

16-3592

United States Court of Appeals
for the
Second Circuit

FREDERICK M. CARGIAN,

Plaintiff-Appellant,

vs.

BREITLING USA, INC.,

Defendant-Appellee.

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

**BRIEF OF *AMICUS CURIAE* NELA/NY IN SUPPORT
OF PLAINTIFF-APPELLANT AND OF REVERSAL**

STEPHEN BERGSTEIN

BERGSTEIN & ULLRICH, LLP
5 Paradies Lane
New Paltz, New York 12561
(845) 469-1277

On Behalf of *Amicus Curiae*
National Employment Lawyers Association/New York (NELA/NY)

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule Appellate Procedure 29(c), Amicus Curiae National Employment Lawyers Association/New York states that it is a non-profit corporation with no parent corporation and no publicly-held corporation owns more than 10% of its stock or membership interests.

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THE INTERESTS OF THE AMICUS CURIAE

NELA/NY is the New York affiliate of the National Employment Lawyers Association, a national bar association dedicated to the vindication of the rights of individual employees. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4,000 member attorneys and 69 state and local affiliates who focus their expertise on employment discrimination, employee compensation and benefits and other issues arising out of the employment relationship. With approximately 400 members, NELA/NY is NELA's second largest affiliate.¹

NELA/NY advances and encourages the professional development of its members through networking, educational programs, publications and technical support. NELA/NY also promotes the workplace rights of individual employees through legislation, a legal referral service, filing briefs as amicus curiae and other activities, with an emphasis on the special challenges presented by New York's employment laws.

¹ Pursuant to the Second Circuit Rule 29(c)(5), no party's counsel authored this brief in whole or in part. No party or party's counsel contributed to funding the preparation or the submission of this brief. Amicus is solely responsible for this brief. The Appellant and Appellee have both consented to the filing of this amicus brief.

NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation. Our members advance these goals through representation of employees who have been discriminated and retaliated against, including employees with claims under Title VII of the Civil Rights Act of 1964.

NELA/NY has filed numerous amicus briefs in this Court and the New York Court of Appeals in cases that raise important questions of anti-discrimination law. The aim of this participation has been to highlight the practical effects of legal decisions on the lives of working people.

For example, in this case, NELA/NY asks this Court to recognize that Title VII prohibits sexual orientation discrimination. That holding would benefit the clients of NELA/NY members, who currently only have recourse for this form of employment discrimination under state law, which does not provide for punitive damages or attorneys' fees. The unavailability of attorneys' fees hampers the efforts of NELA/NY members to represent victims of employment discrimination, many of whom cannot pay for counsel. As courts have recognized, the availability of attorneys' fees under Title VII attracts competent counsel for meritorious cases. *See Millea v. Metro-N. R.R.*, 658 F.3d 154, 169 (2d Cir. 2011) ("Especially for claims where the financial recovery is likely to be small, calculating attorneys' fees as a

proportion of damages runs directly contrary to the purpose of fee-shifting statutes: assuring that civil rights claims of modest cash value can attract competent counsel. The whole purpose of fee-shifting statutes is to generate attorneys' fees that are disproportionate to the plaintiff's recovery").

BACKGROUND

Plaintiff-Appellant Frederick M. Cargian filed this action alleging that his former employer, Defendant-Appellee Breitling USA, Inc., terminated his employment, *inter alia*, in violation of Title VII of the Civil Rights Act of 1964 because of his sexual orientation. Plaintiff's evidence includes allegations that the company president, Thierry Prissert "created a 'boy's club' atmosphere, excluding the 'girls,' a group in which he included Corgian, from his inner circle." (SPA 2). In addition, Plaintiff was not invited to a June 2013 marketing event in England, golf events with clients and other social events, all of which included other male sales representatives. *Id.* Prissert called Plaintiff "darling" on one occasion, and on a company trip to Switzerland in Spring 2011, the company assigned him to a shared hotel room with a female sales representative. (SPA 2-3). Over time, Prissert reduced Plaintiff's sales territory and substantially cut his 2013 salary from \$230,000 to \$196,000. (SPA 3). The company reduced Plaintiff's sales goal in early 2013, and

later that year, Prissert further reduced Plaintiff's sales goal. (SPA 3-4). Plaintiff was terminated from his position in December 2013. (SPA 4).

On Defendant's motion for summary judgment, citing *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), the district court held that Second Circuit precedent foreclosed Plaintiff's Title VII sex discrimination claim. The district court further stated that "[t]he Circuit has warned that 'a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" (SPA 7) (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)). "Despite significant changes in the broader legal landscape since the Second Circuit's decision in *Simonton*, the prevailing law in this and every 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." (SPA 7). Accordingly, while employers violate Title VII where "plaintiff suffered adverse employment action for failing to conform to stereotypical gender norms through behavior or appearance" (SPA 7), it was not enough for Plaintiff to argue that "as a gay man, [he] was treated less well than straight men because, based on the fact that 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." (SPA 7-8). The district court concluded that "Plaintiff's

argument conflates a sexual orientation discrimination claim with a gender-stereotyping claim. Such claims are not actionable under current Second Circuit law.” (SPA 8).

ARGUMENT

Recent developments in the Supreme Court and the Second Circuit confirm that Title VII prohibits discrimination on the basis of sexual orientation, and that the district court’s holding that Title VII provides Plaintiff no relief should be reversed. While this Court has previously ruled that Title VII offers no such protection to plaintiffs who suffer sexual orientation discrimination, as demonstrated in Point I, subsequent cases have undercut the reasoning in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). Discrimination on the basis of sexual orientation is discrimination on the basis of sex.

This Court is free to revisit the reasoning in *Simonton*. It has done so in other cases interpreting Title VII and related civil rights laws. Two years ago, without sitting *en banc*, this Court repudiated the reasoning in *Bernheim v. Litt*, 79 F.3d 318 (2d Cir. 1996), holding that subsequent developments in the Supreme Court and the Second Circuit established that retaliation plaintiffs who work for the government may proceed under 42 U.S.C. § 1983, not just Title VII. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72 (2d Cir. 2015) (overturning the

holding in *Bernheim* that retaliation claims filed by public employees may only be filed under Title VII). As set forth in Point II, the analysis in *Vega* applies here, compelling this Court to find that the post-*Simonton* landscape renders the reasoning in *Simonton* obsolete.

POINT I

DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION VIOLATES TITLE VII'S PROSCRIPTION AGAINST GENDER DISCRIMINATION

Title VII makes it unlawful for covered employers to “fail or refuse to hire or to discharge any individual, or to otherwise discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s sex.” 42 U.S.C. § 2000e-2(a)(1). As demonstrated below, Title VII prohibits discrimination on the basis of sexual orientation. This Court should reach this conclusion for the following reasons: (1) discrimination on the basis of sexual orientation constitutes discrimination based on sex; (2) sexual orientation discrimination violates Title VII’s prohibition against associational discrimination; and (3) discrimination on the basis of sexual orientation constitutes gender stereotyping, also in violation of Title VII.

A. Discrimination on the basis of sexual orientation constitutes gender discrimination.

In July 2015, the EEOC – the federal agency charged with interpreting and enforcing Title VII – determined that the statute prohibits discrimination on the basis of sexual orientation. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, 2015 EEO PUB LEXIS 1905 (EEOC July 15, 2015). The EEOC framed the issue as follows: “When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination — whether the agency has ‘relied on sex-based considerations’ or ‘take[n] gender into account’ when taking the challenged employment action.” 2015 WL 4397641, at *4. The EEOC notes that “[s]exual orientation as a concept cannot be defined or understood without reference to sex. A man is referred to as ‘gay’ if he is physically and/or emotionally attracted to other men. A woman is referred to as ‘lesbian’ if she is physically and/or emotionally attracted to other women. Someone is referred to as ‘heterosexual’ or ‘straight’ if she or she is physically and/or emotionally attracted to someone of the opposite sex.” *Id.* at *5 (citing American

Psychological Assn., “Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation” (Feb. 2011)).

The EEOC’s reasoning why sexual orientation discrimination violates Title VII is persuasive. “[U]nder so-called ‘*Skidmore* deference,’ we give effect to an agency’s non-legislative interpretation of a statute to the extent we find it persuasive.” *Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 n.47 (2d Cir. 2016) (citing *inter alia Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The agency’s hypothetical in *Baldwin v. Foxx* demonstrates the logic of its position:

For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. *See Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (“Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

Id. at *5.

As Members of Congress stated in an amicus brief to this Court in *Christianson v. Omnicom Group, Inc.*, 16-748, Dkt. No. 46, “To discriminate against gay male employees, for example, is to treat male employees negatively for being attracted to men, while female employees do not face equally negative treatment for identical conduct.” *Id.* at 17. The Congress Members further note that courts have interpreted Title VII to prohibit discrimination against subcategories of gender, including caregiver discrimination and hiring practices that favor single women over married women. *Id.* at 18 (citing *Back v. Hastings-on-Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118-121 (2d Cir. 2004) (rejecting defendant’s argument that “stereotypes about pregnant women or mothers are not based on gender, but rather, ‘gender-plus parenthood’”), and *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (“so long as sex is a factor in the application of the [hiring] rule, such application involves discrimination based on sex”). *See generally Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (“This Court, in its prior order dismissing in part Plaintiffs’ FAC, stated that ‘the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best.’ After further briefing and argument, the Court concludes that the distinction is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination. Thus,

claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims”); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 U.S. Dist. LEXIS 132878, at *6-12 (W.D. Wash. Sep. 22, 2014) (plaintiff – a male married to another male – alleged sex discrimination under Title VII in alleging that management denied him a spousal health benefit where women in heterosexual marriages had received the benefit); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015) (“If a business fires Ricky ... because of his sexual activities with Fred, while th[is] action[] would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex”) (quoting Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 208 (1994)).

Simply put, the above cases confirm that an employer cannot discriminate against an employee based on his sexual orientation without taking his gender into account. Rather than parse out distinctions among gender- or sex-based treatment in the workplace, this Court should hold that sexual orientation discrimination is in fact gender discrimination in violation of Title VII.

B. Discrimination against employees on the basis of their sexual orientation constitutes associational discrimination.

In *Baldwin v. Foxx*, the EEOC explained that sexual orientation discrimination violates Title VII's prohibition against sex discrimination because "it is associational discrimination on the basis of sex." 2015 WL 4397641, at *6. The EEOC explains as follows:

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

Id. at *6.

Title VII already prohibits discrimination on the basis of inter-racial association. In *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008), this Court held that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 138. The reasoning in *Holcomb* is straightforward. "Where an employee is subjected to adverse action because an employer disapproves of interracial association, the

employee suffers discrimination because of the employee's own race.” *Id.* at 139 (citing *inter alia* *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (Title VII applies where employee suffered discrimination because he had a biracial daughter); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race”). This reasoning equally applies to gender discrimination. As the Supreme Court emphasized in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), “our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.” *Id.* at 243 n.8. See also *Whidbee v. Garzarelli Food Specialities, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000) (“the same standards apply to both race-based and sex-based hostile environment claims”). As the EEOC has argued in its amicus brief in *Magnusson v. County of Suffolk*, 16-1876, Dkt. No. 55, “The behavior of an employer that discriminates against a gay employee because it disapproves of same-sex dating is not materially different from the behavior of an employer that discriminates against an employee because it disapproves of interracial dating. In both cases, the employer

bases its actions on the protected characteristic of its employee, viewed in relation to the individuals with whom that employee associates.” *Id.* at 23.

Like inter-racial association, men and women who associate intimately with people of the same gender deserve full protection under Title VII. Discrimination arising from that association is inherently rooted in the employee’s sex. This Court’s reasoning in *Holcomb* compels this Court to hold that discrimination on the basis of sexual orientation violates Title VII.

C. Discrimination on the basis of sexual orientation constitutes stereotyping in violation of Title VII.

In its administrative ruling, the EEOC provided a third reason why sexual orientation discrimination violates Title VII: this discrimination stereotypes men and women in making assumptions about overt masculine or feminine behavior. As the EEOC stated, “Sexual orientation discrimination and harassment ‘[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.’” *Baldwin*, 2015 WL 4397641, at *8 (citing *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). Quoting from *Centola*, the EEOC stated:

In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether

effeminate or not, because he thinks, “real” men should date women, and not other men.

Id. (quoting 183 F. Supp. 2d at 410). *See also id.* at *8 (holding that plaintiff plead a claim where he “has alleged that he is ‘a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles,’ that his ‘status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under [his supervisor’s] supervision or at the LOC,’ and that ‘his orientation as homosexual had removed him from [his supervisor’s] preconceived definition of male’”) (quoting *Terveer v. Library of Congress*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014)).

The EEOC’s reasoning is consistent with judicial interpretations of Title VII. It is well known that the Supreme Court in *Price Waterhouse* held that sex stereotyping violates Title VII. In *Back v. Hastings-on-Hudson*, this Court held that a plaintiff may utilize a sex-stereotyping theory to prove sex discrimination under 42 U.S.C. § 1983 where the employer denied tenure to a female employee with small children on the assumption that she would not be committed to her job. 365 F.3d at 120-22. As the EEOC has stated in its amicus brief in *Magnusson v. County of Suffolk*, 16-1876, “there is no reason why the well-established sex-stereotyping theory – premised, as it is, on an individual’s failure to conform to traditional gender

stereotypes of dress, conduct, or appearance – should not include sexual orientation discrimination.” (Dkt Entry 55, at 18-19).

There is no question than men are stereotypically expected to be attracted to women, and vice-versa. That gender norm has long guided American life. But not all men are attracted to women, and not all women are attracted to men. Advances in gay rights over the years have acquainted even Main Street America with the biological reality that some men are attracted to men, and some women are attracted to women. Yet, while gays and lesbians are in the minority and still held to majoritarian and stereotypical norms, “It is impossible to categorically separate ‘sexual orientation discrimination’ from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.” *Videckis*, 150 F. Supp. 3d at 1160.

POINT II

THIS COURT SHOULD ABANDON THE REASONING IN *SIMONTON v. RUNYON*

While this Court will not typically abandon a prior precedent, it will do so in particular circumstances. This Court recently set forth the ground rules governing this process:

It is a longstanding rule of our Circuit that a three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting *en banc* or by the Supreme Court. Nonetheless, we have consistently recognized two instances in which a threejudge panel may issue an opinion that overrules Circuit precedent. The first is often called a "mini-*en banc*," in which the panel circulates its opinion among all active judges and receives no objections to its filing. The second is "where an intervening Supreme Court decision casts doubt on the prior ruling." To qualify as an intervening decision, the Supreme Court's conclusion in a particular case must have "broke[n] the link ... on which we premised our [prior] decision," or "undermine[d] [an] assumption" of that decision. It is not, however, necessary that the Supreme Court have "address[ed] the precise issue decided by the panel for this exception to apply." If a panel concludes that a particular Supreme Court decision does not cast sufficient doubt on our precedent, the precedent continues to be binding. When sufficient doubt exists, however, and the panel must reconsider whether that precedent should continue as the law of the Circuit, it not only applies the conclusions of the intervening Supreme Court case but also employs normal interpretive methods and examines such things as the internal consistency of the statute, statutory purpose and legislative history, analogous statutes, and even changes in the judicial landscape and the conclusions of other Circuits. 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 v. Sea Port Grp. Sec. LLC, 832 F.3d 372, 378 (2d Cir. 2016).

In *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), this Court held that Title VII does not prohibit sexual orientation discrimination. While noting that “we have ‘little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex,’” *id.* at 35, this Court stated that “we are informed by Congress’s rejection, on numerous occasions, of bills that would have extended Title VII’s protection to people based on their sexual preferences.” *Id.* This Court further noted that, in *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986)), it held the plaintiff could not prevail in a suit “alleging that a male employer had passed over several male applicants for a promotion in order to hire a woman with whom the employer had a romantic relationship.” *Id.* at 36. Accordingly, this Court held, “[b]ecause the term ‘sex’ in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation.” *Id.* This Court should abandon the reasoning in *Simonton*.

A. The legal landscape has changed since this Court issued *Simonton*.

Subsequent Second Circuit rulings confirm that *Simonton* applies a rigidly narrow view of discrimination “based on sex.” As demonstrated above, in 2008, this Court held in *Holcomb* that Title VII prohibited an employer from discriminating against a white employee because his African-American fiancé. This holding is grounded in the “associational theory” of discrimination, a concept the *Simonton* panel did not address. *See Holcomb*, 521 F.3d at 139 (“where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race”). Yet, discrimination against gays and lesbians targets those who associate romantically with the same gender. *Holcomb* more faithful to Title VII’s mandate to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Price Waterhouse*, 490 U.S. at 251. As that expansive view of Title VII post-dates *Simonton*, the reasoning in *Holcomb* controls.

Simonton is outdated. While that case was decided only 17 years ago, the legal landscape governing the rights of gays and lesbians has changed substantially. Indeed, we have witnessed a sea-change in how the law protects gays and lesbians from discrimination. These changes have reconceptualized how the American legal system interprets discrimination “because of sex.” *Simonton* is now a relic.

Not only has the EEOC determined that discrimination on the basis of sexual orientation violates Title VII, *Baldwin*, 2015 WL 4397641, but more broadly, post-*Simonton*, the Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) in holding that a state law criminalizing consensual homosexual conduct violates the Constitution. *Lawrence v. Texas*, 539 U.S. 558 (2003). More recently, in *United States v. Windsor*, 133 S.Ct. 2675 (2013), the Court struck down the Defense of Marriage Act, which had defined “marriage” and “spouse” under federal law to exclude same-sex partners. This Court’s ruling in *Windsor* held that gays and lesbians are suspect classes under the U.S. Constitution and cannot suffer discrimination without a compelling government interest. 699 F.3d 169 (2d Cir. 2013). And, in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Court held that the Constitution protects the right of same-sex couples to marry. While these are not employment discrimination cases, they confirm that the legal landscape has changed. The courts no longer treat gays and lesbians as second-class citizens.

Simonton stands out as an anomaly. Unlike the more recent precedents cited above, that case continues to treat discrimination on the basis of sexual orientation as legal under Title VII. So long as *Simonton* remains good law, a gay male can get married under the U.S. Constitution and remain free from sexual orientation

discrimination under Second Circuit equal protection precedent. But he can be terminated from his position because of his sexual orientation.

B. Under comparable circumstances, this Court recently abandoned a precedent without convening *en banc*.

In *Bernheim v. Litt*, 79 F.3d 318 (2d Cir. 1996), this Court held that Title VII was the appropriate vehicle for public employees to pursue retaliation claims, not 42 U.S.C. § 1983. However, in *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72 (2d Cir. 2015), this Court held that employment discrimination plaintiffs may pursue retaliation claims under Fourteenth Amendment, as enforced through § 1983. In abandoning the reasoning in *Bernheim*, the *Vega* Court noted that, post-*Bernheim*, this Court “permitted retaliation claims brought by state employees to proceed under § 1983, even though the adverse treatment was allegedly in retaliation for their participation in discrimination investigations and proceedings.” 801 F.3d at 81 (citing *Hicks v. Baines*, 593 F.3d 159, 171 (2d Cir. 2010)). Although *Hicks* was inconsistent with *Bernheim*, *Hicks* did not discuss or cite *Bernheim*. *Id.* Resolving this conflict, this Court concluded that “a claim of retaliation for a complaint that alleged discrimination is actionable under § 1983,” in part because “we have recognized that once the color of state law requirement is met, except for the issue of individual liability, an ‘equal protection claim parallels [a plaintiff’s] Title VII claim.’”

Id. at 82. This Court further noted in *Hicks* that “retaliation is a form of discrimination,” as the Supreme Court had recognized in 2005, after this Court had decided *Bernheim*. *Id.* (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005)). As later cases had contravened this Court’s reasoning in *Bernheim*, this Court determined to abandon the holding in *Bernheim* that retaliation plaintiffs cannot proceed under § 1983.

The process set forth above in *Vega* applies here. The reasoning in *Simonton* has been repudiated in subsequent cases. In light of this Court’s *Holcomb* precedent and the intervening Supreme Court authority on the rights of gays and lesbians, one district court in this Circuit has already declined to apply *Simonton* as binding precedent. In *Boutillier v. Hartford Public Schools*, No. 3:13-cv-01303-WWE, 2016 U.S. Dist. LEXIS 159093 (D. Conn. Nov. 17, 2016), the Court stated:

[S]ince *Simonton*, the Second Circuit has empowered employees to bring virtually identical associational Title VII claims in the context of race discrimination. *See Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008). ... The logic is inescapable: If interracial association discrimination is held to be “because of the employee’s own race,” so ought sexual orientation discrimination be held to be because of the employee’s own sex. *Holcomb* and *Simonton* are not legitimately distinguishable. If Title VII protects individuals who are discriminated against on the basis of race because of interracial association (it does), it should similarly protect individuals who are discriminated against on the basis of

sex because of sexual orientation – which could otherwise be named "intrasexual association." As *Holcomb* and *Simonton* cannot be legitimately reconciled, given that *Holcomb* is more recent, more consistent with general principles of statutory construction, and more agreeable to reason, the Court finds that Title VII protects individuals who are discriminated against on the basis of sex because of their sexual orientation.

Id. at *27.

Another district court within this Circuit has noted a further paradox between *Simonton* and other civil rights claims alleging stereotyping based on gender non-conformity. In *Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320 (N.D.N.Y. 2016), the Court addressed whether the plaintiffs could maintain a claim that their son's classmates had bullied him in violation of Title IX. The Court noted that while Title IX does not prohibit educational discrimination on the basis of sexual orientation, plaintiffs may proceed under that statute if the bullying stems from sexual stereotypes. The Court explained:

Because a Title IX sex discrimination claim is treated in much the same way as a Title VII sex discrimination claim, Title VII jurisprudence therefore applies. *Papelino v. Albany College of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011). Under the "gender stereotyping" theory of liability under Title VII, individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class. *See Dawson [v. Bumble & Bumble]*, 398 F.3d [211], 218 (2d Cir. 2005). However, courts in the Second Circuit do not recognize sexual orientation as a protected classification under Title VII or Title IX. *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d

601, 622 (E.D.N.Y. 2011). The critical fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. *Dawson*, 398 F.3d at 218. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible. *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998)).

Id. at 332-33.

These district courts recognize that this Circuit's current sexual orientation jurisprudence under Title VII is unworkable. The weak link in this equation is *Simonton*. This Court should abandon the reasoning in *Simonton* and firmly hold that discrimination on the basis of sexual orientation is discrimination "because of sex" under Title VII.

CONCLUSION

This Court should hold that Title VII prohibits sexual orientation discrimination. It should further reverse the judgment of the district court and remand this case for trial on the merits.

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Respectfully submitted,



STEPHEN BERGSTEIN

BERGSTEIN & ULLRICH, LLP

5 Paradies Lane

New Paltz, New York 12561

(845) 469-1277

Counsel for amicus curiae National Employment Lawyer's Association
New York Chapter