16-3592-cv

United States Court of Appeals

For the Second Circuit

FREDERICK M. CARGIAN,

Plaintiff-Appellant,

v.

BREITLING USA, INC.,

Defendant-Appellee.

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

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Cargian submits this brief in reply to Breitling's response and in further support of his appeal from the district court's summary judgment dismissal.

Breitling makes two basic arguments in response to Cargian's appeal: (1) stare decisis requires upholding *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), which held that discrimination because of sexual orientation is not prohibited under Title VII, Breitling Br. 25-37; and (2) even if *Simonton* and *Dawson* were overruled, Cargian has not met his evidentiary burden on summary judgment.

Breitling's opposition brief rests on errors of law and misrepresents contested evidence as uncontested fact. In light of the change in the legal landscape, this is an appropriate time and case for the Court to revisit and overrule its prior decisions excluding sexual orientation discrimination from discrimination because of "sex." If the Court holds that sexual orientation discrimination is sex discrimination, the record taken as a whole presents triable issues of fact as to whether Cargian's sexual orientation was a motivating factor in the adverse actions taken.

I. *SIMONTON* AND *DAWSON* SHOULD BE REVISITED AND OVERRULED.

That *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), were wrongly decided has become increasingly apparent as courts in this circuit and, indeed, across the

country grapple with claims of sexual orientation discrimination. In fact, the Chief Judge has called on this Court to reexamine those decisions in an appropriate case. *See Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017) (Katzmann, C.J., concurring).

Breitling's justification for why this Court should exclude lesbian, gay, and bisexual people from Title VII's sex provision amounts to little more than "because *Simonton* (and other circuits) said so." But while stare decisis may be the beginning of the inquiry, it is not the end. "Stare decisis is not an inexorable command . . . ." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (internal quotation marks and italics omitted). "[T]he Supreme Court has never applied stare decisis mechanically to prohibit overruling earlier decisions determining the meaning of statutes." *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 310 (2d Cir. 2007) (internal quotation marks, brackets, and ellipsis omitted).

Cargian does not dispute that courts, including this one, have held that Title VII does not prohibit sexual orientation discrimination. Rather, Cargian submits that this is an appropriate case in which to revisit those decisions and to hold that sexual orientation discrimination is discrimination because of sex under the plain meaning of Title VII.[1]

[1] Cargian has filed a petition for hearing en banc asking the full Court to consider this important legal question. *See* ECF No. 81.

That discrimination because of sexual orientation is a form of sex discrimination has been briefed thoroughly by Cargian and his *amici* and will not be repeated here. *See, e.g.*, Cargian Br. (ECF No. 37) at 19-27; EEOC Br. (ECF No. 54) at 4-15. Cargian limits his reply to three key points:

1. The EEOC's decision in *Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015), is correct and entitled to deference at least under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Cf. Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 53 (2d Cir. 2012) (finding EEOC's Enforcement Guidance entitled to *Skidmore* deference). Breitling's contention that *Baldwin* is "clearly wrong" is refuted by the fact that, in the approximately three months since Cargian filed his opening brief, the en banc Seventh Circuit as well as judges of this Court and of the Eleventh Circuit all have agreed with the EEOC that sexual orientation discrimination is sex discrimination. *See Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc) (citing *Baldwin*); *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring) (same); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1273 (11th Cir. 2017) (Rosenbaum, J., concurring in part and dissenting in part) (same); *see also Philpott v. New York*, No. 16 Civ. 6778 (AKH), 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017) ("[B]ecause plaintiff has stated a claim for sexual orientation discrimination, 'common sense' dictates that

he has also stated a claim for gender stereotyping discrimination, which is cognizable under Title VII.").

That *Baldwin* marked a change in the agency's position does not lessen its power to persuade. Indeed, Breitling's own authority confirms that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The EEOC's decision was set forth in a well-reasoned and thoroughly supported opinion, which acknowledged that the agency's "own understanding of Title VII's application of sexual orientation discrimination has developed over time." *See Baldwin*, 2015 WL 4397641, at *9 n.13. Federal courts have recognized *Baldwin*'s reasoning as "persuasive[]." *See, e.g.*, *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015).

Moreover, Breitling's reliance on the fact that the words "sexual orientation" do not appear in the text of Title VII is misplaced. The words "sexual harassment" do not appear on the face of the statute either, but courts – including the Supreme Court – have long recognized sexual harassment as a form of sex discrimination. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Townsend*, 679 F.3d 41. The question is not whether "sexual orientation" appears in the statute, but whether sexual orientation discrimination is a form of prohibited discrimination because of "sex." *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

For the reasons discussed in Cargian's opening brief, the answer to that question is yes.

2. The "evolving legal landscape" for lesbian, gay, and bisexual people, *see Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring), should inform this Court's understanding of the word "sex." To be sure, the Supreme Court's recognition that gay people enjoy certain constitutional rights under the Equal Protection and Due Process Clauses does not control this Court's interpretation of the word "sex" in Title VII. But that does not mean that this Court must turn a blind eye to the fact that "in the years since [*Simonton* and *Dawson* were decided], the legal landscape has substantially changed . . . affording greater legal protection to gay, lesbian, and bisexual individuals." *Id.* at 206; *see also Hively*, 853 F.3d at 342 ("[S]ince the Supreme Court's recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry. . . . bizarre results ensue from the current regime."). Rather, our nation's evolving understanding of same-sex couples, and the discrimination they faced historically and today, *see Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012), helps to inform why sexual orientation discrimination cannot be carved out of Title VII's prohibition against discrimination "because of sex." *See Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring).

3. Sexual orientation discrimination is a form of associational discrimination prohibited by this Court's precedent in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), which recognized that discrimination based on an employee's association with a person of another race violates Title VII's race provision. Similarly, discrimination based on an employee's association with persons of the same sex violates Title VII's sex provision. *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring) ("[T]he associational theory of race discrimination applies also to sex discrimination."). Breitling's attempt to escape this conclusion by suggesting that Cargian was required to present proof of some *particular* relationship misses the point. Sexual orientation discrimination *by definition* turns on the sex of individuals to whom a person is attracted. Here, Prissert knew that Cargian, a gay man, forms or seeks to form intimate relationships with other men. That is sufficient to bring Cargian's claim within the ambit of associational discrimination prohibited by *Holcomb*.[2]

[2] Noting that the American Civil Liberties Union (ACLU) and the New York Civil Liberties Union (NYCLU) have recently appeared as co-counsel for Cargian and had also previously filed an amicus curiae brief in support of Cargian, Breitling speculates that the ACLU and NYCLU will try to assert new issues or arguments into the case that were not raised in the principal brief. Breitling Br. 3 n.2. This reply memorandum of law does not assert any new claim – the question of whether Title VII encompasses discrimination on the basis of sexual orientation was the central issue raised in the principal brief. Cargian Br. 19-28. Nevertheless, the ACLU and NYCLU have requested that the Court permit them to withdraw the previously filed amicus curiae brief. *See* ECF No. 106.

II. CARGIAN HAS ESTABLISHED GENUINE ISSUES OF MATERIAL FACT WARRANTING A TRIAL ON HIS SEXUAL ORIENTATION DISCRIMINATION CLAIM.

The question at the summary judgment stage is whether there are sufficient contested facts from which a reasonable fact finder can conclude that Cargian's sexual orientation was a motivating factor, even if not the only factor, in his demotion and firing and that Breitling's rationales for its decisions are but a pretext for discrimination. *See Holcomb*, 521 F.3d at 138; *see also Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995); *Zaken v. Boerer*, 964 F.2d 1319, 1325 (2d Cir. 1992). Where, as here, there are contested facts, "the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of" the non-moving party, Cargian. *See Holcomb*, 521 F.3d at 137. Nor is it for the court to decide issues of credibility. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

Taken as a whole, the record in this case presents triable issues of fact as to whether Cargian's sexual orientation was a motivating factor in his demotion and ultimately the termination of his employment – actions all taken by Breitling's then-newly appointed president, Thierry Prissert. As this Court has noted,

> No one piece of evidence need be sufficient, standing alone, to permit a rational finder of fact to infer that defendant's employment decision was more likely than not motivated in part by discrimination. To use the apt metaphor coined by Vincent Gambini . . . a plaintiff may satisfy her burden by building a wall out of evidentiary bricks.

Walsh v. N.Y.C. Hous. Auth., 828 F.3d 70, 76 (2d Cir. 2016). Here, Cargian has built just such a wall of proof using evidentiary bricks that, taken together, add up to more than the sum of their parts. This Court should reject Breitling's invitation to review each evidentiary brick as if it stood alone.

For example, Breitling suggests that direct evidence of discrimination is required, but it is black-letter law that circumstantial evidence of discrimination is not only permitted, but usually the necessary method of proving discriminatory intent. *Holcomb*, 521 F.3d at 137 ("Where an employer has acted with discriminatory intent, direct evidence to that intent will only rarely be available . . . ."); *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991) ("An employer who discriminates is unlikely to leave a 'smoking gun' . . . attesting to discriminatory intent."); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1991) ("[C]lever men may easily conceal their motivations." (internal quotation marks omitted)).

Moreover, Breitling asks this Court to accept as true its own version of events and to overlook contrary evidence in the record. Applying the proper standard, and resolving all ambiguities and drawing all permissible factual inferences in Cargian's favor, Cargian has offered sufficient admissible evidence – through affidavits, deposition testimony, admissions of fact, and documents – from which a reasonable trier of fact may conclude that his sexual orientation was a

motivating factor in his demotion and firing and that Breitling's proffered reasons for those actions are pretextual.

The district court's grant of summary judgment should be reversed, and this case should be remanded for trial or, at a minimum, for reconsideration by the district court.[3]

A. Cargian has made out a prima facie case of discrimination.

Breitling's argument that Cargian has not even established a prima facie case of discrimination is frivolous. The "burden of establishing a *prima facie* Title VII case is *de minimis*." *Sassaman v. Gamache*, 566 F.3d 307, 312 (2d Cir. 2009) (internal quotation marks and brackets omitted). Cargian easily satisfies that minimal burden: He has offered admissible evidence that (1) he was qualified for the position, (2) he is a member of a class protected under Title VII (should *Simonton* and *Dawson* be overruled), (3) he suffered adverse employment actions, and (4) those actions occurred under circumstances giving rise to an inference of

[3] The district court dismissed Cargian's Title VII claim based on its interpretation of this Court's precedent that precluded a claim of sexual orientation discrimination and, further, required evidence of gender non-conforming behavior or appearance to proceed on a claim of sex stereotyping. SPA 7-8. Because Cargian did not have evidence that Breitling considered him to be effeminate or disapproved of a specific aspect of his behavior or appearance, the district court rejected Cargian's sex stereotyping claim as "bootstrapping." As a result, the district court did not have the opportunity to analyze or address the evidence Cargian did present regarding disparate treatment motivated at least in part by his sexual orientation. If this Court holds that sexual orientation discrimination is sex discrimination, at a minimum, the district court should be given the opportunity to consider whether there are genuine issues of material fact as to that claim.

discrimination. *See Littlejohn v. City of New York*, 795 F.3d 297, 312 (2d Cir. 2015).

Breitling does not seriously dispute that Cargian was qualified. Nor could it, given his twenty-one years as the leading sales representative, and the ample proof in the record including:

Marie Bodman, the former president of Breitling USA before Prissert, who supervised Cargian for approximately twenty-one years, held him in the highest regard, even providing him with a reference letter in January 2014, written on Breitling SA stationary, attesting to his abilities. A. 748, Cargian Aff. Ex. A.

Lisa Roman, the Marketing Director from 2002 until 2015, testified that Cargian was "easy to work with," "very responsible," responsive to his accounts, and good at getting accounts to marketing events. A. 397, Roman Tr. 11:3-8; A. 404-406, Roman Tr. 77:9-79:1; A. 407-409, Roman Tr. 85:14-87:23; A. 411-412, Roman Tr. 97:23-98:15. She corroborated how highly Cargian was respected prior to Prissert's appointment. A. 412-413, Roman Tr. 98:16-99:18; A. 415, Roman Tr. 101:12-21.

Melissa Vessely, the Training Director hired by Prissert in 2012 who worked with Cargian until his termination at the end of December 2013, testified that she found Cargian very knowledgeable and well respected by colleagues, that he was liked by clients, and that he was helpful and generally did a good job. A.

420, Vessely Tr. 96:13-23; A. 421, Vessely Tr. 100:20-24; A. 422, Vessely Tr. 110:3-8.

Nor does Breitling dispute that Cargian is a member of a protected class (if sexual orientation discrimination is recognized as sex discrimination) nor that he suffered adverse employment actions.

Breitling challenges only the fourth element of Cargian's prima facie case, namely, that it fired Cargian under circumstances giving rise to an inference of discrimination. Cargian can satisfy that element in at least two ways, either of which is sufficient to survive summary judgment. First, an inference of discrimination "arises when an employer replaces a terminated or demoted employee with an individual outside the employee's protected class." *Littlejohn*, 795 F.3d at 312-13. Here, Cargian has presented admissible evidence that he was replaced by Isaac Schafrath, an unqualified heterosexual man. Cargian Br. 15-16. The National Sales Manager, Charles Anderson, said of Schafrath that it would "take some to get the kid up to speed." A. 510, Anderson Tr. 325:16-20; A. 511-512, Anderson Tr. 326:10-327:19. Indeed, Schafrath himself testified that Prissert told him that he was promoted based on "faith," despite his lack of experience. A. 531-533, Schafrath Tr. 118:10-120:25. Second, as discussed in detail below, an inference of discrimination also arises from the fact that Breitling maintained a

"boys' club" atmosphere that excluded Cargian from employment opportunities because Prissert did not consider Cargian to be a "real man."

B. Cargian has established genuine issues of material fact as to whether Breitling's explanations are pretextual.

Breitling, to support its contentions, oft repeats its unsubstantiated mantra that Cargian relies on "conclusory allegations" based on "speculation." Presumably, Breitling holds to the theory that if you say something often enough, even if not true, it will be believed. To the contrary, as fully discussed in Cargian's opening brief, Cargian has raised, through affidavits, documents, deposition testimony and admissions, genuine issues of material fact as to whether Breitling's proffered reasons for demoting him and terminating his employment are pretextual.

Breitling asserts that it was justified in terminating Cargian's employment because of a drop in performance. But Cargian's performance cannot be separated from Breitling's increase in his sales goals, which itself was part of the discriminatory continuum, and calculated to ensure his failure.[4]

It is uncontested that, in January 2011, upon Prissert's assuming the Presidency of Breitling USA, Cargian's sales goal was raised 92%, while no other sales representative's goal was raised more than 63%. A. 384-387, Breitling's

[4] As discussed above, another impediment to Cargian's performance was that Prissert denied him opportunities to enhance his production because Cargian, along with the "girls," was denied opportunities to participate in marketing events that would have enhanced his selling ability.

Resp. to Pl.'s First RFAs ¶¶ 33-54. There is no merit to Breitling's contention that this astronomical increase in Cargian's goal resulted from an increase in his territory. To the contrary, Breitling's own admissions show that another sales representative, Josh Haley, had an even greater increase in territory in 2011, but his sales goal was increased by only $7M or 62%. In contrast, Cargian's sales goal was increased by $12M or 92%. A. 382-83, Breitling's Resp. to Pl.'s First RFAs ¶ 28; A. 386, Breitling's Resp. to Pl.'s First RFAs ¶¶ 46-48.

Contrary to Breitling's assertion, Breitling Br. 46, Cargian continued to express concern that his goals the following years were raised by a greater amount than the goals of his colleagues. For example, in 2013, Cargian's territory was significantly reduced (and his salary reduced by $35,000), yet his goal was raised by 14% while all other sales representatives (except one) had their goal raised between 8% and 10%. A. 698, Cargian Aff. ¶ 25.

Instead of attempting to explain this disparity, Prissert claims that Cargian's sales goal was set by Bodman, who preceded him as Breitling USA's president. That claim is contradicted by the statements of other Breitling employees, including Anderson and Bodman herself, who told Cargian that the decision belonged to Prissert. A. 448, Cargian Tr. 223:-16; A. 449-450, Cargian Tr. 225:2-226:14. Anderson's and Bodman's statements to Cargian are admissible because both are agents of Breitling.

As Breitling's own brief makes plain, even given these unfair sales goals, Cargian's performance in 2013, the year he was dismissed, remained above that of several of his colleagues, who were retained. Breitling Br. 23 n.4. Breitling asserts that there was one sales representative whose performance was worse than Cargian's. However, as demonstrated by computerized sales documents produced by Breitling, the measure of success is the year over year figures, that is, how much the sales representative increased or decreased his or her sales from the prior year. A. 692, Cargian Aff. ¶ 8; A. 706-747, Cargian Aff. Ex. A. Applying this standard, there were in fact three sales representatives (out of seven) with lesser performance in 2013. A. 551, Goodman Aff. Ex. 16; A. 747, Cargian Aff. Ex. A.[5] By Breitling's numbers, it is fair to say that, in 2013, the year he was fired, Cargian was as close to the best performers as the worst performers.

Breitling's reliance on its claim that Cargian's performance fell short relative to his sales goals is misplaced. Personal sales goals at Breitling, which were controlled entirely by management, related primarily to a sales representative's compensation, not productivity or success. The function of the goal was to establish the base upon which the reps bonuses were calculated. A. 691, Cargian Aff. ¶ 7. Establishment of these goals was akin to a salary

[5] Brian Criddle's sales were down by 20.68%; Josh Haley's by 17.27%, and Beth Haddad's by 14.55%, while Cargian's sales were down just 13.84%. And all but one sales representative had a decrease that year. A. 551, Goodman Aff. Ex. 16.

negotiation. Even if personal sales goals were the correct measure, Breitling offers no admissible evidence of Cargian's performance relative to his sales goals compared to other sales representatives, instead relying on manually drawn summary charts that Breitling's witnesses admitted at deposition contained errors and discrepancies.[6] These documents fail to meet evidentiary standards of authenticity and reliability.

Also without merit is Breitling's claim that Cargian was less than an energetic salesman who had to be reprimanded because he was not making his sales calls. Breitling Br. 19. Breitling's own records reflect that, in 2012, Cargian was the second highest among the sales representatives in total number of client calls made. Additionally, Cargian's compensation records show that, as of October 2012, he had seventeen unused vacation days, eleven unused sick days, and two unused personal days – hardly the record of an employee who was slacking off. A. 578-579, Goodman Aff. Ex. 24; A. 643, Goodman Aff. Ex. 33.

Breitling also claims that it terminated Cargian's employment because of disciplinary proceedings against him, but a review of discipline meted out to comparators shows that this claim, too, is pretextual. In 2012, Prissert issued a warning letter to Cargian, claiming that he violated company policy by giving cash

[6] The summary charts would be inadmissible at trial for several reasons, including the fact that Breitling refused to turn over the underlying documents upon which the summary charts were based. *See* Fed. R. Evid. 1006. A. 355-357, Goodman Aff. ¶¶ 3-6.

gifts to support staff for Christmas, A. 48, Prissert Decl. ¶ 45, resulting in a "warning letter' being sent to Cargian from the president. A. 699, Cargian Aff. ¶¶ 29-30. But, as the HR manager testified, there was no such policy. In contrast, another heterosexual sales representative, whose performance fell below Cargian's in 2013, was not fired despite the fact that just months earlier he lied about making customer calls when in fact he was out on personal joy rides, which he then claimed as business expenses. Cargian Br. 13.

Breitling further claims that Cargian spoke to Prissert inappropriately, but that is disputed. While Cargian expressed general frustration about his mistreatment, his comments were not directed to anyone in particular, let alone to Prissert, who was many feet away in a noisy bowling alley with no customers present to Cargian's knowledge. A. 441-442, Cargian Tr. 127:1-128:24; A. 699-700, Cargian Aff. ¶ 31. In contrast to Prissert's uncorroborated statement, Cargian's testimony was corroborated by Sommer, who confirmed that any remarks Cargian made were not directed at Prissert, that the bowling alley was noisy, and that Prissert was far away. A. 483-485, Sommer Tr. 87:16-89:13. At most, this incident raises a factual dispute that cannot be resolved on a summary judgment motion and must be submitted to a jury.

Moreover, Cargian has offered ample proof from which a reasonable trier of fact could "infer that [Breitling's] employment decision was more likely than not

based in whole or in part on discrimination." *See Kirkland v. Cablevision Sys.*, 760 F.3d 223, 225 (2d Cir. 2014). Indeed, Prissert maintained a "boys' club" atmosphere at Breitling that relegated Cargian to one of the "girls" and excluded him from employment opportunities that would have enabled him to enhance his performance.

Evidence that Prissert saw Cargian as one of the "girls" includes the fact that Cargian was assigned to share a hotel room with a female sales representative at a conference in 2011. Defendant gloms on to confusion in the record to claim that Cargian and that sales representative, Annie Sommer, conceded they had shared rooms repeatedly, but Cargian testified that that was not the case. At his deposition, Cargian clarified that his e-mail message that "Annie and I have shared rooms all the years we have attended" referred to the fact that he and Sommer had shared hotel rooms with *other sales representatives of the same sex*, not with each other. A. 703-704, Cargian Aff. ¶ 37(c). Cargian also testified that, most years, he shared a hotel room with a specific male colleague, and only once many years earlier he shared a room with Sommer. A. 439-440, Cargian Tr. 100:3-101:12. In other words, Cargian did not object to sharing a hotel room because of space constraints. What he objected to was being assigned to share a room with Sommer, a woman. Sommer likewise clarified that she had not shared a room with Cargian on multiple occasions and that she did object to the assignment with

Cargian. A. 461-462, Sommer Tr. 16:11-16; A. 475, Sommer Tr. 76:5-12. While the e-mail may be susceptible to multiple interpretations, on summary judgment, all inferences must be drawn in Cargian's favor. *See Reeves*, 530 U.S. at 151.

Evidence of the "boys' club" atmosphere also includes:

Annie Sommer testified to the boys' club atmosphere which excluded women and excluded Cargian. A. 460, Sommer Tr. 11:10-22; A. 465, Sommer Tr. 31:16-23.

Beth Haddad submitted a written complaint to the National Sales Director grieving the "boys" versus "girls" mentality established by Prissert. A. 567-568, Goodman Aff. Ex. 20.

Lisa Roman confirmed that Prissert maintained a boys' club atmosphere, which excluded women from the inner circle, and that Cargian was excluded from the inner circle. A. 412-415, Roman Tr. 98:16-99:18; 101:12-21.

Images of scantily dressed women, including posing on phallic symbols, were used to promote the company and to decorate the hallways and offices of Breitling. A. 553-558, Goodman Aff. Ex. 17; A. 753-754, Cargian Aff. Ex. C. Vessely, the training manager, testified that Breitling markets its products primarily to men and conceded that the material would not attract men who were not sexually attracted to women. Nothing better illustrates Breitling's view that

gay men are not viewed as real men. A. 425-428, Vessely Tr. 141:13-22; 142:13-144:7.

Exclusion from the company president's inner circle is not trivial. "A jury could find that the exclusionary culture fostered by [a supervisor] evidenced a biased attitude toward" the excluded group. *Zakre v. Norddeutsche Landesbank Girozentrale*, 396 F. Supp. 2d 483, 508 (S.D.N.Y. 2005); *cf. Bryson v. Chi. State Univ.*, 96 F.3d 912, 916-17 (7th Cir. 1996) ("The subtle indicia of job status and reward thus may, in a particular institution, take on an importance that may be far greater in context than would appear on the outside . . . .").

Additionally, exclusion from the inner circle resulted in Cargian's exclusion from job enhancing opportunities. Cargian Br. 7-8. For example, Cargian was excluded from the Bentley show in Crewe, England, an event to which all of the male sales representatives – except Cargian – were invited. Conversely, none of the female sales representatives were invited. A. 702, Cargian Aff. ¶ 37a. While Breitling tries to dismiss this piece of evidence as unsupported by the record, Cargian testified to it based on personal knowledge. By contrast, Breitling has offered not a scintilla of admissible evidence contradicting it. Rather, Breitling relies on a stray parenthetical in its Rule 56.1 counterstatement, which cites no supporting evidence (required by Rule 56) to claim that another man was not invited. Moreover, that Prissert failed to contradict Cargian's statement – despite

the opportunity to do so in his affidavit in support of summary judgment, A. 59-60, Prissert Decl. ¶ 56 – casts further doubt on Prissert's veracity and raises a question of fact.

For the reasons set forth above, Cargian has met his burden of establishing contested issues of material fact, supported by deposition testimony, documents, and admissions, from which a reasonable factfinder could conclude that discriminatory animus played a motivating role in Cargian's demotion and the subsequent termination of his employment.

III. CARGIAN HAS PRESERVED A SEX STEREOTYPING CLAIM BASED ON HIS SEXUAL ORIENTATION.

Cargian has preserved a sex stereotyping claim to the extent that it will be a viable claim if this Court overrules *Simonton* and *Dawson*. Should this Court recognize that "the stereotype that men should be exclusively attracted to women" is an actionable gender stereotype, *see Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring), then Cargian may proceed on a claim of gender stereotyping without evidence that some specific aspect of his behavior or appearance failed to conform to Prissert's stereotypical notions of a "real man."

IV. CARGIAN'S STATE AND LOCAL LAW CLAIMS SHOULD BE REINSTATED IF HIS TITLE VII SEXUAL ORIENTATION DISCRIMINATION CLAIM IS HELD VIABLE.

The district court dismissed, without prejudice, Cargian's state and local law claims under the Human Rights Law because it held that there was no viable

federal claim under *Simonton* and *Dawson*. If those decisions are overruled, then judicial economy and justice would be served by reinstating the state and local law claims.

CONCLUSION

The Court should reverse the district court's grant of summary judgment and remand this case for trial or, in the alternative, reconsideration.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(B) because it contains 4,876 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure (FRAP) 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2017, I electronically filed the foregoing Plaintiff-Appellant's Reply Brief with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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