

EISENBERG & SCHNELL LLP  
ATTORNEYS AT LAW

HERBERT EISENBERG  
LAURA S. SCHNELL

JULIAN R. BIRNBAUM  
Of Counsel

JANICE GOODMAN  
Of Counsel  
Direct Dial  
212-869-1940  
jg@janicegoodmanlaw.com

May 10, 2016

VIA ECF and  
FAX (212-805-6737)  
Hon. George B. Daniels  
United States District Judge  
Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1310  
New York, N.Y. 10007

Re: Cargian v Breitling USA, Inc.  
15 CV 01084 (GBD, HP)  
Motion to Submit Post Argument Memo of Law

Dear Judge Daniels:

On May 2, 2016 at oral argument on Defendant's summary judgment motion the Court extensively questioned Plaintiff on the elements of proof needed to establish a claim of sex stereotyping under Title VII under Dawson v Bumble & Bumble, and the extension of gender discrimination to include sexual orientation. I request permission to submit the attached supplemental letter memo of law to respond to some of your questions not previously addressed in the parties briefs. I reached out to Defendant's counsel who informed me that Defendant does not consent to supplemental briefing. No prior request has been made for this relief. Thank you.

Respectfully submitted



Janice Goodman

cc: Glenn Grindlinger, Esq. (Via ECF & email)  
Zev Singer, Esq. (Via ECF & email)

THE WOOLWORTH BUILDING  
233 BROADWAY, SUITE 2704  
NEW YORK, NEW YORK 10279

PHONE 212.966.8900  
FAX 212.966.2505  
eisenbergschnell.com

EISENBERG & SCHNELL LLP  
ATTORNEYS AT LAW

May 10, 2016

VIA ECF AND  
FAX (212-805-6737)  
Hon. George B. Daniels  
U.S. District Court Judge  
Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1310  
New York, N.Y. 10007

HERBERT EISENBERG  
LAURA S. SCHNELL

JULIAN R. BIRNBAUM  
Of Counsel

JANICE GOODMAN  
Of Counsel  
Direct Dial  
212-869-1940  
jg@janicegoodmanlaw.com

Re: Cargian v Breitling USA  
15 CV 01084 (GBD-HBP)  
Post Argument Memo Re: Sex Stereotyping

Dear Judge Daniels:

Your Honor raised the question of whether plaintiff had shown some outward manifestation of nonconformance to his gender in order to meet the requirement of *Dawson v. Bumble & Bumble*, 398 F. 3d 211 (2d Cir. 2005). The reason for that requirement in *Dawson* was because Bumble & Bumble was a very unconventional workplace embodying “many lifestyles and sexual preferences.” Id at 214. Thus, for the *Dawson* plaintiff to succeed she needed to have an evidentiary basis to show there was something more than just being a lesbian to conclude the employer’s motivation was based on gender stereotyping rather than just sexual orientation.

*Dawson*, however, did not create binding precedent regarding the behavior/appearance standard for establishing a sex stereotyping claim in all instances. In *Dawson* the Court held that plaintiff not only failed on her stereotyping claim, but in fact, did not prove her sexual orientation claim under the state and local laws. Thus, its behavior/appearance standard is merely dicta. A better reference on the standard for gender stereotyping is the 2d Circuit’s approach in *Back v Hastings on Hudson Union Free Sch. Dist.*, 365 F. 3d 107 (2d Cir. 2004). In *Back* the Court correctly concluded that a proper reading of *Price Waterhouse*<sup>1</sup> is that the “question [of w]hat constitutes a gender based stereotype must be answered in the particular context in which it arises, and without undue formalization.” Id at 119-20.

---

<sup>1</sup> *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989)

THE WOOLWORTH BUILDING  
233 BROADWAY, SUITE 2704  
NEW YORK, NEW YORK 10279

PHONE 212.966.8900  
FAX 212.966.2505  
eisenbergschnell.com

Hon. George B. Daniels  
May 10, 2016  
Page 2

Against this standard, the *Dawson* court inappropriately narrows the universe of relevant gender norms to those specifically identified in *Price Waterhouse*, ignoring the Supreme Court declaration that Title VII was “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Price Waterhouse* 490 U.S. at 251. Any number of cases apply stereotyping claims much more broadly than the *Dawson* interpretation. See: *City of L.A. Dept. of Water & Power v Manhart*, 435 U.S. 702 (1978). (invalidating a policy making women, as a group, pay higher pension contributions based on the stereotypical conclusion that women as a group live longer); *Sprogis v United Airlines*, 444 F.2d 1194, 1198 (7<sup>th</sup> Cir. 1971 (invalidated policy against married female flight attendants); *Sobel v Yeshiva Univ.*, 839 F.2d 18, 33 (2d Cir. 1988) (refusing to credit stereotype that men are more often sole wage earners); *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5<sup>th</sup> Cir. 1974) (discrimination based on “stereotypical culturally-based concepts of the abilities of people to perform certain tasks because of their sex violates Title VII”). *Weinberger v Wiesenfeld*, 420 U.S. 636 (1975) (holding statute rooted in stereotypes that families depend on male breadwinners unconstitutional).

Here, we have sufficient evidence for a reasonable jury to find that Cargian was treated in a way that showed he did not conform to Breitling’s and Prissert’s stereotypical perception of his gender. Not only was Cargian the only gay man, the workplace was permeated with sexual images of no interest to plaintiff given his sexuality; he wasn’t a man to whom they could talk about sports as they would with a stereotypical man; it was proper for them to have him room with a woman because he wouldn’t have a sexual interest in her as a stereotypical man would; and he was treated as one of the “girls,” which included being removed from the president’s inner circle and excluded from marketing events that would have enhanced his work to which none of the women were invited.<sup>2</sup> How he was treated supports the inference that they perceived

---

<sup>2</sup> This treatment is similar to the cases *Dawson* cited as providing evidence of the employer’s perceptions of the plaintiff’s masculinity, or which sex the plaintiff should date, sufficient to support a stereotyping claim:

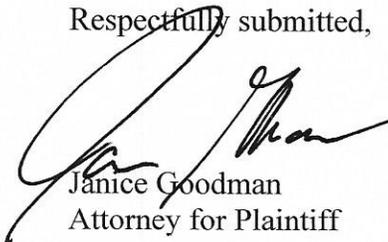
*Kay v. Independence Blue Cross*, 2003 U.S. Dist. LEXIS 8521, 2003 WL 21197289, at \*5 (E.D. Pa. May 16, 2003) (holding that gay male plaintiff "has shown that he was subjected to adverse treatment because of his co-workers[] perceptions that he was a 'miss prissy' or less than [a] 'real man.' As such, there is affirmative evidence that the harassment was related to perceptions about Mr. Kay's masculinity, rendering the conduct gender stereotyping actionable under Title VII."); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212,

Hon. George B. Daniels  
May 10, 2016  
Page 3

him as not conforming to traditional stereotypes of masculinity and supplies the connection between perception and the unlawful motivation required by *Dawson*.

Further, for the reasons stated in *Baldwin v Foxx*, 2015 WL 4397641 and in Plaintiff's brief, pp 20-21, we urge that the Court rule that Title VII's ban on gender discrimination by definition includes discrimination based on sexual orientation. However, should the Court believe itself constrained by the Court of Appeals prior rulings, then Plaintiff requests that the Court defer decision on that issue pending the Circuit Court's ruling on the cases before it that directly address the question. Presently pending before the Second Circuit are: *Zarda v Altitude Express, Inc.*, Docket No. 15-3775 (plaintiff's brief has been submitted and I have been told that the answer is expected this summer); and *Christiansen v Omnicom Group, Inc.*, Docket No. 16-748 (plaintiff's brief is due June 21, 2016). Further guidance from the Second Circuit will serve the interest of judicial economy.

Respectfully submitted,



Janice Goodman  
Attorney for Plaintiff

Cc: Glenn Grindlinger, Esq. (Via ECF and email)  
Zev Singer, Esq. (Via ECF and email)

---

1224 (D. Or. 2002) (lesbian plaintiff stated Title VII claim by alleging discrimination based upon her failure to conform to supervisor's "stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.").

*Dawson v. Bumble & Bumble*, 398 F.3d 211, 219 (2d Cir. 2005).Price Waterhouse 490 U.S. at 251.