). Plaintiff subsequently received a letter on March 10, 2015, stating that pursuant to his request, the NYSDHR was considering dismissing his administrative complaint to allow him to pursue his claims in federal court. (*Id.* at Ex. E). Three days later, on March 13, 2015, Plaintiff received a Notice of Right to Sue from the EEOC. (FAC ¶ 6(b)). The record thus reflects that the EEOC clearly received notice of Plaintiff's ADA claim, and of the fact that the claim arose out of conduct closely related to his Title VII discrimination claim, well before issuing its Right to Sue letter. Accordingly, Plaintiff has satisfied the ADA's exhaustion requirement.

b. Plaintiff's ADA Claim Is Time-Barred

Failure to exhaust is only one form of procedural bar. A plaintiff claiming ADA disability discrimination also has a limitations period within which he must act; specifically, the plaintiff must file a charge with the EEOC within 180 days of the allegedly unlawful act giving rise to the Plaintiff's claim, or with an equivalent state or local agency within 300 days. *Williams*, 458 F.3d at 69. Plaintiff asserts that he is disabled within the meaning of the ADA by virtue of his status as an HIV-positive individual who was perceived by his

supervisor and employer as having AIDS. (FAC ¶¶ 30, 60, 80, 86-90). As such, his claim for disability discrimination must necessarily rest on — and be filed within 300 days of — a discriminatory act motivated by his status as an individual with HIV or AIDS.

Plaintiff's FAC pleads two instances of AIDS-related discrimination: (i) Defendant Cianciotto's May 2013 comment that, "[i]t feels like I ha[ve] AID[S], you know what that's like[,] Matt?" (FAC ¶ 30 p.7), and (ii) Plaintiff's "constructive discharge," based at least in part on his status as an HIV-positive or AIDS-infected individual, in March 2015 (*id.* at ¶¶ 60, 86-87). Since filing the FAC, Plaintiff has wisely abandoned his constructive discharge allegation, as he continues to be employed with DDB. (Lask Decl. ¶ 1). *See Petrosino* v. *Bell Atl.*, 385 F.3d 210, 229 (2d Cir. 2004) ("[A]n employee is constructively discharged when his employer, rather than discharging him directly, intentionally creates a work atmosphere so intolerable that he is *forced to quit involuntarily*." (emphasis added)). This leaves Cianciotto's May 2013 comment as the only allegation of explicitly disability-based discrimination in the FAC. Plaintiff did not file his NYSDHR complaint until December 17, 2014, placing his ADA claim well outside the applicable 300-day limitation period set forth in 42 U.S.C. §§ 2000e-5(e) and 12117. (Feinstein Decl. Ex. D). Plaintiff's disability discrimination claim under the ADA is therefore time-barred.[5]

[5] While Plaintiff's NYSHRL disability discrimination claim is analyzed under the same framework as his claim under the ADA, the applicable limitations period for his NYSHRL claim is three years. N.Y.C.P.L.R. § 214(2). Thus his claim for disability discrimination under that statute, unlike his ADA claim, is timely. As discussed further in this Opinion, however, it fails on the merits.

c. Even Were Plaintiff's ADA Claim Timely, Both It and His NYSHRL Disability Discrimination Claim Fail on the Merits

i. Plaintiff Fails to Allege a Disability-Based Hostile Work Environment Claim or a Continuing Violation

While it is not entirely clear from the FAC that Plaintiff is alleging disability discrimination under a hostile work environment theory — the portion of the FAC outlining his ADA claim discusses almost exclusively Plaintiff's now-abandoned theory of "constructive discharge" — Plaintiff's brief in opposition tries to save his ADA claim by positioning Cianciotto's May 2013 comment as part of a "continuing violation" that extended through at least January 2015. (Pl. Opp. 19). Plaintiff's continuing violation and hostile work environment arguments fail, both as means of extending any limitations period and on the merits.

The "continuing violations" doctrine extends the ADA's 300-day filing period where a plaintiff alleges that a hostile work environment has been created by continuing acts of discrimination as part of an official policy or mechanism of discrimination. *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 114-18 (2002). Essential to application of the continuing violations theory, however, is an allegation that at least one discrete act of discrimination occurred within the 300 day period. *See Bonner* v. *Guccione,* 178 F.3d 581, 584 (2d Cir. 1999). Plaintiff fails to allege any specific act of disability-based discrimination within the limitations period. More fundamentally, however, the totality of Plaintiff's pleadings fail to allege sufficient disability-based discrimination to sustain an ADA hostile work environment claim.

As a threshold matter, the Second Circuit has not directly ruled on whether hostile work environment claims are cognizable under the ADA. *See Robinson* v. *Dibble*, 613 F. App'x 9, 13 n.2 (2d Cir. 2015) (summary order) ("We have not yet decided whether a hostile work environment claim is cognizable under the ADA."); *see also Giambattista* v. *Am. Airlines, Inc.*, 5 F. Supp. 3d 284, 294 (E.D.N.Y.) (assuming the viability of a hostile work environment claim under the ADA, but finding it insufficiently alleged in that case), *aff'd,* 584 F. App'x 23 (2d Cir. 2014) (summary order). A number of other Circuits, as well as district courts within the Second Circuit, have recognized such claims, applying the same standard applicable to hostile work environment claims under Title VII. *See, e.g., Shaver* v. *Indep. Stave Co.*, 350 F.3d 716, 719 (8th Cir. 2003); *Fox* v. *Gen. Motors Corp.*, 247 F.3d 169, 175-76 (4th Cir. 2001); *Flowers* v. *S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 232-35 (5th Cir. 2001); *Lewis* v. *Blackman Plumbing Supply L.L.C.*, 51 F. Supp. 3d 289, 309 (S.D.N.Y. 2014); *Forgione* v. *City of New York*, No. 11 Civ. 5248 (JG), 2012 WL 4049832, at *10 & n.6 (E.D.N.Y. Sept. 13, 2012).

Assuming that Plaintiff can bring an ADA claim under a hostile work environment theory, he

> must plead facts that would tend to show that the complained of conduct: [i] is objectively severe or pervasive — that is, … creates an environment that a reasonable person would find hostile or abusive; [ii] creates an environment that the plaintiff subjectively perceives as hostile or abusive; and [iii] creates such an environment because of [his disability].

Patane v. *Clark*, 508 F.3d 106, 113 (2d Cir. 2007) (quoting *Gregory* v. *Daly*, 243 F.3d 687, 691-92 (2d Cir. 2001) (internal quotation marks omitted)). To succeed on a hostile work environment claim, "[t]he plaintiff must show that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of [his] employment were thereby altered." *Alfano* v. *Costello*, 294 F.3d 365, 373 (2d Cir. 2002). Generally speaking, the discriminatory acts must "be more than 'episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.'… But it is well-settled in this Circuit that even a single act can meet the threshold if, by itself, it can and does work a transformation of the plaintiff's workplace." *Id.* (quoting *Perry* v. *Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)).

The sum total of Plaintiff's disability-related allegations are as follows:

- Plaintiff is HIV positive, and alleges that Defendants perceived him as having AIDS — a perception engendered by the fact that he is openly gay, and which was allegedly reinforced at some later date through inferences drawn from his medical insurance records. (FAC ¶¶ 11, 42-43).

- In May 2013, Cianciotto was feeling ill and said at a meeting that "[i]t feels like I ha[ve] AID[S], you know what that's like[,] Matt?" (*Id.* at ¶ 30 p.7).

- Cianciotto is not alleged to have made any other comments related to Plaintiff's medical status. After Plaintiff met with DDB's Human Resources Director, however, Cianciotto approached Plaintiff to explain that he had a severe phobia of communicable diseases, including AIDS. (*Id.* at ¶ 49).

- Finally, Plaintiff alleges that he was asked to leave his employment at least in part because he was perceived to have AIDS. (*Id.* at ¶¶ 60, 87).

These incidents, whether considered individually or in combination, fail to demonstrate an environment "so severely permeated with discriminatory intimidation, ridicule, and insult" as to alter the terms and conditions of Plaintiff's employment. [6]

The Court does not foreclose the possibility that under some circumstances, the disclosure of an individual's sensitive medical information might plausibly constitute discrimination so severe as to "work a transformation of the plaintiff's workplace." *Alfano*, 294 F.3d at 374. No facts are alleged, however, to suggest that such transformation occurred here. After Cianciotto's May 2013 comment, Plaintiff's responsibilities, compensation, and position remained the same, and his co-workers made no mention of his medical status and treated him no differently. To be sure, Plaintiff alleges that Cianciotto's comment took an emotional toll on him; but subjective perception is only one element of a hostile work environment. *See Patane*, 508 F.3d at 113 (describing both an objective and a subjective prong to a hostile work environment claim). On these pleadings, Cianciotto's single off-handed

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[6] Plaintiff additionally alleges two instances of AIDS-related commentary from Cianciotto directed at other employees: Cianciotto stated to an employee with a buzz haircut that the employee "looked like an AIDS patient," and remarked upon hearing that another employee had pneumonia, "Well, be glad [it's] not AIDS." (FAC ¶ 30 p.9). The Court recognizes that in determining whether a hostile work environment exists, "the crucial inquiry focuses on the nature of the workplace environment as a whole," and that therefore "a plaintiff who [him]self experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support [his] claim." *Kaytor* v. *Elec. Boat Corp.*, 609 F.3d 537, 547 (2d Cir. 2010) (emphases omitted) (quoting *Cruz* v. *Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000)). In this case, however, the two additional comments — while in poor taste — are not obviously discriminatory; they certainly do not establish conduct so "severe" and "pervasive" such that, taken together with Plaintiff's other allegations, they would establish a hostile work environment. *Alfano* v. *Costello*, 294 F.3d 365, 374 (2d Cir. 2002).

comment — distasteful though it may have been — was not "severe … enough to create an objectively hostile or abusive work environment."

In addition to the May 2013 statement by Cianciotto previously discussed, Plaintiff alleges further inappropriate actions by his supervisor, but none of those actions was causally related to Plaintiff's asserted disability. *See, e.g.*, *Marini* v. *Costco Wholesale Corp.*, 64 F. Supp. 3d 317, 326 (D. Conn. 2014) ("A hostile work environment claim requires more than just a hostile work environment — it requires proof that hostile acts were based on plaintiff's protected status (*e.g.,* his disability), rather than other reasons."), *reconsideration denied,* No. 11 Civ. 331 (JAM), 2015 WL 1169284 (D. Conn. Mar. 13, 2015). Specifically, Plaintiff alleges that, shortly after he began working under Cianciotto's supervision, "Cianciotto became openly resentful and hostile towards Plaintiff because of his sexual orientation." (FAC ¶ 33). Plaintiff further alleges that Cianciotto expressed his animosity by "harassing, intimidating, and mistreating Plaintiff as a homosexual male by drawing offensive sketches and creating other pictures of Plaintiff in a sexually suggestive manner." (*Id.* at ¶ 34).

Save for Cianciotto's comment at the May 2013 meeting, every instance of discrimination alleged by Plaintiff centers on his sexual orientation; they make no reference to AIDS or illness. The ADA specifically protects against discrimination *on the basis of an individual's disability*; it does not protect an individual against harassment generally. *See, e.g., Castro* v. *City of New York*, 24 F. Supp. 3d 250, 271 (E.D.N.Y. 2014) (dismissing a hostile work

environment claim where there was "no basis upon which to conclude that the delay in compensation and the assignment of physical tasks occurred *because* plaintiff was disabled" (emphasis in original)).[7]

Statements mocking or making light of the notion that an individual may suffer from a life-threatening illness are inappropriate, to say the least. However, because the alleged instances of discriminatory conduct based on Defendants' perception that Plaintiff had AIDS fail to rise to the level necessary to constitute a hostile work environment claim, Plaintiff's claims for disability discrimination in violation of the ADA and the NYSHRL fail on the merits.

ii. Plaintiff Fails to Demonstrate a Basis for Equitable Tolling or an Adverse Employment Action

As a fallback position to his continuing violation argument, Plaintiff contends that any relevant limitations periods for his claims should be tolled, as (i) the treatment he received from Cianciotto caused him such psychological trauma that he was unable to file a timely claim, and (ii) DDB never informed him of his right to pursue discrimination claims with the EEOC. (Pl. Opp. 17-19). Defendants argue in response that Plaintiff's own allegations doom his equitable tolling argument, as he was capable of complaining to Human Resources in June 2013; filing three separate complaints between 2014 and

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[7] In alleging that "Cianciotto targeted him as having AIDS … because he was gay" (FAC ¶ 2). Plaintiff conflates sexual-orientation-based actions with discrimination based on the perception that he had AIDS. Assuming that Plaintiff had AIDS does not constitute discrimination *based on that assumption*; rather, it represents a discriminatory assumption *based on Plaintiff's sexual orientation.* In other words, according to Plaintiff's pleadings, both the assumption that he had AIDS and Cianciotto's harassment stemmed from a common cause (namely, animus toward Plaintiff's sexual orientation). That does not make them causally related to each other.

2015; and working continuously for DDB during the period from April 2011 to the present. (Def. Reply 6). Regarding notice of Plaintiff's right to file with the EEOC, Defendants contend, *inter alia*, that they had no legal obligation to inform Plaintiff of such rights. (*Id.* at 6 n.7).

"Equitable tolling is only appropriate in 'rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising [his] rights.'" *Paneccasio* v. *Unisource Worldwide, Inc.*, 532 F.3d 101, 112 (2d Cir. 2008) (quoting *Zerilli-Edelglass* v. *N.Y.C. Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003)). In light of Plaintiff's ability both to continue working — and at such a level as to receive a promotion — and to lodge a complaint with Human Resources during the very period for which he alleges the limitations period should be tolled, Plaintiff's case is easily distinguishable from the case law on which he relies. (*See* Pl. Opp. 17-18 (citing *Tsai* v. *Rockefeller Univ.*, 137 F. Supp. 2d 276, 281-83 (S.D.N.Y. 2001))).

As for Plaintiff's claim that DDB failed to inform him of his right to complain to the EEOC, it is true that DDB had an obligation to display a poster informing employees of their rights under the Equal Employment Opportunity Act. Plaintiff alleges neither the presence nor the absence of such a poster. But even assuming that DDB failed to discharge its responsibility in this regard, such failure would not constitute the sort of "affirmative misconduct … aimed at causing [a plaintiff] to forgo his legal rights," so as to warrant equitable tolling. *Long* v. *Frank*, 22 F.3d 54, 59 (2d Cir. 1994). This is particularly so given Plaintiff's allegation that a co-worker filed a complaint

against DDB with the EEOC in 2012, for which other DDB employees provided supporting testimony — thereby demonstrating that other employees were familiar with the EEOC charge process. (FAC ¶ 30 p.6). The Court strongly doubts the applicability of equitable tolling in this case. It need not decide this issue, however, as Plaintiff's disability discrimination claims fail on the merits, for the reasons stated in the preceding section and an additional reason discussed in this section.

Plaintiff fails to allege that he suffered an adverse employment action within the meaning of the ADA and the NYSHRL; therefore his claims under those statutes must fail. A plaintiff suffers an "adverse employment action" for the purposes of the ADA when "he or she endures a 'materially adverse change' in the terms and conditions of employment." *Galabya* v. *N.Y.C. Bd. of Educ.,* 202 F.3d 636, 640 (2d Cir. 2000) (citing *Richardson* v. *N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999)). A materially adverse change is a change in working conditions that is "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.* (quoting *Crady* v. *Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993)). "Examples of materially adverse employment actions include 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices … unique to a particular situation." *Feingold* v. *New York*, 366 F.3d 138, 152 (2d Cir. 2004) (quoting *Galabya,* 202 F.3d at 640) (ellipsis in original).

As noted *supra*, Plaintiff has abandoned his assertion of disability-based constructive discharge. (Lask Decl. ¶ 1). This does not necessarily mean, of course, that he has withdrawn the factual contentions underlying that claim; as relevant to his disability discrimination claims, these include the contention that the corporate Defendants "request[ed] Plaintiff to leave his employment without any basis regarding his work performance after he complained to the EEOC and indicated that he actually had HIV." (FAC ¶ 86). Plaintiff did not, however, leave his employment. On the contrary, as of the filing of his FAC, he continued to hold his position at DDB. Nor does Plaintiff allege any demotion, salary reduction, loss of benefits, or change to his responsibilities as a consequence of his disability; in fact, the only change in employment conditions that Plaintiff alleges as having occurred during his tenure with DDB consists of a promotion and a raise. (*Id.* at ¶¶ 35-36).[8] The mere offering of a

[8] Plaintiff does allege a one-year delay in receiving the salary increase that accompanied his promotion. (FAC ¶ 36). The FAC provides no suggestion that this delay was in any way related to Plaintiff's medical status; to the contrary, the temporary withholding occurred months prior to any mention by Cianciotto of his associating Plaintiff with AIDS. Additionally, "a plaintiff seeking to assert a discrimination claim based on a delay in the receipt of compensation faces a substantial hurdle." *Castro* v. *City of New York*, 24 F. Supp. 3d 250, 262 & n.24 (E.D.N.Y. 2014). Courts in the Second Circuit have consistently held that paycheck delays do not constitute an "adverse employment action" for purposes of making a *prima facie* employment discrimination or retaliation claim. *See Bobbitt* v. *N.Y.C. Health and Hosp. Corp.*, No. 08 Civ. 10765 (SAS), 2009 WL 4975196, at *9 n.130 (S.D.N.Y. Dec. 22, 2009) (listing cases in which delayed paychecks were found not to constitute an adverse employment action). This is particularly so where the delay does not interrupt a preexisting schedule of payments, such that the withholding could not be said to constitute a "materially adverse change" to the terms and conditions of a plaintiff's employment. *Castro*, 24 F. Supp. 3d at 263; *see also Bobbitt*, 2009 WL 4975196, at *9 ("A delay in receiving [a] workers' compensation check does not change the terms or conditions of [the plaintiff's] employment."). Even assuming the delay could conceivably constitute an adverse employment, however, the lack of any connection to Plaintiff's proffered disability would preclude the delayed payment from supporting Plaintiff's disability discrimination claims.

severance package to Plaintiff does not itself constitute an adverse employment action, in light of the fact that Plaintiff alleges no negative consequences arising from his refusal to leave DDB.

For all of these reasons, even had Plaintiff's ADA claim been found timely, both that claim and his NYSHRL disability claim were nevertheless doomed to fail on the merits. They will therefore be dismissed.

D. Plaintiff Fails to State a Claim for Retaliation Under the ADA, Title VII, or the NYSHRL

Plaintiff asserts claims for retaliation under the ADA, Title VII, and the NYSHRL, all three of which are analyzed under the same framework. *See Weissman* v. *Dawn Joy Fashions, Inc.*, 214 F.3d 224, 234 (2d Cir. 2000) (comparing retaliation provisions under ADA and NYSHRL); *Sarno* v. *Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir. 1999) (comparing retaliation provisions under ADA and Title VII). In order to make out a *prima facie* case under any of these statutes, a plaintiff must show that (i) he engaged in protected activity, (ii) his employer was aware of that protected activity, (iii) his employer took adverse action against him, and (iv) "a retaliatory motive played a part in the adverse employment action." *Sista* v. *CDC Ixis N. Am., Inc.*, 445 F.3d 161, 177 (2d Cir. 2006) (quoting *Reg'l Econ. Cmty Action Program, Inc.* v. *City of Middletown*, 294 F.3d 35, 54 (2d Cir. 2002)). In the present case, Plaintiff fails to allege any adverse employment action taken against him. Consequently, his claims for retaliation, whether construed as related to his allegations of disability discrimination or sexual orientation discrimination, cannot stand.

An employment action in the retaliation context is adverse if it "would have been materially adverse to a reasonable employee or job applicant." *Hicks* v. *Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (internal quotations omitted). "Actions are 'materially adverse' if they are 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* (quoting *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 57 (2006)). Here, the only negative action allegedly taken subsequent to Plaintiff's protected activity — his filing of complaints with the EEOC and NYSDHR — was the offering of a severance package that Plaintiff was free to accept or decline (and which he did in fact decline, with no adverse consequences). (FAC ¶¶ 10, 58). Nothing about the offer of a severance package, absent some indication that a complainant did or would suffer negative repercussions should he or she reject the offer, would tend to dissuade a reasonable employee from engaging in protected activity. Plaintiff's retaliation claims are therefore dismissed.

E. Plaintiff Fails to State a Claim for Discrimination Under Title VII

1. Applicable Law

"Under Title VII of the Civil Rights Act of 1964, 'it shall be unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting 42 U.S.C. § 2000e-2(a)(1)). Absent direct evidence of discrimination, a *prima facie*

case of Title VII discrimination requires a showing that (i) the plaintiff is a member of a protected class; (ii) he was qualified for the position he held; (iii) he suffered an adverse employment action; and (iv) the adverse action took place under circumstances giving rise to an inference of discrimination. *See, e.g., Reynolds* v. *Barrett,* 685 F.3d 193, 202 (2d Cir. 2012); *Ruiz* v. *County of Rockland,* 609 F.3d 486, 491-92 (2d Cir. 2010).

To survive a motion to dismiss "a complaint in a discrimination lawsuit need not contain specific facts establishing a *prima facie* case of discrimination[.]" *Twombly*, 550 U.S. at 569 (internal alteration omitted) (quoting *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 508 (2002)). Rather, at the pleading stage, "a plaintiff 'need only give plausible support to a minimal inference of discriminatory motivation.'" *Vega* v. *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015) (quoting *Littlejohn* v. *City of New York*, 795 F.3d 297, 306 (2d Cir. 2015)).

2. Analysis

a. Plaintiff's Title VII Claims Against the Individual Defendants Fail Because Title VII Does Not Provide For Individual Liability

The FAC does not make clear which claims are being asserted against which Defendants. Defendants correctly note (*see* Def. Br. 23; Cianciotto Br. 2) that, to the extent Plaintiff asserts claims for Title VII discrimination against Cianciotto, Hempel, and Brown, such claims must fail on the grounds that Title VII does not provide for individual liability. *See Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir. 1995) (holding "that an employer's agent may not be held

individually liable under Title VII"), *abrogated on other grounds by Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998).

b. Plaintiff's Title VII Claims Against the Corporate Defendants Fail on the Merits Under Governing Second Circuit Law

Plaintiff alleges that Cianciotto, his supervisor at DDB, was "openly hostile and resentful" toward Plaintiff "because of his sexual orientation." (FAC ¶ 33). In support of this contention, Plaintiff provides numerous examples of Cianciotto's allegedly anti-gay behavior, including three lewd drawings of Plaintiff on an office whiteboard; a movie poster, circulated to the office and posted on Facebook, depicting Plaintiff's head on the body of a bikini-clad woman "in the gay sexual receiving position"; a comment made to a co-worker in which Cianciotto stated that "if he were gay, he'd like to have gay intercourse with [the co-worker]"; and a question posed to another employee during a trivia game asking how it felt to "be beaten out by the gay guy." (*Id.* at ¶¶ 30, 34).

By any metric, the conduct alleged is reprehensible. Defendants move to dismiss Plaintiff's Title VII claim, however, on the ground that discrimination claims based on sexual orientation are simply not cognizable under Title VII. (Def. Br. 9-10). Plaintiff responds by arguing that Title VII should be expanded to recognize sexual orientation claims; and that in any case, he has asserted a viable claim based not on sexual orientation, but rather on sexual stereotyping. (Pl. Opp. 12-14; *see also* FAC 19 (titling Plaintiff's second cause of action "Title VII Stereotypical Animus")). Under the law as it currently stands, the Court is constrained to find that Plaintiff has not stated a cognizable claim for Title VII discrimination.

In *Simonton* v. *Runyon*, 232 F.3d 33 (2d Cir. 2000), the Second Circuit unequivocally held that "Title VII does not proscribe discrimination because of sexual orientation." *Id.* at 36. In reaching this conclusion, it cited "Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences." *Id.* at 35 (citing, e.g., Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)). The *Simonton* Court additionally looked to the other protected classifications under Title VII, reasoning that when read alongside the categories of race, color, religion, or nationality, "sex" could logically only refer to a class "delineated by gender, rather than sexual activity regardless of gender." *Id.* (quoting *DeCintio* v. *Westchester County Med. Ctr.*, 807 F.2d 304, 306-07 (2d Cir. 1986)).[9] The *Simonton* Court drew a distinction, however, between claims based on discrimination targeting sexual orientation and those based upon nonconformity with sexual stereotypes — the latter of which the Second Circuit has since recognized *are* cognizable under Title VII, but "should not be used to 'bootstrap protection for sexual orientation into Title VII.'" *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 218-21 (2d Cir. 2005) (quoting *Simonton*, 232 F.3d at 38); *see also Kiley* v. *Am. Soc. for Prevention of Cruelty to Animals*, 296 F. App'x

[9] The Court notes that to the extent that sexual orientation is argued to be dissimilar to the classes expressly protected under Title VII because it is based on "activity" rather than personal traits, the inclusion of religion in the text of Title VII would appear to disprove that argument.

107, 109 (2d Cir. 2008) (summary order) ("Plaintiffs may bring Title VII claims alleging that an adverse employment decision was due in part to sexual stereotyping by the employer," but "may not use a gender stereotyping claim to bootstrap protection for sexual orientation into Title VII." (internal quotation marks omitted)).

The broader legal landscape has undergone significant changes since the Second Circuit's decision in *Simonton*. In 2013, the Supreme Court issued an opinion striking down the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7 and 28 U.S.C. § 1738C, which amended the Dictionary Act — the statute providing rules of construction for a multitude of federal laws and regulations — to define "marriage" and "spouse" as excluding same-sex partners. *See generally United States* v. *Windsor*, 133 S. Ct. 2675 (2013). In so doing, the Supreme Court found that DOMA violated the equal protection guarantee contained within the Fifth Amendment to the United States Constitution by "refusing to acknowledge a status the [individual states recognizing same-sex marriage] find[] to be dignified and proper." *Id.* at 2696. Two years later, the Court further advanced protections for individuals in same-sex relationships when it ruled that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have the right to marry. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

To be sure, neither of these cases impacts the issue of what protections Title VII affords; that said, they reflect a shift in the perception, both of society and of the courts, regarding the protections warranted for same-sex

relationships and the men and women who engage in them. It is against this backdrop that in July 2015 the EEOC issued a decision, binding on federal agencies (though not federal courts), finding that claims for sexual orientation discrimination *are* cognizable under Title VII. *See* EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015); *see generally McMenemy* v. *City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (concluding 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 (1944)).

Further highlighting the degree to which times have changed 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." (internal quotation marks and alteration omitted)); *Boutillier* v. *Hartford Pub. Sch.*, No. 13 Civ. 1303 (WWE), 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014) (finding that, "[c]onstrued most broadly," the plaintiff's allegations of sexual orientation discrimination also stated discriminatory treatment based on sexual stereotypes); *Videckis* v. *Pepperdine Univ.,* No. 15 Civ. 298 (DDP), 2015 WL 1735191, at *8 (C.D. Cal. 2015) (observing, in the context of Title IX, that "the line between discrimination based on gender stereotyping and discrimination

based on sexual orientation is blurry, at best, and thus a claim that Plaintiffs were discriminated against on the basis of … their sexual orientation may fall within the bounds of Title IX."); *Bianchi* v. *City of Philadelphia,* 183 F. Supp. 2d 726, 738 (E.D. Pa. 2002) (discussing the fine distinction between sex-based claims and sexual orientation discrimination); *cf. Latta* v. *Otter*, 771 F.3d 456 (9th Cir. 2014) (Berzon, J., concurring) ("the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations"). This difficulty comes as no surprise, for, as the EEOC stated in its July 2015 decision, "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." 2015 WL 4397641, at *5; *see also Centola* v. *Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (observing that "[s]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.").

A simple example helps to illustrate the futility of treating sexual orientation discrimination as separate from sex-based considerations: If an employer fires her female employee because the employer believes that women should defer to men, but the employee sometimes challenges her male colleagues, such action would present a cognizable claim under Title VII. If the same employer fires her female employee because the employer believes that

women should date men, but the employee only dates women, the prevailing construction of Title VII would find no cognizable claim under that statute. The inevitable result of holding that some sexual stereotypes give rise to cognizable Title VII claims, while others — namely, those involving sexual orientation — do not, has been an invitation to the precise bootstrapping that the *Simonton* Court intended to avoid. *See*, *e.g.*, Kristin M. Bovalino, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003) (counseling "gay plaintiffs bringing claims under Title VII [to] emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality"); *see also Videckis,* 2015 WL 1735191, at *8 (stating that plaintiffs could frame a claim for sexual orientation discrimination as one for sexual stereotyping).

The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims. Yet the prevailing law in this Circuit — and, indeed, every Circuit to consider the question — is that such a line must be drawn. *Simonton* is still good law, and, as such, this Court is bound by its dictates. Consequently, the Court must consider whether the Plaintiff has pleaded a claim based on sexual stereotyping, separate and apart from the stereotyping inherent in his claim for discrimination based on sexual orientation. The Court finds that he has not.

In his opposition brief, Plaintiff contends that Cianciotto "abused him because of his effeminate characteristics." (Pl. Opp. 14). Were that so, Plaintiff

could likely state a cognizable Title VII claim under Second Circuit law; Plaintiff's pleadings fail, however, to support an inference of discrimination based on a perception that he was overly effeminate. Plaintiff's brief argues that Cianciotto "accused him of being especially effeminate and that he is a 'bottom' and a 'poof'" because he was insufficiently masculine, but — Plaintiff's use of quotation marks around "poof" notwithstanding — no such name-calling is attributed to Cianciotto in the FAC. (Pl. Opp. 14). Rather, the terms "bottom" and "poof" refer to Plaintiff's *own* characterization of the Muscle Beach poster, which depicts Plaintiff in what he repeatedly describes as the "gay sexual receiving position." (FAC ¶¶ 34, 45).

Plaintiff additionally states that Cianciotto told a coworker that Plaintiff was "effeminate and gay so he must have AIDS." (FAC ¶ 30 p.9). This is the sole mention of Plaintiff as effeminate or otherwise non-conforming to traditional gender norms in the whole of the FAC; it alone cannot serve to transform a claim for discrimination that Plaintiff plainly interpreted — and the facts support — as stemming from sexual orientation animus into one for sexual stereotyping. (*See, e.g., id.* at ¶ 33 ("Cianciotto became openly resentful and hostile towards Plaintiff *because of his sexual orientation*" (emphasis added)). *See also Trigg* v. *N.Y.C. Transit Auth.*, No. 99 Civ. 4730 (ILG), 2001 WL 868336, at *6 (E.D.N.Y. July 26, 2001) (noting that plaintiff's words and his own perception of the import of the alleged harasser's taunts "compel the conclusion that sexual orientation and not gender stereotyping are the *sine qua non* of his grievance").

While Plaintiff provides virtually no support in his FAC for an allegation of discrimination based on sexual stereotyping, he provides multiple illustrations of Cianciotto's animus toward gay individuals. The FAC notes, for instance, the fact that "[m]ost of [the] pictures [Cianciotto] drew were of men fornicating, and they always involved a gay employee"; that he repeatedly expressed a belief that gay men were reckless and disease-prone; and that he commented at a meeting that he did not want an advertisement to be "too gay." (FAC ¶ 30 p.9). All of these examples lend further support to the inference that Cianciotto's harassment was motivated by sexual-orientation-based discriminatory animus, not sexual stereotyping.

The Muscle Beach poster arguably provides an exception to the overall lack of sex-based stereotyping implicit in Cianciotto's actions, as it does indeed place Plaintiff's face on a woman's body, perhaps thereby implying that Plaintiff is effeminate. The Court must, however, consider Plaintiff's FAC as a whole, and nearly every other instance of discrimination alleged by Plaintiff involves a characterization of Plaintiff not as effeminate, but as overtly (indeed, overly) masculine. For instance, Cianciotto is alleged to have said to Plaintiff at a meeting, "Your muscles are big," and "Everybody look at Matt's muscles," and all three of Cianciotto's whiteboard drawings of Plaintiff depict Plaintiff as shirtless and "muscle bound"; one of them depicts Plaintiff with a large, erect penis. (FAC ¶¶ 30 p.7, 34 & Ex. B). Additionally, Plaintiff alleges no facts suggesting that he speaks, dresses, or otherwise behaves in a particularly effeminate manner, nor any facts, beyond possibly the single movie poster, to

suggest that Cianciotto's behavior arose from a perception of Plaintiff as insufficiently masculine. Plaintiff *does*, however, allege that he presents himself as "openly gay," and that this triggered nearly immediate hostility and resentment in Cianciotto. (*Id.* at ¶¶ 11, 33).

In short, the Court has "no basis in the record to surmise that [Plaintiff] behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation." *Simonton*, 232 F.3d at 38. The Court *could* latch onto the single use of the word "effeminate" and the depiction of Plaintiff's head on a woman's body, strip these facts of the context provided by the rest of the FAC, and conjure up a claim for "sexual stereotyping." But while the ends might be commendable, the means would be intellectually dishonest; the Court would obliterate the line the Second Circuit has drawn, rightly or wrongly, between sexual orientation and sex-based claims. In light of the EEOC's recent decision on Title VII's scope, and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, 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 claim under Title VII; Plaintiff's Title VII discrimination claim must therefore be dismissed.

F. The Court Declines to Exercise Supplemental Jurisdiction Over Plaintiff's Additional State and Local Claims

Where a federal district court dismisses the causes of action over which it has original jurisdiction, that court then has discretion regarding whether to

exercise supplemental jurisdiction over the plaintiff's remaining state-law claims. 28 U.S.C. § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine — judicial economy, convenience, fairness, and comity — will point toward declining to exercise jurisdiction over the remaining state-law claims." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 727 (2d Cir. 2013) (citation and quotation marks omitted); *see also In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998) ("[W]hen the federal claims are dismissed the 'state claims should be dismissed as well.'" (quoting *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1966))).

In addition to the claims resolved *supra*, Plaintiff claims sexual orientation discrimination under the NYSHRL and NYCHRL; disability discrimination under the NYCHRL; New York State and New York City liability for aiding and abetting the foregoing discrimination; slander *per se*; intentional infliction of emotional distress; breach of contract; and violations of the New York Labor Law. (FAC ¶¶ 105-35, pp. 24-25). In light of the Court's dismissal of Plaintiff's federal-law claims; the early stage of the litigation; and the multiple issues of state law implicated by Plaintiff's remaining claims, the Court declines to exercise supplemental jurisdiction over these non-federal causes of action. *See, e.g.*, *Vuona* v. *Merrill Lynch & Co.*, 919 F. Supp. 2d 359, 393 (S.D.N.Y. 2013) (disposing of a plaintiff's Title VII and NYSHRL claims because an identical standard applies, but declining to exercise supplemental

jurisdiction over the differently analyzed NYCHRL claims). The Court therefore dismisses the claims without prejudice to their potential refiling in state court.

CONCLUSION

For the reasons given in this Opinion, Defendants' motions are GRANTED in full. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: March 9, 2016
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MATTHEW CHRISTIANSEN,

Plaintiff,

-against-

OMNICOM GROUP, INC., et al.,

Defendants.

----------X

15 **CIVIL** 3440 (KPF)

JUDGMENT

Defendants Joe Ciancotto, and DDB executives Peter Hempel and Chris Brown (together, "Defendants"), in two separate motions, having moved to dismiss the First Amended Complaint ("FAC"), and the matter having come before the Honorable Katherine Polk Failla, United States District Judge, and the Court, on March 9, 2016, having rendered its Opinion and Order granting Defendants' motions in full; and directing the Clerk of Court to terminate all pending motions, adjourn all remaining dates, and close this case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated March 9, 2016, Defendants' motions are granted in full; accordingly, the case is closed.

Dated: New York, New York
March 9, 2016

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW CHRISTIANSEN

(List the full name(s) of the plaintiff(s)/petitioner(s).)

15 CV 03440 (KPF)( )

-against-

NOTICE OF APPEAL

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

(List the full name(s) of the defendant(s)/respondent(s).)

Notice is hereby given that the following parties: Plaintiff MATTHEW CHRISTIANSEN

(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit

from the ☐ judgment ☒ order entered on: March 9, 2016

(date that judgment or order was entered on docket)

that: opinion and order granting Defendants' Motion to Dismiss the complaint is appealed in its entirety.

(If the appeal is from an order, provide a brief description above of the decision in the order.)

March 9, 2016
Dated

/s Susan Chana Lask
Signature*

Susan Chana Lask, Esq attorney for Plaintiff
Name (Last, First, MI)

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* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/23/13