16-748

United States Court of Appeals
for the Second Circuit

ANONYMOUS,

Plaintiff,

MATTHEW CHRISTIANSEN,

Plaintiff-Appellant,

V.

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

Defendants-Appellees.

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

BRIEF FOR DEFENDANT-APPELLEE JOE CIANCIOTTO

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CLAIMS AT ISSUE ON APPEAL

On June 22, 2015, Plaintiff-Appellant filed his First Amended Complaint (the "Complaint") (A. 7-44). The causes of action set forth in the Complaint were described by Plaintiff-Appellant as follows:

- FIRST CAUSE OF ACTION: Federal Disability HIV/AIDS Perceived
- SECOND CAUSE OF ACTION: Title VII Stereotypical Animus
- THIRD CAUSE OF ACTION: Federal Constructive Discharge
- FOURTH CAUSE OF ACTION: NY CLS Exec §290 et. seq. Sexual Orientation Discrimination
- FIFTH CAUSE OF ACTION: NY CLS Exec §296 Disability Discrimination
- SIXTH CAUSE OF ACTION: NYC Human Rights Law Harassment
- SEVENTH CAUSE OF ACTION: Aiding & Abetting
- EIGHTH CAUSE OF ACTION: Slander *per se*
- NINTH CAUSE OF ACTION: Emotional Distress
- TENTH CAUSE OF ACTION: Negligent Supervision/Retention of an Unfit Employee
- ELEVENTH CAUSE OF ACTION: Breach of Contract
- TWELFTH CAUSE OF ACTION: Violations of Labor Law §§190-198

Only the second, fourth, fifth, seventh, eighth, and ninth causes of action were asserted against Cianciotto – claims pursuant to Title VII, the New York State Human Rights Law, and state law claims for slander and emotional distress.[1]

On March 19, 2016, the Honorable Katherine Polk Failla dismissed the Complaint in its entirety. (A. 131-69). In his appellate brief, Plaintiff-Appellant addresses only those claims brought pursuant to Title VII and the ADA. (Dkt. 33). As the Complaint does not assert a claim against Cianciotto pursuant to the ADA, and there is no individual liability under Title VII,[2] none of the claims asserted against Cianciotto are within the scope of this appeal. Nonetheless, we briefly comment below.

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[1] As the Complaint is not 100% clear, Cianciotto's counsel repeatedly requested clarification from Plaintiff's counsel regarding which claims were asserted against Cianciotto. (15-CV-03440, Dkt. 25, p. 1). Plaintiff's counsel responded just two days before Cianciotto's motion to dismiss was due, stating, via email, that only the second, fourth, fifth, seventh, eighth, and ninth causes of action were asserted against Cianciotto. (Id.) By that time, the motion was almost completely drafted, and Cianciotto included arguments pertaining to all causes of action for the sake of completeness and due to the lack of clarity. (Id.)

[2] In her decision on the motion to dismiss, Judge Failla noted:

> The [Complaint] 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, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

(A. 158).

CIANCIOTTO ADOPTS THE BRIEF OF HIS CO-DEFENDANT-APPELLEES

On September 16, 2016, Defendant-Appellees Omnicom Group, Inc., DDB Worldwide Communications Group, Inc., Peter Hempel, and Chris Brown (the "Corporate Defendants") filed their opposition brief. (Dkt. 81). Cianciotto adopts the Corporate Defendants' Counterstatement of the Issues Presented for Review, Counterstatement of the Case, Summary of Argument, and Argument as his own, joining *in toto*.

CIANCIOTTO FURTHER ADOPTS THE BRIEF SUBMITTED BY THE DEFENDANT-APPELLEE IN HIVELY V. IVY TECH, WHICH IS EXACTLY ON-POINT

Cianciotto notes that all of the issues raised by Appellant and the *amici curiae* in relation to the question of whether sexual orientation is a protected class under Title VII were squarely addressed by the Seventh Circuit just two months ago in Hively v. Ivy Tech Cmty. Coll., 2016 U.S. App. LEXIS 13746 (7th Cir. 2016), which found no protection. In summation, the Seventh Circuit explained:

> In addition to the Supreme Court's silence, Congress has time and time again said "no," to every attempt to add sexual orientation to the list of categories protected from discrimination by Title VII. This circuit has not remained silent on the matter, but rather, as we have described above, our own precedent holds that Title VII provides no protection from nor redress for discrimination on the basis of sexual orientation. We require a compelling reason to overturn circuit precedent. Ordinarily this requires a decision of the Supreme Court or a change in legislation. But it is also true that precedent can be overturned when "the rule has proven to be intolerable simply in defying practical workability...whether related principles of law have

> so far developed as to have left the old rule no more than a remnant of abandoned doctrine...or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." It may be that the rationale appellate courts, including this one, have used to distinguish between gender non-conformity discrimination claims and sexual orientation discrimination claims will not hold up under future rigorous analysis. It seems illogical to entertain gender non-conformity claims under Title VII where the non-conformity involves style of dress or manner of speaking, but not when the gender non-conformity involves the sine qua non of gender stereotypes—with whom a person engages in sexual relationships. And we can see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms. We allow two women or two men to marry, but allow employers to terminate them for doing so. Perchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our precedent. Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, many of the federal courts to consider the matter have stated that they do not condone it, and this court undoubtedly does not condone it. But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED.

Id. at *53-56

This holding is correct. It is disgraceful that Congress has not passed a statute protecting against discrimination based on sexual orientation. But,

Congress has not done so. Sexual orientation is not covered under Title VII, that is the state of the law, and this Court should not legislate from the bench.

Cianciotto notes that four of the five *amici curiae* in Hively have submitted substantially similar briefs in this case.[3] Ivy Tech, the appellee in Hively, submitted an excellent brief to the Seventh Circuit which addresses the issues raised in these briefs, and is thus directly relevant to this case. Accordingly, Cianciotto hereby adopts and incorporates by reference the arguments set forth Ivy Tech's brief. (7th Cir. 15-1720, Dkt. 14). Specifically, Cianciotto adopts the following arguments made by Ivy Tech:

- Sexual orientation discrimination is not prohibited by Title VII and judicially amending the statute would violate the separation of powers. (7th Cir. 15-1720, Dkt. 14, pp. 9-21).
    - Every circuit court to consider the issue is not wrong: sexual orientation discrimination is not prohibited by Title VII. (7th Cir. 15-1720, Dkt. 14, pp. 10-12).
    - The statutory language is plain: sexual orientation discrimination is not prohibited by Title VII. (7th Cir. 15-1720, Dkt. 14, pp. 13-14).
    - Subsequent congressional activity reinforces that sexual orientation discrimination is not prohibited by Title VII. (7th Cir. 15-1720, Dkt. 14, pp. 14-15).
    - Many years have passed since Oncale and Price Waterhouse; sexual orientation is still not prohibited by Title VII. (7th Cir. 15-1720, Dkt. 14, pp. 15-22).

[3] The entities which submitted amicus briefs in both this case and Hively were the ACLU, EEOC, Members of Congress and the National Center for Lesbian Rights.

- Oncale did not make "because of sex" equivalent to "because of sexual orientation" in 1998. (7th Cir. 15-1720, Dkt. 14, pp. 15-17).

- Price Waterhouse did not make sex stereotyping equivalent to sexual orientation in 1989. (7th Cir. 15-1720, Dkt. 14, pp. 17-19).

- Associational race discrimination is not analogous to sexual orientation discrimination. (7th Cir. 15-1720, Dkt. 14, pp. 19-21).

In sum, the arguments advanced in Hively and adopted by the Seventh Circuit are applicable here.

CONCLUSION

For the reasons discussed in the Corporate Defendants' brief, dated September 16, 2016, as well as the reasons presented in the Ivy Tech brief, the District Court's decision should be affirmed.

Dated: Carle Place, New York
September 20, 2016

Respectfully submitted,

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 1,490 words of text.

The brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2007, Times New Roman, Size 14.

Dated: September 20, 2016

/s/
RICK OSTROVE, ESQ.

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