16-748-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MATTHEW CHRISTIANSEN,
Plaintiff-Appellant,
v.

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
Case No. 15-cv-3440
The Honorable Katherine Polk Failla

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR LESBIAN RIGHTS AND GLBTQ ADVOCATES & DEFENDERS IN SUPPORT OF PLAINTIFF-APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* National Center for Lesbian Rights and GLBTQ Advocates & Defenders certify that they have no parent corporations and no corporation or publicly held entity owns 10% or more of their stock.

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INTEREST OF AMICI CURIAE[1]

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for the violation of their civil rights in the workplace.

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[1] Counsel for the parties have not authored this brief in whole or in part. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amici curiae contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

In *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000), a panel of this Court held that "Title VII does not prohibit harassment or discrimination because of sexual orientation." In *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005), the panel reiterated that a gender stereotyping claim should not be used to "'bootstrap protection for sexual orientation into Title VII.'" *Id.* (quoting *Simonton*, 232 F.3d at 38). In this case, the panel was asked to reconsider the rule articulated in *Simonton* in light of contemporary sex discrimination law. Undertaking such an examination, Chief Judge Katzman wrote a separate concurrence, observing that courts around the country have found the *Simonton* rule to be "unworkable" and calling upon this Court to reconsider that rule. Concurring Opinion at 10, 15. The panel reaffirmed the rule nonetheless, citing considerations of stare decisis. *See* Panel Opinion at 2.

Stare decisis, however, "is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). If a decision's "statutory and doctrinal underpinnings have . . . eroded over time," there has not been significant reliance on the precedent, or the decision has "proved unworkable," it need not be followed. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410-11 (2015). *See also Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 310 (2d Cir. 2007). These considerations strongly support the Court granting rehearing en banc to revisit a question of exceptional importance.

The same issue is also presented in two other cases in which en banc

consideration has been requested. *See Cargian v. Breitling USA, Inc.*, No. 15 CIV. 01084 (GBD), 2016 WL 5867445 (S.D.N.Y. Sept. 29, 2016) (petition for initial hearing en banc filed April 19, 2017); *Zarda v. Altitude Express*, No. 15-3775, 2017 WL 1378932 (2d Cir. Apr. 18, 2017) (petition for rehearing en banc filed May 2, 2017). The same considerations support hearing all three cases en banc.

I. THE RULE DOES NOT WARRANT STARE DECISIS PROTECTION BECAUSE IT IS UNWORKABLE AND LEADS TO INCONSISTENT RESULTS.

As the panel concurrence explained, sexual orientation discrimination and sex discrimination are inextricably linked. "[S]exual orientation is commingled in the minds of many with particular traits associated with gender. More fundamentally, carving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any." Concurring Opinion at 11.

Even independent of gender stereotypes, sexual orientation discrimination is based on sex in the most direct and literal way. Sexual orientation is a relational characteristic, defined by being (or desiring to be) associated with persons of a particular sex. For this reason, "'[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.'" *Id*. at 4 (quoting *Baldwin v. Foxx*, E.E.O.C.

Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015)). This is because "'but for' their sex, [gay or lesbian employees] would not have been discriminated against for being attracted to men (or being attracted to women)." *Id.* at 6 (citation omitted).

Because no clear distinction between sexual orientation discrimination and sex discrimination exists, federal case law excluding sexual orientation discrimination from Title VII's scope has bred confusion and inconsistent results. The Seventh Circuit recently acknowledged this doctrinal incoherence, overruling outdated precedent and holding that discrimination on the basis of sexual orientation is a form of sex discrimination. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc). The court observed that it requires "considerable calisthenics to remove the 'sex' from 'sexual orientation,'" and "[t]he effort to do so has led to confusing and contradictory results." *Id.* at 350. The en banc court pointed to the panel decision in *Hively*, which discussed at length the "jumble of inconsistent precedents" and "unsatisfactory results seen in the confused hodge-podge of cases" applying the rule excluding sexual orientation discrimination. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 706, 711 (7th Cir. 2016).

One group of decisions "essentially throw[s] out the baby with the bathwater," *id.* at 706, by insisting "the gender non-conformity claim cannot be tainted with any hint of a claim that the employer also engaged in sexual orientation discrimination,"

id. at 707 (collecting cases). Other decisions "address the problem of the ill-defined lines between sexual orientation and gender non-conformity claims by carefully trying to tease the two apart and looking only at those portions of the claim that appear to address cognizable gender non-conformity discrimination." *Id.* at 708. But attempts to disentangle the evidence in this manner inevitably draw arbitrary and unpredictable lines. Plaintiffs alleging similar facts may find their claims deemed evidence of sex discrimination by one judge and evidence of sexual orientation discrimination by another, based on elusive criteria. *Id*. at 709. "This type of gerrymandering to exclude some forms of gender-norm discrimination but not others leads to unsatisfying results." *Id*. at 715.

The unworkability of the rule may be seen in the decisions of district courts in this Circuit. These cases reflect the jumble of inconsistent results described by the Seventh Circuit. *Compare Morales v. ATP Health & Beauty Care, Inc.*, No. 3:06CV01430 (AWT), 2008 WL 3845294, *8 (D. Conn. Aug. 18, 2008) (rejecting evidence of gender-based harassment by supervisor as actually reflecting sexual orientation discrimination); *Magnusson v. County of Suffolk*, No. 14-CV-3449 (SJF)(ARL), 2016 WL 2889002, *8 (E.D.N.Y. May 17, 2016) (same); *Tyrrell v. Seaford Union Free School District*, 792 F. Supp. 2d 601, 623 (E.D.N.Y. 2011) (same in Title IX case), *with Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303 WWE, 2014 WL 4794527, *2 (D. Conn. Sept. 25, 2014) (holding allegations that

plaintiff "was subjected to sexual stereotyping during her employment on the basis of her sexual orientation" were sufficient to state a claim under Title VII); *Riccio v. New Haven Bd. of Educ*., 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (holding that plaintiff who was "targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual" stated claim under Title IX). Indeed, at least one district court in this Circuit has concluded that homophobic slurs and conduct can be evidence of sex discrimination, *but only if the plaintiff is actually heterosexual*. *See Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist*., 169 F. Supp. 3d 320, 333 (N.D.N.Y. 2016). Such is the confusion created by the *Simonton/Dawson* rule that it has led courts to deem *precisely the same conduct* as evidence of sex discrimination if the plaintiff is heterosexual, but not if the plaintiff is lesbian, gay, or bisexual.

The inconsistency and unpredictability generated by such an incoherent rule do not warrant stare decisis. Maintaining this unworkable rule undermines "the "evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process"—defeating the very goals that stare decisis is designed to serve. *Payne*, 501 U.S. at 827.

II. THERE IS NO RELIANCE INTEREST THAT NEEDS PROTECTION.

The current rule is not "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992). To the contrary, as noted above, the absence of a principled way to determine how courts will rule on Title VII claims by lesbian, gay, or bisexual plaintiffs has left both employers and employees bereft of clear guidance. The instability and unpredictability inherent in such a scheme thwart reliance, leaving litigants to guess as to whether courts will categorize particular facts as evidence of sexual orientation discrimination or as evidence of sex discrimination. Overruling the exclusion would not cause hardship or inequity; rather it would eliminate the inconsistent and inequitable results made inevitable by the existing rule.

III. SUBSEQUENT DEVELOPMENTS HAVE ERODED THE RULE'S DOCTRINAL UNDERPINNINGS.

The rule on which the panel relied has become increasingly out of step with related principles of law. Since *Simonton* was decided, "the legal landscape has substantially changed, with the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), affording greater legal protection to gay, lesbian, and bisexual individuals." Concurring Opinion at 13. In addition, the Equal Employment Opportunity Commission has reconsidered its earlier interpretation and concluded that Title VII prohibits

discrimination on the basis of sexual orientation. *See id.* at 3-4. In recent years, that conclusion also has been embraced by a number of district courts, and now by the Seventh Circuit sitting en banc. *See Hively*, 853 F.3d at 351-52; *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (collecting cases). These decisions recognize what has become increasingly apparent since *Simonton* and *Dawson*: In the wake of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), no principled line can differentiate sexual orientation discrimination claims from other claims based on gender non-conformity.

The exclusion of sexual orientation discrimination claims from Title VII also creates a stark difference in how this Court treats claims of associational discrimination based on race and sex, respectively. This Court has held that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (emphasis in original). As the Seventh Circuit correctly reasoned, the associational-discrimination cases compel the conclusion that Title VII prohibits discrimination on the basis of sexual orientation. *Hively*, 853 F.3d at 349 (citing *Price Waterhouse*, 490 U.S. at 244 n.9). In sum, in the nearly two decades since *Simonton*, the rule it announced has become increasingly at odds with related principles of law. For that

reason as well, it does not warrant insulation from review by the stare decisis doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing en banc.

DATED: May 5, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ECF system on May 5, 2017.

I certify that all participants in the case are registered ECF users and that service will be accomplished by the ECF system.

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