

# 16-3592

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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FREDERICK M. CARGIAN,

*Plaintiff-Appellant,*

—against—

BREITLING USA, INC.,

*Defendant-Appellee.*

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

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**BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT**

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## **PRELIMINARY STATEMENT**

This is an appeal from the final judgment of the United States District Court for the Southern District of New York (Daniels, J) granting summary judgment dismissing all of Plaintiff-Appellant Frederick M. Cargian's ("Cargian" or "Plaintiff") employment discrimination claims against Appellee-Defendant Breitling USA ("Breitling" or "Defendant").

Cargian, an openly gay man who had 23 years of successful employment as a sales representative with Breitling, was fired effective December 31, 2012. For most of Cargian's tenure, Mary Bodman ("Bodman") was President of Breitling and his direct boss. During that time Cargian, who was held in high regard by Bodman, was the most productive sales rep.

This changed in 2010 when Thierry Prissert ("Prissert") was appointed President of Breitling and immediately established a macho atmosphere in the workplace, subjecting Plaintiff to disparate treatment calculated to assure his failure. Prissert created a "boy's club" atmosphere which excluded Cargian, together with the "girls", from his inner circle; denied Plaintiff, along with the women, workplace opportunities which would enhance their success; imposed higher unattainable sales budgets for Cargian than for any of the other sales reps; subjected Cargian to reprimand even when no policy was violated; treated Cargian more harshly in disciplinary matters; demoted Cargian in function and salary while promoting a

totally inexperienced straight man to his territory; and ultimately fired Cargian, while retaining lower performing sales reps, and replacing him with significantly less competent straight man.

### **JURISDICTIONAL STATEMENT**

The District Court had subject matter jurisdiction under 42 U.S.C. §§ 2000e *et seq.* and 28 U.S.C. §§ 1331, 1343. Appellate jurisdiction is proper under 28 U.S.C. § 1291 since the District Court issued a final judgment dismissing the case on September 29, 2016, and Plaintiff timely filed his Notice of Appeal on October 24, 2016, within thirty days of the District Court's entry of judgment. 28 U.S.C. § 2107(a).

### **ISSUES PRESENTED FOR REVIEW**

1. Is discrimination on the basis of sexual orientation cognizable under Title VII?
2. Based on the totality of the evidence, has plaintiff submitted sufficient evidence to defeat summary judgment?
3. If the Federal claim is reinstated, should the District Court accept supplemental jurisdiction of the gender discrimination claims?

## STATEMENT OF FACTS

### A. Procedural Background

On February 17, 2015, Plaintiff filed this action claiming discrimination based on sex (sexual orientation) and sexual stereotyping in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”) and age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (“ADEA”). Supplemental jurisdiction of all claims was brought pursuant to the Administrative Code of the City of New York Secs 8-107 *et seq.*, and the New York Human Rights Law, N.Y. Exec. Law Sec. 296 *et seq.*

On February 29, 2016, Defendant filed a motion for summary judgment requesting dismissal of all causes on the grounds that Plaintiff’s claims of gender discrimination, including sex role stereotyping, were in essence claims of sexual orientation discrimination, which is not cognizable under Title VII, and that Plaintiff’s sex stereotyping claim was simply bootstrapping his sexual orientation action. Breitling further argued that the ADEA claim failed for lack of proof. On September 29, 2016 District Judge George B. Daniels granted Defendant’s motion

dismissing Plaintiff's Title VII and ADEA claims with prejudice and his supplemental claims without prejudice.<sup>1</sup>

## **B. Facts of the Case**

### **a. The Company**

Breitling USA, a wholly owned subsidiary of Breitling SA, a Swiss manufacturer of high end watches, promotes and sells the company's products in the United States. To this end, Breitling USA maintains a sales force throughout the country, dividing responsibilities among regions. During most of Cargian's tenure there were seven regions, each headed by a sales representative, sometimes more formally called Account Executives.<sup>2</sup> Cargian was assigned the Northeast region. During relevant periods, Breitling's President was Bodman, who was replaced by Thierry Prissert ("Prissert") in 2011. During all times relevant, Charles Anderson ("Anderson") was the National Sales Manager. A. 302 ¶ 12. Sebastian Amstutz ("Amstutz") was Vice President in charge of Finance and Administration. A. 304 ¶ 24.

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<sup>1</sup> Plaintiff is not appealing the dismissal of his ADEA claim.

<sup>2</sup> During the period relevant to this action there were six sales reps in addition to Plaintiff. They were: Brian Criddle, Patrick Cawthorne, Beth Haddad, Josh Haley, Rick Lambert and Annie Sommer. A. 323 ¶ 160. Collectively, these are the comparators for Title VII analysis. A. 377-393.

**b. Cargian Was A Star Sales Rep Until the Appointment of Prissert**

Cargian was hired by Bodman in February 1990 as Breitling's National Training Manager. In 1992, he was promoted to Regional Sales Representative while still performing his responsibilities as Training Manager. In about 1995 or 1996, he was relieved of the training responsibilities to become a full time sales rep. At the time of his hiring, Breitling had a minimal presence in the United States. There were about six or seven staff employees and a book of business of between \$2-\$4 million. Over the years, the staff grew to 140 and business to \$100 million. From the late 1990's through 2010, Plaintiff was the leading salesman, increasing his sales over previous years from between 15% to 46%, and surpassing goals, sometimes by 118-130%. The recession years of 2008-09 saw sales diminish for all sales reps, including Plaintiff, but Cargian rebounded in 2010, when he was again the highest producer, increasing his sales by 40%. A. 690-693 ¶¶ 1-13; 706-708.

Independent evidence supports Plaintiff's claim of outstanding performance. Bodman rewarded him with significant compensation increases: she hired him at \$35,000, and by 2008 he was the highest paid sales rep with a base salary to \$230,000. On January 14, 2014, Bodman provided Cargian with a reference letter praising him for "his dedication to the job"... "his integrity...attention to detail... knowledge of the watch industry... and [as being] entirely reliable." A. 748.

Plaintiff's high status was confirmed by Lisa Roman ("Roman"), the former Marketing Director, who testified that Cargian was "respected by Bodman"; he was "one of the top sales reps from 2002-2010"; "he had an outstanding reputation", was "easy to work with, responsible, responsive to his accounts", and was good at getting accounts to marketing events. A. 404-405; 407-409; 411-412; 419-420. Melissa Vessely ("Vessely"), the new Training Manager hired by Prissert in 2012, favorably commented on Cargian as very knowledgeable and well respected by the team; he was cooperative, liked by clients, helpful and generally did a good job. A. 419-420; 421-422. Cargian was also recognized by the trade association as "Favorite Watch Rep." In 2010, Plaintiff was awarded the Sully Award by Anderson and Bodman for highest increase in sales. A. 693 ¶ 13; 751.

**c. The Prissert Era: Establishment of Macho Atmosphere**

The workplace atmosphere at Breitling can only be described as macho—unappealing to and exclusionary of gay men and women in its licentiousness. A. 425-428. The material distributed by sales representatives featured pictures of women straddling a phallic symbol and women with exposed breasts. A. 553-556. The president of the parent company, Breitling SA, where the U.S. staff goes once a year, has on the wall of his business office a picture of a naked woman, legs spread-eagled with exposed pubic hair being leered at by a hovering man. A 557-558. Female

workers are forewarned about entering. A. 563-564. There is also a large statue in the 57th Street boutique of a woman's exposed pantied crotch, while straddling a bomb. A. 753-754. Nothing in the marketing tools is addressed to gay men.

Under Prissert, the macho/boys club atmosphere became not just an offensive marketing device, but part of the workplace practices. Complaints were made to management about the atmosphere, and Prissert pitting the boys against the girls, resulting in the inferior treatment of women. A. 568-560. Cargian was treated with the same disdain as the female reps. As a non-stereotypical male, he was clearly viewed as something less than a real man. As he and his female colleagues testified, Plaintiff too was excluded from the inner circle of the President, and therefore accorded inferior treatment. A. 343 ¶ 172; 413-414. A reasonable jury could easily conclude from Prissert's refusal to treat Cargian as a real man – relegating him to the lesser status of a girl – that Cargian's sexual orientation motivated Prissert to accord him inferior treatment in the workplace.

Exclusion from the President's inner circle extended to exclusion from marketing events which could positively impact Cargian's productivity. For example, in 2013 a major marketing event was held at the Bentley factory in Crewe, England. Prissert decided which representatives to invite. A. 504. All of the male sales reps, except Cargian, were invited. No woman was invited. A. 702 ¶ 37.

Defendant's claims that only the sales reps with customers with substantial Bentley prospects were invited is pretextual. Putting a lie to Defendant's assertion is the fact that several of Cargian's clients were invited . Plus, Plaintiff had more Bentley doors<sup>3</sup> than any other rep. A. 573. Still, Plaintiff was not invited.

Breitling uses an annual air show in Bouchs, Switzerland for marketing. Starting in 2011, Prissert included two male sales reps on those trips. This was an opportunity for exposure and client development. Cargian was never among the men included. A. 703 ¶ b.

The final insult was in 2013. At a business conference in Basel, Switzerland, Plaintiff was assigned to share a room with female sales rep, Annie Sommer ("Sommer"). A. 461-462. Neither requested the sharing arrangement. A. 462; 703-704. Prissert claims he did not make the decision, however; Sommer said it was Prissert who told her. A. 462. The district court adopted Defendant's assertion that the parties often shared a room, and that the allegation did not raise an inference of discrimination. However, both Cargian and Sommer contradict that assertion. There was clearly confusion in the deposition questioning, and Sommer, who was still a Breitling employee at the time of her deposition, was extremely nervous. Both

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<sup>3</sup> A door is the phrase used at Breitling to represent a store serviced and/or sold to Breitling.

Cargian and Sommer were describing the annual watch show in Basel, Switzerland, where hotel rooms were so limited that no sales rep could have his or her own room. They were not testifying that they on multiple occasions shared rooms with each other. They testified only that they always had to share a room with another rep. A 337-338 ¶141; A. 475.

The assignment of the room-sharing is part of the cumulative evidence of discriminatory treatment of Plaintiff, because he, like the girls, was sexually attracted to men and was not a threat to inappropriate sexual behavior with a woman.

**d. The Prissert Era: Disparate Treatment**

Within one short year, under Prissert's supervision, Cargian went from the best to worst. This was accomplished by increasing Cargian's sales goals far in excess of the other reps, and setting them at levels that were unobtainable and guaranteed failure of performance.

Since the district court dismissed the Complaint as a matter of law, holding that Plaintiff failed to establish a *prima facie* claim of sex stereotyping, it never had reason to analyze the contested facts regarding pretext and the treatment of Plaintiff as against the comparators. (See footnote 2, *supra*, for the comparators). The district court simply recited what Defendant claims were its reasons for the adverse actions,

but as a matter of law they were irrelevant to the court's ultimate decision that Plaintiff failed to establish a *prima facie* case of sex stereotyping.

In 2011, Prissert's first full year as President, Plaintiff's goals were raised by close to \$12 million or 92%, while no other rep was raised by more than \$7 million or greater than 63%. A. 384-387 ¶¶ 33-54. These facts are uncontested, but Defendant deflected the issue by claiming, in an uncorroborated allegation, that Bodman set Cargian's 2011 goal. A. 53 ¶ 22. The uncorroborated testimony of an interested witness is not usually considered on summary judgment, *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000), particularly since Cargian offers contrary evidence in contradiction. A. 449-450; 694 ¶ 15. Even assuming *arguendo* that Bodman participated in the setting of goals, as the President, Prissert accepted and implemented the proposal, which he had the power to revise.

Defendant made the further unsubstantiated claim that the significant goal increase resulted from additional territory being assigned to Plaintiff. Defendant offered no evidence to establish the correlation between the additional territory and the amount of the increase. While Plaintiff's territory was increased, it was only by a net of five new doors. A. 695 ¶ 17. Sales Rep. Josh Haley ("Haley"), who also received new territory in 2011, had an increase of at least six doors, yet his goal was

only raised \$7 million or 63%, as compared to Plaintiff's increase of \$12 million and 92%. A. 382-383, 386 ¶¶ 29, 46-48.

As a consequence of these unobtainable goals, Plaintiff's attainment of goal was predictably the lowest among the comparators, a fact relied upon by Defendant for its adverse action. Nonetheless, in 2011 Cargian still increased his sales over the previous year, which is usually the measure of a sales rep's performance, and he still had the highest gross sales. A. 707.

In 2012, Prissert again assigned Plaintiff the highest sales goals, continuing to rely on failure to meet the new goals as a basis for adverse action. 2012 was not a good year for Breitling or any of its sales reps. Total unit sales were down 14.97% from 2011; Bentley, a primary sales outlet, was not faring well, with 42 Bentley accounts closing while only 29 new doors were open. A. 455-456. Total Breitling sales were up only \$2.5 million from 2011, in comparison to 2011, which had a sales increase of \$21 million over 2010. A. 549; 707. As a result, Plaintiff, like the rest of the staff, including house accounts serviced by management, did not do well. Internal and external factors, all of which were known to Defendant, affected Plaintiff's sales. As conceded by Sales Manager Anderson, all of the high end watch makers were in trouble in the New York area. "The territory changed dramatically

over the last few years... Rolex confirmed that it was down. Everyone is struggling.”  
A 260-262.

In addition to being assigned the highest sales goals, and being excluded from career enhancing opportunities, Plaintiff was subjected to harsher disciplinary processes than his colleagues. Prissert alleges he had to reprimand Plaintiff because he "violated company policy" by giving cash gifts to his assistants at Christmas. A. 57 ¶ 45. However, as confirmed by the Human Resource Director, Diane Figueroa (“Figueroa”), there was no such written or stated policy. Nor did Figueroa know of any reason why giving cash gifts would be a problem. She was simply directed to send Cargian a reprimand e-mail, but she had no understanding of why she had to do this. A. 626-627; 699 ¶¶ 30-31.

Prissert cites a second alleged incident in which he claims that on September 16, 2012, at a business event in Reno, Plaintiff yelled at him and used the "f" word. Without any investigation or even meeting with Plaintiff, two days later, on September 18, 2012, Prissert sent Plaintiff a harsh written warning letter signed by the President and not the HR Manager, specifying the nature of the claimed impropriety. A. 57 ¶¶ 46, 47; 571. Cargian disputes the facts, and Prissert's rendition of what happened is highly questionable. A. 332-333 ¶¶ 92-93; 441-442; 483-485. Most significantly, no inquiry was made of Cargian or any other person who may

have witnessed the alleged event. The detailed warning letter was issued over Prissert's signature without investigation or due process. A. 571.

In contrast to the peremptory action taken against Plaintiff was the methodical investigation of the charges and lesser discipline taken against sales rep "X" who knowingly submitted fraudulent expense reports, and constantly lied to management. For many months in 2013, "X" deliberately lied on his call reports stating he was visiting customers when in fact he was not even in the territory. Instead, he was on personal joy rides. A. 349. Further, he claimed these personal jaunts as business expenses. A. 493-494; 599; 602-605; 618-619. Anderson had the documentation that substantiated the fraudulent reporting, but when "X" was confronted he continued to lie to management. A. 495. Amstutz recommended firing "X", but Prissert said he first wanted to interview him before making his decision. A. 605-606. No disciplinary action was taken against "X" except that he had to repay the money he improperly claimed as business expenses. A. 607-608. He was given a "warning" however, and in contrast with Cargian, it was signed by the HR Manager Figueroa, not the President, and it was hardly as harsh in its description of the misbehavior. A. 581. Moreover, despite the fraudulent reporting of activities and expenses, in 2013 "X" was awarded a discretionary quality of work bonus of \$3,000, which was attributed to "reporting" and \$1,500 for visits. A. 668.

**e. Prissert Era: Demotion and Replacement by Unqualified Straight Man**

Further evidence that poor performance was not the real reason for demotion and termination of Cargian is the fact that no objective competitive search was made to replace Plaintiff. Rather, Prissert plucked from the workplace a straight man with no experience, but whose one and only quality was that he fit the macho image and atmosphere of the workplace.

In December, 2012, Prissert informed Plaintiff that he was removing a substantial part of his territory because he wanted to lighten Plaintiff's load. With the reduction in territory there was a \$35,000 reduction in salary. Prissert, in an uncorroborated statement, claims this adverse action was taken because he was trying to help Plaintiff lift his performance. A. 54-55 ¶ 35. The facts belie the claim. Simultaneous with the decrease in territory, Prissert raised Plaintiff's goals by 14% while the other sales reps, except for Sommer, were raised between 8% and 10%. A. 698 ¶ 25. The logic boggles the mind. In 2011, Prissert assigned the highest increase in goals to Cargian, claiming he did so because he assigned Plaintiff additional territory. In 2013, Prissert again assigned the highest percentage raise to Cargian, but this time it was because he reduced his territory. A reasonable jury clearly can conclude from this contradiction that the stated reasons for Defendant's actions are not to be believed.

Moreover, Prissert's asserted reason is contradicted by an independent source. At the same time, Prissert reduced Sommer's territory. Sommer, testified that Prissert told her the reason for the change was "So that...Fred and I could concentrate on corporate sales and I could spend more time with my family." Nothing was mentioned about performance, either hers or Cargian's. A. 464.

Further evidence of the pretextual nature of Defendant's rationale for demoting Cargian – failing performance – is the fact that he was replaced by a totally inexperienced and incompetent heterosexual man, Isaac Schafrath ("Schafrath"), who had become part of Prissert's inner circle. At the time of promotion, Schafrath had been employed by Breitling for seven years. He had unsuccessfully tried for a promotion for most of those years at Breitling. A. 526. However, he gained a relationship with Prissert, who was the first to propose his promotion. A. 509. The first step was in the summer of 2012 when, for no reason associated with his then position, Schafrath was sent on a sales trip with Anderson to gain exposure. A. 519-520. A series of conversations with Prissert, Anderson, and Amstutz were held in mid-October at which he was told they "were hoping they might be able to find a place for him." A. 527. More conversations occurred in November at which Schafrath was told they wanted to promote someone from within the organization to sales rep and that he was the only inside person being considered. A. 528-530.

At the time, Schafrath had no objective qualifications for promotion to sales representative, and Prissert knew it. He was the Vault (Logistics) Manager generally responsible for the safe keeping of the watches. A. 641. Prior to Breitling he was, for short periods of time (under a year for each), a bartender and kitchen assistant, a carpenter's assistant and video production assistant for the OSU football team. A. 639.

What Schafrath did have was a sports background and a relationship with Prissert, who was a big sports fan. A. 521-522. Gilding the lily is the fact that Schafrath is the son of an all-star football player for the Cleveland Browns, a fact Prissert discussed on multiple occasions with him. A 523-525.

Prissert did not promote Schafrath based on any evaluation of his background or performance. Prissert never even asked Schafrath about his qualifications for the job. It was Schafrath who was concerned that his lack of experience might be a problem. He therefore raised the issue at the interview to which Prissert responded that he "knows me well enough now and he has faith that I could do it well." When asked how Prissert knew him, he responded, from around the office including from their sports discussions and discussions regarding Schafrath's father. A. 531-533. Anderson, with whom Prissert claims to regularly consult, acknowledged that the promotion was not a good idea. He said it will "take some time to get the kid up to speed but we'll give him a chance." A 510-512.

**f. Prissert Era: Termination and Replacement By Unqualified Straight Man**

On about December 17, 2013, without prior notice, Prissert informed Plaintiff that he was terminated effective December 31, 2013, but that he should cease working immediately. The reason stated was that "we just are not on the same page." A. 698 ¶ 26. In response to this action, Defendant claims the termination was performance related. However, the sales records for 2013 do not bear that out. Sales were down companywide by about \$9 million or 8.9%. A. 551. The district court cited Defendant's claim that Cargian was tied for next to last as the worst producer of the seven sales reps. However, this is a contested fact. *Id.* The record reflects that three of the seven reps had worse over-all sales results than Plaintiff. A. 551, 666-673. Representative "X," had the worst record. His sales were down 20.6% over the previous year. Plus he made only 70% of his sales goals. In comparison, Cargian reached 79% of his goals, and he was down 13.84%. In addition, Cargian opened two new stores, while Rep "X" opened none. Cargian also worked harder, making more customer visits than Reps "X". Finally, "X" in 2013 committed a serious ethical breach by submitting fraudulent business records and claiming business reimbursement for personal expenses. There were no allegations that Cargian in any way violated any company policies in 2013. Finally, although Plaintiff, because of his

demotion, had a territory about half of Rep "X," the latter sold only about \$600,000 more in gross sales. A. 551; 666-668.

In addition, sales representatives Haley and Haddad, whose production was down 17.27% and 14.68% respectively, had worse performance than Plaintiff, who was down 13.84%. A. 551. Plaintiff was clearly not the worst producer.

Predictably, Schafrath, who took Plaintiff's place, failed horribly. It was not just that his sales were down, but that his work ethic was a significant problem: he failed to contact clients or to timely submit his reports or respond to his supervisors' inquiries. Nonetheless, he was not fired, but given a newly-created position of sales analyst assisting Prissert and Anderson, which was essentially a promotion from the Vault Manager job. A. 542-547. In contrast, Cargian, after 23 years of outstanding performance and dedication to the company, was fired with no notice and two weeks pay.

## ARGUMENT

This Court reviews *de novo* a district court's grant of a motion for summary judgment. *Walsh v New York City Housing Authority*, 828 F.3d 70 (2d Cir. 2016). In this action, the district court's ruling dismissing Plaintiff's sex discrimination claim rests entirely on this Court's decisions in *Simonton v Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) – holding that “Title VII does not proscribe discrimination because of sexual

orientation” – and *Dawson v Bumble & Bumble*, 398 F. 3d 211, 218 (2d Cir. 2005) – holding that such claims cannot be bootstrapped under sexual stereotyping theory. Given the development of the law since 2000, including the EEOC decision in *Baldwin v Fox*, 2015 WL 4397641 (July 16, 2015) and the Supreme Court’s extension of constitutional protection to homosexuals, Plaintiff urges this Court to reconsider *Simonton* and *Dawson* based on *Chevron, U.S.A. Inc. V Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) and/or *Skidmore v Swift & Co.*, 323 U.S. 134 (1944), requiring deference to the EEOC decision in Baldwin. On this basis, Defendant’s motion for summary judgment fails and this case should be remanded for trial.

## **POINT I**

### ***SIMONTON AND DAWSON SHOULD BE REVISITED IN LIGHT OF EMERGING LAW PROTECTING GAYS***

#### **A. The EEOC Holding Extending Title VII Protection to Gays and Lesbians Dictates Reversal of *Simonton* and *Dawson***

Being gay or straight is about nothing but one’s sex. It is not about one’s appearance, or strength or abilities, it is only about one’s sex and one’s relationship to people of his or her own sex. Homosexuality “bears no relation to ability to perform or contribute to society.” *Windsor v U.S.*, 699 F. 3d 169, 182 (2d Cir. 2012). Indeed, homosexuality is quintessentially non-conformance with sex role stereotypes.

The most basic stereotype of being a man or women is that you are romantically and emotionally attracted to members of the opposite sex. Being gay by definition defies that stereotype.

Despite this evident fact, for 15 years or more most courts have contorted logic and reason, jumping through the proverbial hoops to ultimately hold that the term sex discrimination in Title VII does not cover sexual orientation. This Court recognized that the line between sex discrimination and gender stereotyping is not clear. *Dawson*, 398 F.3d at 218. Yet enforcement of the *Simonton/Dawson* standards continue to block protection of gays in employment. Judge Failla in *Christiansen v Omnicom Grp. Inc.*, 167 F. Supp. 3d 598 (S.D.N.Y. 2016), cited *Baldwin* favorably, finding “sexual orientation is inherently a sex based consideration and acknowledging that “no coherent line can be drawn between sexual orientation and sexual stereotyping.” *Id* at 620. Yet Judge Failla was constrained from protecting the plaintiff in that case from egregious discrimination because of *Simonton* and *Dawson*. The Connecticut District Court went one step further, finding that “logic dictate[s] that sexual orientation cannot be extricated from sex” and then circumvented *Simonton/Dawson* by holding that sexual orientation discrimination is illegal based on the association theory established by this Court in race discrimination cases. *Boutillier v Hartford Public*

*Schools*, 2016 WL 6818348 \*8 (D. Conn. Nov. 17, 2016). The California District Court summed up the problem most cogently when it said, “Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because the line does not exist, save as a lingering and faulty judicial construct.” *Videckis v Pepperdine University*, 150 F. Supp. 3d 1151, 1159 (C.D. Ca. 2015).

Holding to the judicial construct leads to ludicrous results. A heterosexual woman who is discriminated against because she dresses in a macho manner has a claim under Title VII, *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989), yet a lesbian who adopts feminine attire and demeanor does not. A gay couple can marry, *Obergefell v Hodges*, 135 S. Ct. 2584 (2015), yet they have no recourse if they are fired for exercising their constitutional rights. A black woman who is married to a white man has a race discrimination claim, *Holcomb v. Iona College*, 521 F. 3d 130 (2d Cir. 2008), yet a gay man married to a gay man has no such claim. There is no rational basis for extending greater legal protection to an effeminate man or drag queen than is afforded a gay football player like Michael Sam. Logic and common sense tells us that the judicial construct leading to that result is simply wrong.

Stepping into the morass, the EEOC has now clarified the issue by holding that Title VII’s ban on sex discrimination by definition includes discrimination on the basis of sexual orientation, thus allowing this Court to reverse its earlier decisions.

In its well reasoned decision in *Baldwin v Fox*, 2015 WL 4397641 (July 16, 2015), the EEOC “conclude[d] that sexual orientation is inherently a “sex-based consideration” since conceptually sexual orientation “cannot be defined or understood without reference to sex.” *Id* at \*5.

The EEOC rightly dismissed the argument that Title VII does not explicitly refer to sexual orientation as a protected category and therefore should not be recognized by the court without legislative authority. Justice Scalia rejected such reasoning when he said “[S]tatutory prohibitions often go beyond the principle evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

The EEOC recognized, as has this Court, that the broad principles of Title VII guide the courts in analyzing and applying the law. Here “Congress intended [Title VII] to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Los Angeles Dept. Of Water & Power v Manhart*, 435 U.S. 702, 707 n. 13 (1978). Thus, to fulfill the broad purposes of the Civil Rights Act, the courts, including this Court, have carved out many protected groups not specifically identified in the law. For example, although there is no mention in Title VII that discrimination based on participation in an interracial relationship can give rise to a

claim of race discrimination, this Court had little trouble in finding race discrimination which was based on interracial relationships. *Holcomb*, 521 F. 3d at 139. The EEOC also points out in *Baldwin* that the law does not establish a protected category of non stereotypical women, yet the Supreme Court extended the definition to protect such women. *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989). There is certainly no mention of motherhood in the statute, yet the Supreme Court had no problem identifying motherhood together with gender as forming a protected group under Title VII. *Philips v Martin- Marietta*, 400 U.S. 542, 543-44 (1971)

Nor does the fact that Congress has considered, but not passed, an amendment to the law which would extend coverage to sexual orientation defeat the interpretation of the present law to cover sexual orientation. “Congressional 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.” *Baldwin*, 2015 WL 439764 \*9 citations omitted).<sup>4</sup> As Judge Eginton pointed out in reference to the Pregnancy Discrimination Act, proponents of that bill emphasized that the Supreme Court had erroneously interpreted Congressional

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<sup>4</sup> There are many reasons why further legislation has not passed. For example, the various proposed legislation incorporated much more than simply extension of Title VII to cover sexual orientation. Some of the proposals called for a totally new Act.

intent “when it held that pregnancy discrimination is not covered by Title VII.”  
*Boutiller*, 2016 WL 6818348 \*8.

As *Simonton* and *Dawson* cannot be reconciled with the cogent analysis of the EEOC in *Baldwin*, this Court should defer to the government interpretation. Congress delegated to the EEOC authority to interpret and enforce Title VII claims in the federal sector through rule making and adjudication. 42 U.S.C. § 2000e-16. The *Baldwin* decision was rendered pursuant to that authority. The EEOC decision is entitled to deference under the standards established in *Chevron, U.S.A. Inc. v Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). Deference is due “[W]hen it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *U.S. v Mead Corp.*, 533 U.S. 218, 226-27 (2001). Once the authority to make such rules is established, *Chevron* deference is required if (1) Congress has not directly spoken on the precise question at issue and (2) its decision is not arbitrary, capricious or manifestly contrary to the statute. *New York v Federal Energy Regulatory Commission*, 783 F.3d 946, 953-54 (2d Cir. 2015).

*Chevron* is applicable to the instant action since (1) Congress gave the EEOC the authority to render such final decision; (2) Congress has not spoken on the precise issue as evidenced by the fact that the Supreme Court and lower courts have

interpreted sex discrimination claims to cover such things as sex plus motherhood, sex stereotyping, and sex harassment; and (3) the position of the EEOC is well reasoned. Given the misgivings and discomfort of many federal courts regarding the perpetuation of the legal fiction separating sexual orientation from sex discrimination, the EEOC decision is clearly reasonable.

The fact that the EEOC adjudication related to the federal sector and the EEOC has no comparable authority over private enterprise does not limit its applicability. There is no difference between the standards of discrimination applicable to federal sector claims or others. Moreover, the plaintiff in *Simonton* was a federal employee—a postal worker. Therefore, *Baldwin*, which addresses the standards to be applied in a federal sector action, specifically overrules *Baldwin*. It can be argued from there that this Court has yet to rule on the law as to be applied in the private sector.

Further, as Judge Eginton said, this Court’s decision of *Holcomb*, which came many years after *Simonton*, essentially overturns *Simonton* because the two cases cannot be “legitimately reconciled.” *Boutillier*, 2016 WL 6818348 \*9. This Court in *Fowlkes v Iron Workers Local 40*, 790 F. 3d 378 (2d Cir. 2015) also opened the door to such reversal when it extended equity to a transgender litigant to pursue a Title VII case, which followed the EEOC’s decision in *Macy v Holder*, 2012 EEO PUBL EXIS 1181 (EEOC Apr. 20, 2012).

If this Court does not grant *Chevron* deference, Plaintiff submits that deference is still appropriate based on the EEOC's expertise in the field and the persuasiveness of its decision. *Skidmore v Swift & Co.*, 323 U.S. 134 (1944). The EEOC is the administrative body dedicated to the interpretation and enforcement of the law. It provides a body of informed judgment and guidance worthy of the court's deference where, as here, the decision is well reasoned and answers the ambiguities of the law with which this Court of Appeals has been grappling. "The administrative interpretation of the Act by the enforcing agency is entitled to *great* deference." *Griggs v Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (emphasis added) .

**B. *Simonton* Cannot Be Reconciled with the Constitutional Protections Extended to Gays by the Supreme Court.**

The Supreme Court's recent rulings extending constitutional protections to homosexuals would be hollow with the continuation of legal discrimination against gays in employment. The Supreme Court has gone from criminalizing homosexual sex, *Bowers v Hardwick*, 478 U.S. 186 (1986), to recognizing the fundamental rights of homosexuals to dignity in their personal choices. *Lawrence v Texas*, 539 U.S. 558 (2003). Justice Kennedy said it best when, in reversing *Bowers*, he held "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579.

In 2013, the Supreme Court struck down DOMA which defined marriage as limited to heterosexual relations. *U.S. v Windsor*, 133 S. Ct. 2675 (2013). Two years later the Court went one step further, granting same sex couples the right to marry. *Obergefell v Hodges*, 135 S. Ct. 2584 (2015).

**C. Under the Changed Legal Landscape a Three Judge Appellate Panel Has the Authority to Reverse *Simonton* and *Dawson***

While three judge panels of this Court ordinarily adhere to prior decisions, *U.S. v. Wilkerson*, 361 F. 3d 717, 721 (2d Cir. 2004), this direction is not applicable where, as here, the legal landscape has changed so dramatically to render the decisions in *Simonton* and *Dawson* meaningless and without basis. *Doscher v. Sea Port Group Securities LLC*, 832 F. 3d 372, 378 (2d Cir. 2016). The decision of the Supreme Court in *Lawrence* ; the decisions of the Supreme Court and this Court in *Windsor*; the decisions of this Court in *Holcomb* and *Fowlkes*; and the EEOC decision in *Baldwin* are so inconsistent with *Simonton* and *Dawson* to have broken the link upon which those cases rests. Under this precedent, “Even if the effect of a Supreme Court decision is ‘subtle,’ it may nonetheless alter the relevant analysis fundamentally enough to require overruling prior ‘inconsistent precedent.’” *Doscher*, 832 F. 3d at 378.

Plaintiff respectfully refers the Court to the excellent briefs submitted by Amici, Lambda Legal Defense Fund, in this case and in *Magnusson v County of Suffolk*, 16-1876, for a full discussion on the issue of this Court's authority to reverse *Simonton*, without deferring to *en banc* review.

It is clear from the development of the law that *Simonton* and *Dawson* should be overruled either because by definition sexual orientation discrimination is sex discrimination as found by the EEOC and therefore *Simonton* is simply wrong just as *Bowers* was simply wrong; or because sexual orientation falls within the penumbra of discrimination based on association. In either case, gays and lesbians should be protected in their right to equal employment opportunities.

## POINT II

### **IF SEXUAL ORIENTATION IS HELD TO BE PROTECTED UNDER TITLE VII THEN SUMMARY JUDGMENT SHOULD BE DENIED AND THIS CASE REMANDED FOR TRIAL**

On a motion for summary judgment:

[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence

to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.

*Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (emphasis added). *See also Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464-65 (2d Cir. 1989).

In assessing whether there is genuine issue as to any material fact, the Court is required to resolve all ambiguities and draw all permissible inferences in favor of the party against whom summary judgment is sought. *Holcomb*, 521 F3d at 137.

This Court has repeatedly “expressed the need for caution in granting summary judgement to an employer in a discrimination case where, as here, the merits turn on a dispute as to the employer’s intent” *Id.* “An employer who discriminates is unlikely to leave a ‘smoking gun’... attesting to a discriminatory intent.” *Rosen v Thornburgh*, 928 F. 2d 528, 533 (2d Cir. 1991); *Ramseur, supra.* 865 F.2d at 465 (“clever men may easily conceal their motivations”). Because there is rarely “direct smoking gun evidence of discrimination... plaintiff usually must rely on ‘bits and pieces’ of information to support inferences of discrimination, *i.e.*, a ‘mosaic’ of intentional discrimination.” *Vega v. Hempstead Union Free School District*, 801 F. 3d 72, 86 (2d Cir. 2015). “In determining the appropriateness of summary judgement, the court

should not consider the record solely in piecemeal fashion, giving credence to innocent explanations for individual strands of evidence for a jury, in assessing... pretext... for discrimination, would be entitled to view the evidence as a whole.” *Howley v. Town of Stratford*, 217 F. 3d 141, 151 (2d Cir. 2000).

In *Walsh v New York City Housing Authority*, 838 F 3d 70 (2d Cir. 2016), this Court strongly reaffirmed its direction that district courts must “examin[e] the record as a whole, just as a jury would, to determine whether a jury could reasonably find an invidious discriminatory purpose on the part of the employer.” *Id* at 76. “A motion for summary judgment may be defeated where a plaintiff’s *prima facie* case, *combined with sufficient evidence to find that the employer’s asserted justification is false*, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Id.* (emphasis added). Whether the Court uses the metaphor of drawing a mosaic, as did Judge Chin in *Vega*, 801 F. 3d at 86, or the brick wall of evidentiary facts argued by Vinny Gambini, cited by Judge Hall in *Walsh*, the message is clear—it is the totality, not piecemeal analysis, of the evidence that is to be applied.

To prove discrimination, a plaintiff must show (1) he belonged to a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discriminatory intent. *Bucalo v. Shelter Island Union Free*

*School Dist.*, 691 F. 3d 119, 128 (2d Cir. 2012); *Holcomb*, 521 F. 3d at 138. “[P]laintiff’s burden of establishing a prima facie [Title VII] case is *de minimus*.” *Sassman v Gamache*, 566 F 3d 307, 312 (2d Cir. 2009).

Assuming reversal or revision of *Simonton*, there is no serious question but that plaintiff meets the *de minimus* standard of establishing a *prima facie* claim of sexual orientation discrimination as well as sexual stereotyping. (1) He is a member of the protected class; (2) he was more than minimally qualified for his job having performed it for 23 years; (3) adverse action-- demotion, loss of pay and ultimately termination-- is admitted; and (4) he was replaced by a straight man significantly less qualified than he. It is well settled law that replacing plaintiff with a person outside his protected class satisfies plaintiff’s *prima facie* burden. *Littlejohn v City of New York*, 795 F. 3d 297, 313 (2d Cir. 2015).<sup>7</sup>

Once a *prima facie* claim is established, defendant has the limited responsibility

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<sup>7</sup> The only analysis the district court made of any of the facts submitted by the parties is whether Plaintiff met the fourth prong of the *McDonald Douglas* standards for establishing a *prima facie* case. The district court found Plaintiff could not establish a *prima facie* claim of sex stereotyping because, under *Dawson*, he had to demonstrate a physical or a behavioral mannerism which is outside the general stereotypical norm. Finding none, the court held Plaintiff was simply conflating his sex discrimination claim with sex stereotyping. The district court never addressed the factual issue of whether there was a legitimate basis for the adverse action. The decision rests solely on the law, and does not address the facts as related to summary judgment.

of articulating a legitimate non-discriminatory reason for its action, which Breitling has met. Defendant alleges it terminated Plaintiff because of poor work performance, particularly his failure to meet sales goals; his lack of hard work; his bad attitude and his violation of company rules. But that does not end the inquiry. The burden returns to plaintiff to demonstrate that the stated reason is not the real reason, but a pretext for discrimination. *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981). “A motion for summary judgment may be defeated where a plaintiff’s prima facie case, *combined with sufficient evidence to find that the employer’s asserted justification is false*, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Walsh*, 828 F.3d at 76 (emphasis added). Plaintiff’s testimony – based on his personal knowledge, even if it is uncorroborated – can also create an issue of fact for trial. *Yang v Navigators Group*, No. 16-77-cv, 2016 WL 7436485, at \*1 (2d Cir. Dec. 22, 2016).

This case falls within the area of caution. There is no “smoking gun.” Rather, it is the cumulative weight of the totality of the evidence of disparate treatment that must be considered. When the evidence is read as a whole, Cargian has adequately pled contested facts which could lead a jury to reasonably find that Defendant’s rationales for the adverse actions taken are without merit. Moreover, Plaintiff, who does not have to establish that sex animus was the sole reason, has established

sufficient facts to demonstrate that invidious discrimination played a motivating role in the decision. *Luciano v Olsten Corp.*, 110 F. 3d 210, 219 (2d Cir. 1997).

### **A. Evidence of Disparate Treatment**

Substantial contested facts raise issue as to the veracity of Defendant's stated reasons for the demotion and termination of Cargian. Until Prissert became President, Cargian was the leading salesman at Breitling belying claims of poor work performance and lack of interest in the job. Claims of excellent performance is based not only on Cargian's testimony, but that of a former colleague and the prior president. A. 404-405; 407-409; 411-412; 419-420; 690-693; 706-708 ¶¶ 1-13. The documents also substantiate that Cargian's sales performance was better than other sales reps who were retained. A. 551; 666-673.

The evidence also substantiates Cargian's claim that once Prissert took over in 2011, he was assigned significantly more difficult performance goals than his comparators, essentially assuring his failure. In 2011, Plaintiff's sales goals were raised by 92% while no other rep was raised more than 63%. Defendant's stated reason for this disparity was the increase in Plaintiff's territory. However, a jury could find that was not the real reason since the territory of Haley, one of the other reps, was increased even more, but his goal was raised by only 63%. A. 46-48; 382-383; 386 ¶29; 695 ¶ 17. Based on failure to meet these goals, Plaintiff was demoted

in 2012 when his territory was significantly decreased and his salary was lowered by \$35,000. Defendant, among other things, said this action was taken to lessen Cargian's burden. A. 54-55 ¶ 35. Yet, Cargian's sales goals were disproportionately increased by 14%, while all other reps, except for Sommer, were increased by 8%-10%. A. 698 ¶ 25.

Cargian was also disciplined by Prissert even when he did not violate any policy, and the Manager of Human Resources did not see anything wrong in what he did. A. 57 ¶ 45; 626-627; 699 ¶¶ 30-31. Also, as set forth in the Statement of Facts, *supra* at 13, a sales rep who committed serious acts of fraud was treated with due process and a lesser penalty than plaintiff who was disciplined without even a hearing.

Most consequentially, there was no search for a qualified candidate who had the ability to enhance the business as a replacement for Plaintiff. Rather, Plaintiff was replaced by a straight man with absolutely no selling experience or any discernable qualifications for the job which undermines any claim that termination was because of Cargian's poor sales production and the need to bring on a more productive sales person. A. 531; 533; 639; 641.

To synopsise, there are many small pieces of evidence which create a total picture evidencing the fact that Defendant's stated legitimate reasons for its adverse action are false.

1. Defendant alleges that Plaintiff was basically lazy and did not make required service calls and showed a disinterest in work. See, e.g., A. 238-239. **Contested Fact:** Defendant's own record shows that in 2012 Cargian made a total number of 332 customer visits for an average of 7.72 per week, the second highest among the reps; Haley made 292 or 6.34 per week; Lambert 133; and Cawthorne 219. A. 419-4422; 643. Vessely, the Training Manager hired by Prissert, testified that Plaintiff is "very knowledgeable and well respected by the team." He was cooperative and "generally did a good job." *Id.* And Cargian's comp time records show that in 2012 he took very little of the time off owed to him under the Breitling policies. 2012. A. 578-579.

2. Defendant claims as a legitimate basis for termination Plaintiff's violation of a policy prohibiting cash gifts at Christmas. **Contested fact.** There is no such policy, and the Director of Human Resources did not really see any problem with Plaintiff's behavior. A. 626-627.

3. Defendant claims that in 2013 Plaintiff was one of the worst performers. **Contested fact:** Not true, Rep "X" was the worst performer in 2013; Haley and Cargian had the same performance. No one, including the house, performed well in 2013. A. 549-551.

4. Defendant claims that the 2011 goals were raised by 92% because of

Plaintiff's increased territory. **Contested Fact:** Haley's territory was also increased to an even greater extent, but his goals were raised only 63%. A. 382-383; 386 ¶¶26, 46-48.

5. Defendant claims Plaintiff was disrespectful in 2012. **Contested Fact:** The facts of the alleged incident are hotly disputed, but equally important, Prissert took disciplinary action against Plaintiff without ever investigating or talking to him. In contrast, months of investigation went into review of "X" who submitted fraudulent business records, and no action was taken against him until management interviewed him to decide what to do. A. 604-606; 614-615. Plus, this alleged incident happened a year and several months before Plaintiff was fired. There was no further allegation of requiring disciplinary action in the next year and 4 months. Thus this alleged incident is clearly not the basis for termination in December 2013

6. Defendant claims it helped Plaintiff out by lowering his goals in 2012 and 2013. A. 247. **Contested fact:** mid-year reduction in goals were given to every sales rep, presumably because no one reached goal by mid-year. A. 645-656.

7. Defendant claims that Plaintiff's sales were below par as the reason for demotion and termination. **Contested fact:** If that were the real reason, why would a business person making legitimate business decisions hire a totally untutored replacement with no demonstrated ability to increase business.

Breitling may have met its minimum standard of articulating a legitimate basis for termination, to wit, work performance. However, although an employer may have a valid reason for adverse action, those standards and policies must be equally applied to all to constitute a non-discriminatory defense. *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 283 (1976).

A reasonable jury can conclude from these contradictions that Defendant's alleged basis for its actions are false, and together with Plaintiff's *prima facie* case can reasonably find that discriminatory animus was a motivating factor.

**b. Evidence of Sex-Based Animus**

Defendant cannot establish there is no evidence from which a reasonable jury could infer that Defendant's proffered motives for its adverse action were not discriminatory. As described in the Statement of Facts, the workplace itself was permeated with licentious material appealing to straight men. A. 425-428, 553-556; 557-558; 753-754. Defendant claims these are "pin ups" that go with the aviator motif of the company. A reasonable jury could agree with Plaintiff that the decor borders on pornography, not attractive to men who are not sexually attracted to women. A. 426-428.

Prissert established a "boys club" atmosphere which excluded the one gay man and the "girls" from his inner circle. Haddad complained that Prissert pitted the "boys

v. girls” A. 568-569; and both Roman and Sommer testified that Cargian, along with the girls, was excluded from the President’s inner circle. A. 413-414; 460. Both of the female reps testified that the “boys atmosphere” focused a great deal on sports talk, that excluded them; they also testified that Cargian was excluded in the same way; and other female employees made the same complaints of exclusion. A 343 ¶ 72; 413-414. Clearly as a gay man, whose emotional attachment was to men, Prissert viewed Plaintiff as something less than a real man, and subjected him to the inferior treatment he accorded girls. Thus, Cargian was excluded from the inner circle of men.

Defendant never denies the allegations that part of the exclusionary behavior revolved around sports talk among the men. Rather, Defendant attempts to minimize the importance of Plaintiff’s exclusion from the President’s inner-circle by arguing that conversations revolving around sports are not stereotypically male, or people might be excluded simply because they are not interested in sports. A reasonable juror, from common experience, could find “sports talk” is typically considered macho, and/or that Prissert had a stereotypical view that sports was a topic around which real men bonded. However, whether gay men or girls talk sports is not the issue; the significance of the use of sports talk was that it was a mechanism engaged in by the President to isolate Plaintiff because he was viewed as not manly, but, like the girls, he preferred romantic association with men. Nowhere does Defendant offer any uncontroverted evidence that

he did include Plaintiff or women in this inner circle.

When the President of a company engages in behavior which excludes a protected group, its impact is not *de minimus*. “A jury could find that the exclusionary culture fostered by [supervisors] evidence a biased attitude toward the excluded group.” *Zakre v Norddeutsche Landesbank Girozentrale*, 395 F. Supp. 2d 483, 508 (S.D.N.Y. 2005). *See also Bryson v Chicago State Univ.*, 96 F. 3d 912 917 (7th Cir. 1996). Such exclusion directly affects an employee’s status in the workplace, and reflects an animus toward the excluded group. Schafrath is a perfect example. He had direct easy contact with the President which access gave him entree for promotional consideration, despite his total lack of qualifications. His access was through inclusion in the inner circle. A. 521-525; 531-532; 641.

Exclusion from the inner circle had a detrimental effect on Cargian’s business opportunities. Cargian was not invited to marketing events which afforded the sales rep opportunity to interact with customers, which enhanced sales opportunities. In 2012, all of the male sales reps were invited to the major Bentley marketing event in Crewe, England. Cargian was not, nor were any of the women. A 702. There was also a marketing event at the air show in Bouces, Switzerland where male colleagues were invited, but Cargian was not; nor were any of the women. A. 703 ¶ b.

Further evidence of the stereotypical treatment of Plaintiff as a girl is that Breitling assigned him to share a room at a business conference with a female colleague, Sommer. This was inappropriate and offensive to both. A. 462; 703-704. Defendant claims that on multiple occasions Cargian and Sommer shared a room, and that this assignment was therefore acceptable. As discussed in the Statement of Facts, this is a disputed issue that a jury should resolve. A. 337-338 ¶ 141; 475.

It is not a stretch to find Breitling's categorizing a gay man as one of the girls as evidence of disdain for gay men, who are not viewed as real men. Real men are attracted to women, and in the atmosphere of Breitling, women were ill-treated and objectified as a marketing device. Because he was viewed as something less than a man, more like a girl, thus he was afforded the inferior treatment to which the girls were subjected.

The "bits and pieces" of evidence gathered by plaintiff creates just that "mosaic" that could lead a reasonable jury to conclude that work performance was not the real reason, and discriminatory animus was a motivating factor.

### POINT III

#### **JUDICIAL ECONOMY WILL BE SERVED BY REINSTATING THE CITY AND STATE CLAIMS**

Without comment, the district court dismissed without prejudice Plaintiff's supplemental claims asserting violation of the New York City and State laws prohibiting discrimination based on sexual orientation. Presumably, since the federal claims were dismissed, the lower court found pendant jurisdiction not appropriate.

If this court reinstates Plaintiff's federal claims, then reinstatement of the pendant claims, which "derive from a common nucleus of operative fact" is in the interest of judicial economy and fairness. *United Mine Workers v Gibbs*, 383 U.S. 715, 725 (1966).

## CONCLUSION

The judgment of the district court should be reversed and the case remanded for trial.

Dated: January 27, 2017.

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## CERTIFICATION

Janice Goodman, counsel for Plaintiff-Appellant, affirms that this brief complies with FRAP 32(a)(7) in that it was drafted using WordPerfect and utilizes non-proportional typeface with no more than 10.5 characters per inch. The brief contains 9,326 words.

Dated: January 27, 2017

\_ /S/ Janice Goodman \_\_\_\_\_  
JANICE GOODMAN

## **SPECIAL APPENDIX**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FREDERICK M. CARGIAN,

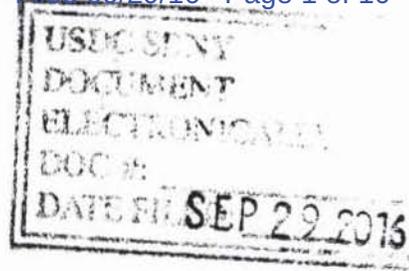
Plaintiff,

-against-

BREITLING USA, INC.,

Defendant.  
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GEORGE B. DANIELS, United States District Judge:



MEMORANDUM DECISION  
AND ORDER

15 Civ. 01084 (GBD)

Plaintiff Frederick M. Cargian filed this action alleging that his former employer, Defendant Breitling USA, Inc. (“Breitling”), discriminated against him on the basis of gender in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.*, (Compl. ¶¶ 44–46), and on the basis of his age in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.*, (Compl. ¶¶ 47–49). Plaintiff also alleges that Breitling discriminated against him on the basis of his age and sexual orientation in violation of the New York State Human Rights Law (“NYSHRL”) and the New York City Human Rights Law (“NYCHRL”). (Compl. ¶¶ 50–55.)

Defendant moved, pursuant to Federal Rule of Civil Procedure 56, for summary judgment to dismiss Plaintiff’s Complaint in its entirety. Defendant has established that there is no admissible evidence sufficient to allow a trier of fact to find that Defendant discriminated against Plaintiff under Title VII or the ADEA on the basis of gender or age. Defendant’s motion for summary judgment is therefore GRANTED as to Plaintiff’s federal claims. Plaintiff’s Title VII and ADEA claims are DISMISSED with prejudice. In light of this Court’s dismissal of Plaintiff’s federal-law claims and the multiple issues of state law implicated by Plaintiff’s remaining claims,

this Court declines to exercise supplemental jurisdiction over Plaintiff's non-federal causes of action.

## I. BACKGROUND

Plaintiff is a gay man born on November 23, 1960. (Compl. ¶ 10.) In February 1990, Breitling, a Swiss manufacturer of high-end watches, hired him as a training manager. (*Id.* ¶ 11.) In 1992, Plaintiff was promoted to sales representative and assigned an area from Maine to Richmond, Virginia. (*Id.* ¶ 15.) Each Breitling sales representative was assigned a designated geographic territory; he or she was responsible for sales in that territory. (Def.'s Rule 56.1 Statement ¶ 7, ECF No. 40.) During Plaintiff's last ten years of employment at Breitling, sales representatives' compensation consisted of a base salary and a bonus. (*Id.* ¶ 21.) The bonus was tied to achieving certain specified sales goals as well as qualitative criteria. (*Id.*)

Around September 2010, Breitling hired Thierry Prissert as its new president. (*Id.* ¶ 16.) Plaintiff alleges that Prissert "created a 'boy's club' atmosphere, excluding the 'girls,' a group in which he included Cargian, from his inner circle." (Pl.'s Corrected Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Mem."), (ECF No. 45), at 1.) For example, Plaintiff alleges that Prissert frequently had conversations about sports at the office with other male sales representatives but excluded Plaintiff; in addition, Plaintiff was not invited to a June 2013 marketing event in England, golf outings with clients, or social events at Prissert's New York apartment, all of which included other male sales representatives. (Compl. ¶¶ 28–29; Pl.'s Rule 56.1 Statement ¶ 179, ECF No. 46.) Plaintiff also claims Prissert called him "darling" on one occasion. (Def.'s Rule 56.1 Statement ¶ 149.) Further, he alleges that on a spring 2011 annual

company trip to Basel, Switzerland, the company assigned him to a shared hotel room with a female sales representative. (Pl.'s Rule 56.1 Statement ¶ 141.)<sup>1</sup>

In 2011, Breitling increased Cargian's sales goal from \$13,000,000 to \$24,995,000, a 92.2% increase over the prior year. (Def.'s Rule 56.1 Statement ¶ 95; Pl.'s Rule 56.1 Statement ¶ 190.)<sup>2</sup> That year, out of seven sales representatives, Plaintiff achieved the lowest percentage of his or her sales goal. (Def.'s Rule 56.1 Statement ¶¶ 100–101.) In 2012, Breitling initially set Plaintiff's sales goal at \$16,500,000, excluding sales to the Tourneau account, which were counted separately. (*Id.* ¶¶ 40, 105.) In the middle of the year, Prissert reduced Plaintiff's sales goal by \$1.1 million to \$15,400,000. (*Id.* ¶ 107.) Plaintiff's 2012 sales were approximately \$12,899,581. (*Id.* ¶ 108.) That year, Plaintiff was again the sales representative who achieved the lowest percentage of his or her sales goal. (*Id.* ¶ 111.)

Around the end of 2012, Prissert reduced Plaintiff's sales territory and also cut his 2013 base salary from \$230,000 to \$196,000. (*Id.* ¶¶ 120, 133–34.) Plaintiff was approximately fifty-two years old at the time. At the same time, Prissert promoted an employee named Isaac Schafrath to sales representative and assigned Schafrath the sales territory that had been removed from Plaintiff and another sales representative. (*Id.* ¶¶ 136–37.) Schafrath was about thirty-three years old at the time and had no prior sales experience. (Pl.'s Rule 56.1 Statement ¶¶ 205–206; Def.'s Rule 56.1 Statement ¶ 137.)

At the beginning of 2013, Breitling reduced Plaintiff's sales goal to \$11,200,000. (Def.'s Rule 56.1 Statement ¶ 114.) In September 2013, Prissert further reduced Plaintiff's 2013 sales

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<sup>1</sup> Defendant alleges that Plaintiff requested the room for himself and his female colleague. (Def.'s Rule 56.1 Statement ¶ 141.)

<sup>2</sup> Plaintiff alleges Prissert set the goal knowing it was unobtainable, and that Plaintiff had the greatest increase in goals of any rep. (Pl.'s Rule 56.1 Statement ¶ 88.)

goal to \$10,640,000. (*Id.* ¶ 116.) Plaintiff's 2013 sales were approximately \$8,452,072. (*Id.* ¶ 117.) Of Breitling's eight sales representatives that year, Plaintiff was tied for achieving the second lowest percentage of his or her sales goal. (*Id.* ¶¶ 119–120.)

Breitling terminated Plaintiff's employment in December 2013. (*Id.* ¶ 157.) Prissert made the decision to terminate Plaintiff. (*Id.* ¶ 158.)

## II. LEGAL STANDARDS

### A. Motion for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). “An issue of fact is genuine ‘if the evidence is such that a jury could return a verdict for the nonmoving party.’” *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). A fact is material when “it ‘might affect the outcome of the suit under the governing law.’” *Id.* (quoting *Anderson*, 477 U.S. at 248).

The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *See Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002). In turn, to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact. To do so, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)), and it “may not rely on conclusory allegations or unsubstantiated speculation,” *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2002) (quoting *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998)). Rather, the non-moving party must produce admissible evidence that supports its pleadings. *See First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S.

253, 289–90 (1968). In this regard, “[t]he ‘mere existence of a scintilla of evidence’ supporting the non-movant’s case is also insufficient to defeat summary judgment.” *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 175 (2d Cir. 2003) (quoting *Anderson*, 477 U.S. at 252).

In determining whether a genuine issue of material fact exists, the court must construe the evidence in the light most favorable to the non-moving party and draw all inferences in that party’s favor. *See Niagara*, 315 F.3d at 175. Accordingly, the court’s task is not to “weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249. Summary judgment is therefore “improper if there is any evidence in the record that could reasonably support a jury’s verdict for the non-moving party.” *Marvel*, 310 F.3d at 286.

**B. *Prima Facie* Case of Discrimination Under Title VII and the ADEA**

Plaintiff brings two discrimination claims under federal law: (1) gender discrimination in violation of Title VII, (Compl. ¶¶ 44–46); and (2) age discrimination in violation of the ADEA, (Compl. ¶¶ 47–49).

To state a *prima facie* case of employment discrimination under Title VII and the ADEA, a plaintiff “must show: (1) he belonged to a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent.” *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012) (quoting *Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008)); *see Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2d Cir. 2014) (applying same standard to ADEA suits). If a plaintiff states a *prima facie* case of discrimination, the burden shifts to the defendant to show that any adverse employment action was taken for legitimate, non-discriminatory reasons. *Delaney*, 766 F.3d at 168. “When the employer meets its burden, the

plaintiff can no longer rely on the *prima facie* case, but must prove that the employer's proffered reason was a pretext for discrimination." *Id.* (citations and internal quotation marks omitted). With respect to an ADEA claim, a plaintiff can satisfy this burden only by "presenting facts, which taken in his favor, suffice to show that a triable issue exists as to whether his age was a 'but for' cause of his termination." *Id.* (alterations, citations, and internal quotation marks omitted).

Defendant concedes that Plaintiff belongs to the ADEA's protected class as an individual over forty years of age. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. ("Def.'s Mem."), (ECF No. 41), at 5 n.2); *see* 29 U.S.C. § 631(a). Defendant also concedes that Defendant took two adverse employment actions against Plaintiff by (1) reducing Plaintiff's compensation around the end of 2012 when a portion of Plaintiff's sales territory was assigned to Schafrath and (2) terminating Plaintiff's employment in December 2013. (Def's Mem., at 5.)

### **III. PLAINTIFF'S TITLE VII CLAIM FOR GENDER DISCRIMINATION FAILS ON THE MERITS UNDER SECOND CIRCUIT LAW**

The Second Circuit has held that "Title VII does not proscribe discrimination because of sexual orientation." *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *see also Christiansen v. Omnicom Grp., Inc.*, No. 15 Civ. 03440, 2016 WL 951581, at \*12–15 (S.D.N.Y. Mar. 9, 2016) (summarizing Second Circuit case law on sexual orientation discrimination under Title VII). Realizing that discrimination based upon sexual orientation is not currently actionable under Title VII, Plaintiff attempts to avail himself of the "the 'gender stereotyping' theory of Title VII liability according to which individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class." *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005). Plaintiff's first cause of action therefore claims that Breitling discriminated against him on the basis of his gender in violation of Title VII. (Compl. ¶¶ 44–46.)

Courts in this Circuit must distinguish between claims based on discrimination targeting sexual orientation, which are not cognizable under Title VII, and cognizable claims based on discrimination targeting nonconformity with gender stereotypes. *See Christiansen*, 2016 WL 951581, at \*12. The Circuit has warned that “a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’” *Dawson*, 398 F.3d at 218 (quoting *Simonton*, 232 F.3d at 38). “[D]istrict courts in this Circuit have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes.” *Dawson*, 398 F.3d at 219 (summarizing cases). Despite significant changes in the broader legal landscape since the Second Circuit’s decision in *Simonton*, the prevailing law in this and every other Circuit to consider the question is that, in the Title VII context, courts must distinguish between actionable gender-stereotyping claims and non-actionable sexual orientation claims. *See Christiansen*, 2016 WL 951581, at \*13–14. Courts have found actionable Title VII claims in cases where plaintiff suffered adverse employment action for failing to conform to stereotypical gender norms through behavior or appearance. *See, e.g., Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (holding that stereotypical remarks about the incompatibility of motherhood and employment can be evidence that gender played a part in adverse employment decision); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989) (finding sufficient evidence of sexual stereotyping where an employer’s performance evaluations criticized female plaintiff’s tendency to act in what was seen as a masculine manner).

In his opposition brief, Plaintiff argues that he “as a gay man was treated less well than straight men because, based on the fact that [sic] as a gay man he was stereotypically viewed as one of the ‘girls’ by Prissert; and the workplace was permeated with a macho atmosphere that

excluded ‘the girls’ from the president’s inner circle.” (Pl.’s Mem., at 21.) Plaintiff’s argument conflates a sexual orientation discrimination claim with a gender-stereotyping claim. Such claims are not actionable under current Second Circuit law. *See, e.g., Christiansen*, 2016 WL 951581, at \*15 (finding no basis to infer that male plaintiff behaved in a stereotypically feminine manner or that employer’s behavior arose from a perception of plaintiff as insufficiently masculine) (citing *Simonton*, 232 F.3d at 38); *Dawson*, 398 F.3d at 222–23 (finding no substantial evidence that plaintiff’s alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any adverse employment action).

Moreover, Plaintiff has failed to show that he suffered an adverse employment action under circumstances giving rise to an inference of intentional discrimination based upon Plaintiff’s membership in a protected class. In support of his argument that he was treated as one of “the girls,” Plaintiff alleges (1) frequent conversations about sports at the office from which he was excluded, (2) a business trip when he was assigned to share a hotel room with a female colleague, and (3) Breitling’s use of images in its marketing campaigns that Plaintiff alleges are degrading to women and are “surely not pin ups that would entice gay men.” (*See* Pl.’s Mem., at 21–23.)

Frequent conversations about sports at an office do not constitute discrimination based upon gender stereotypes. Moreover, Plaintiff had voluntarily shared a hotel room with that same female colleague on multiple occasions on vacation, and Plaintiff had emailed a Breitling employee saying that he and the female colleague had shared rooms multiple times before Prissert started at Breitling. (*See* Def.’s Rule 56.1 Statement ¶¶ 141–42, 145–46.) Finally, Plaintiff has failed to show how Breitling’s marketing materials are in any way relevant to the employment actions taken against him.

There is no record evidence on which a rational finder of fact could conclude that Defendant discriminated against Plaintiff in the terms and conditions of Plaintiff's employment on the basis of Plaintiff's gender. Plaintiff's first cause of action for gender discrimination in violation of Title VII is therefore DISMISSED.

**IV. PLAINTIFF HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF AGE DISCRIMINATION**

Plaintiff has failed to show that age discrimination played any role in Breitling's adverse employment actions against him. The sole allegation related to age discrimination in the Complaint is that Schafrath "was about 33 years old" in January 2013, when he was promoted to sales representative and assigned part of Plaintiff's sales territory by Prissert. (Compl. ¶ 30.) Plaintiff also testified that on one occasion, his immediate supervisor said to him, "you're so old, you wouldn't remember that – you probably didn't remember that." (Def.'s Rule 56.1 Statement ¶ 150.)

On the other hand, Plaintiff testified that Prissert never made any comments about Plaintiff's age. (Def.'s Rule 56.1 Statement ¶ 147.) Moreover, the fact that six out of the seven other sales representatives who shared Plaintiff's title and position were over forty years old and were therefore in the ADEA's protected class at the time that Plaintiff was terminated by Breitling in December 2013 belies Plaintiff's age discrimination claim. (Def.'s Rule 56.1 Statement ¶ 160.) *See, e.g., Holowecki v. Fed. Express Corp.*, 644 F. Supp. 2d 338, 357 (S.D.N.Y. 2009) (finding no evidence of age discrimination where other employees of a similar age did not experience the same adverse employment action as plaintiff).

Plaintiff has failed to demonstrate any causal relationship between his age and the adverse employment actions taken against him. Plaintiff has therefore failed to establish a *prima facie* age

discrimination claim under the ADEA. Plaintiff's second cause of action for age discrimination in violation of the ADEA is DISMISSED.

**C. Plaintiff's State and City Claims Are Dismissed Without Prejudice**

In addition to his claims under Title VII and the ADEA, Plaintiff claims that Breitling discriminated against him on the basis of his sexual orientation and age in violation of the NYSHRL and the NYCHRL. (Compl. ¶¶ 50–55.) In light of this Court's dismissal of Plaintiff's federal-law claims and the multiple issues of state law implicated by Plaintiff's remaining claims, this Court declines to exercise supplemental jurisdiction over Plaintiff's non-federal causes of action. Plaintiff's third and fourth state and city law causes of action for discrimination in violation of the NYSHRL and NYCHRL are therefore DISMISSED without prejudice.

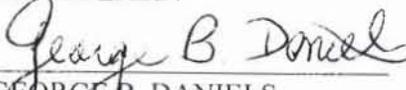
**IV. CONCLUSION**

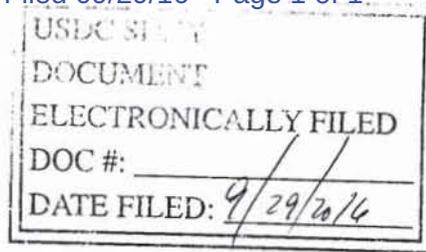
Defendant's motion for summary judgment is GRANTED. Plaintiff's first cause of action for violation of Title VII and second cause of action for violation of the ADEA are DISMISSED with prejudice. Plaintiff's third cause of action for violation of the NYSHRL and fourth cause of action for violation of the NYCHRL are DISMISSED without prejudice.

The Clerk of Court is directed to close the above-captioned action.

Dated: September 29, 2016  
New York, New York

SO ORDERED.

  
\_\_\_\_\_  
GEORGE B. DANIELS  
United States District Judge



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
FREDERICK M. CARGIAN,

Plaintiff,

15 CIVIL 01084 (GBD)

-against-

**JUDGMENT**

BREITLING USA, INC.,

Defendant.  
-----X

Defendant having moved, pursuant to Fed. R. Civ. P. 56, for summary judgment to dismiss Plaintiff's Complaint in its entirety, and the matter having come before the Honorable George B. Daniels, United States District Judge, and the Court, on September 29, 2016, having rendered its Memorandum Decision and Order granting Defendant's motion for summary judgment, dismissing with prejudice, Plaintiff's first cause of action for violation of Title VII and second cause of action for violation of the ADEA , dismissing without prejudice Plaintiff's third cause of action for violation of the NYSHRL and court cause of action for violation of the NYCHRL, and directing the Clerk of Court to close the above-captioned action, it is,

**ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Memorandum Decision and Order dated September 29, 2016, Defendant's motion for summary judgment is granted; Plaintiff's first cause of action for violation of Title VII and second cause of action for violation of the ADRA are dismissed with prejudice; Plaintiff's third cause of action for violation of the NYSHRL and fourth cause of action for violation of the NYCHRL are dismissed without prejudice; accordingly, the above-captioned action is closed.

**Dated:** New York, New York  
September 29, 2016

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED  
ON THE DOCKET ON 9/29/2016