UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, Plaintiff vs. ALTITUDE EXPRESS, et ano., Defendants	)	Civil Action No. 10 CV 4334 (JFB)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR RECONSIDERATION OF THE DISMISSAL OF THE TITLE VII CLAIM

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PRELIMINARY STATEMENT

Congratulations - or condolences, as the case might be; I know you are a cautious judge, and this might be an uncomfortable position to be in, but You can be the first judge to hold that Title VII protects sexual orientation discrimination. You not only have that power, ab initio, as any court, rogue or otherwise, has power; but, for the reasons that follow, you *should* be the first judge to to hold that Title VII protects sexual orientation. The law, if you follow it closely, has opened up ever so slightly to allow this. The weight of authority at this time in history demonstrates that, while this admittedly is a close question, the deference you owe the EEOC under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) would not only allows, but essentially requires you to defer to agency interpretation in the absence of evidence of Congressional intent. You are in a position to ignore the mandate of Chevron, or apply the wooden, dated rule of Simonton v. Runyon, 232 F.3d 33 (2d Cir.2000) beyond that which the panel recognized its holding. Simonton was a close case written in precatory language; it was even amended to **remove** the following headnote (originally 7):

> Because the term "sex" in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq ., 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.

Compare id. with its prior incarnation, reported at 225 F.3d 122 (2d Cir. 2000). The Second Circuit allowed the *result* to stand in the amended opinion, but forsaw that the statement set forth in that headnote should not enter the federal reporter. Headnotes don't count for holdings: We're taught that in the first week of law school, but the removal of this headnote is significant because it speaks to the Circuit's intent in affirming the dismissal of a sexual-orientation discrimination claim on the narrow grounds of the grant of a 12(b)(6) motion, recognizing that the law would

likely develop in such a way as to make such a blanket statement imprudent. Further, Simonton *did not analyze the legislative history of Title VII*, but merely *subsequent* Congressional attempts to make it Title VII more clear. 232 F.3d at 35. But at the time there was no agency interpretation and that's not the way a court applies Chevron; the question is simply whether the agency's interpretation is reasonable, and whether Congressional intent in adopting the particular statute in question said anything *different* about how the agency interpreted the statute. Simonton not only did not analyze agency interpretation, but it not analyze the original congressional intent, which it admitted was vague. Id. at 35, citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).[1]

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[1] Imagine a member of Congress introducing a bill protecting from discrimination Muslim worshippers who follow Sharia law. Such a bill would get nowhere in this political climate, notwithstanding that Title VII protects religious worship of any kind. If, hypothetically, that were to happen and a person thereafter were to bring suit alleging discrimination on the grounds of membership in the sect of Muslim faith that follows Sharia law, *the responsibility of the Court would be to protect the minority based on the plain language of the statute*, not interpolate Congressional intent from the 1960's based on a more current wave of discrimination. See, e.g., Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), aff'd 670 F.3d 1111 (10th Cir. 2012) (granting injunction on legislative effort to outlaw Sharia Law on multiple grounds.). The polity did not speak of Sharia Law when the Civil Rights Act was passed, and no one knows why Title VII was adopted with sex as a protected class. The fact is that sex was thrown into the Act by an amendment to derail the bill, by an avowed racist, one "Mr. Smith" from Virginia, who absurdly noted: "The census of 1960 shows that we had [an imbalance] in this country . . . of 2,661,000 females. Just why the Creator would set up such an imbalance of spinsters, shutting off the 'right' of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct, especially in this election year. Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their 'right' to a nice husband and family?" 110 Cong. Rec. 2577 (1964) (quoted in Francis J. Vaas, Title VII: Legislative History, 7 B.C.L. Rev. 431, 441-42 (1966)).

The question for this Court is not only whether Chevron deference trumps appellate precedent. The question is more nuanced to these facts: First, would the rules of Chevron apply without regard to appellate authority; (2) whether there is any bright line rule forbidding a district court from applying Chevron given newly adopted agency decisionmaking; and (3) whether these nuanced circumstances including (1) an almost complete absence of legislative history; (2) a clear statement of interpretation by the agency; (c) a very carefully worded decision in Runyon that was subsequently amended; and, most significantly (d) subsequent Second Circuit authority that has given deference to the EEOC's interpretation of the application of Title VII to sexual minorities. Finally, I'll throw in the judical economy argument. This is clearly a close call, but if you follow Chevron and you look to the clear development of Title VII in favor of the protection of sexual minorities like Donald Zarda, you would be courageous, but well suited to grant this motion.

PROCEDURAL SUMMARY

The procedural events leading to this motion are, synoptically, as follows: Plaintiff filed his complaint in 2010 alleging sexual orientation discrimination under state law and discrimination under Title VII alleging sex stereotypes under the nuanced rules afforded by the Second Circuit. See, e.g., Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009). At the time of summary judgment, the Second Circuit had promulgated a case-by-case approach in which to a litigant could allege sexual sex stereotypes as a subset under Title VII, but shyed away from blatant sex stereotype claims based on the stereotype that men associate sexually with other men. The reasoning, as stated in Simonton, was that Congress had not adopted a sexual orientation discrimination cause of action, ipso facto, it must not have interpreted Title VII to have been

inclusive of sexual orientation discrimination. Though I would have preferred otherwise, this Court did not, on summary judgment, believe that there were sufficient facts to make it to the jury under Title VII, but allowed the sexual orientation claim to go trial given diversity. Sadly, the plaintiff died young, but there was sufficient evidence to allow his estate to substitute for the plaintiff and the case is scheduled for trial on October 13.

ARGUMENT

I. CHANGES IN THE INTERPRETATION OF TITLE VII

The EEOC, starting in 2011, began to take a more expansive view of Title VII as it related to sexual minorities. First, in Macy v. Holder, EEOC Appeal No. 0120120821, the Commission found that a transgender woman was discriminated against on the basis of Title VII, despite *additional* federal protections for gay and lesbian and transgender employees. The Commission held:

> While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through [the Title VII]. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Id. at p.6. After Macy came down, no less than the Second Circuit applied it in reversing Judge Kaplan[2] on an equitable-tolling issue. Fowlkes v. Ironworkers Local 40, 2015 U.S. App. LEXIS 10339 (2d Cir. N.Y. June 19, 2015):

> It was not until Macy v. Holder, (E.E.O.C. Apr. 20, 2012), published after Fowlkes filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute

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[2] The decision said it was both Judge Preska and Kaplan; PACER confirms it was actually Judge Kaplan who sat in the district court.

> sex-based discrimination in violation of Title VII. Thus, Fowlkes's failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had "taken a firm stand" against recognizing his Title VII discrimination claims.

Id. at *18. I think your answer is right there. The Second Circuit recognized Macy as explaining Title VII, notwithsanding no previous caselaw supporting the argument, and, indeed, some caselaw that seemed to contradict it. Now we have Complainant v. Foxx, Appeal No. 0120133080, which I have provided the court and holds straight away that sexual orientation discrimination is sex discrimination both because of sex steretypes and for associational discrimination. It chided the analysis that other courts have reached in rejecting the claims of sexual minorities' use of Title VII by holding that associational discrimination has long been recognized as a cognizable claim under Title VII, despite that said statute does not carve out a niche for blacks who date whites. The same is true as to sex stereotypes; there is no statutory language that creates a cause of action for "masculine women," nor, for that matter, sexual harassment - something that wasn't recognized until the 1970's, Meritor, nor same-sex sexual harassment, which wasn't recognized until the 1990's. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79, 78-80 (1998) ("statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Lower courts and litigants cannot veritably wait until the Supreme Court rules on every single controversy. District Courts have to take a stand on issues that are foreseeably in the offing. Judge Weinstein recently held Foxx to be a landmark decision Roberts v. UPS, Inc., 2015 U.S. Dist. LEXIS 97989, *40 (E.D.N.Y. July 27, 2015) and described how the arc of history over the last few decades - and, indeed, since the filing of this case - has changed markedly towards

gays and lesbians. Id. at 39-42. He noted that "[c]ongressional 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." (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citations omitted)). It so happened that Roberts case was a diversity matter filed by the plaintiff in federal court, that pled no cause of action under Title VII, merely five claims under the City Administrative Code. (I checked PACER as to this, and Judge Weinstein's analysis doesn't mention Title VII as a basis for plaintiff's claims.) His analysis as to Title VII is therefore dicta, but one of the most highly respected and smartest judges in the country cannot be ignored.

II. FOXX ALONE WOULD REQUIRE CHEVRON DEFERENCE

The question presented to the Court is whether, in the midst of circuit caselaw that goes in one direction, what should the court do when the agency that interprets the law in question comes out with a holding seemingly, but not entirely, contrary to the Circuit authority. First, the question would be whether Foxx would require Chevron deference in the first instance. Chevron requires a two-part test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, *the question for the court is whether the agency's answer is based on a permissible construction of the statute*.

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

A. Foxx Satisfies Chevron Step One: Statutory Ambiguity

Chevron deference is afforded to the adjudicatory function of the EEOC. See United States. v. Mead Corp., 533 U.S. 218, 226–27 (2001). See also Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325, 1335–36 (2011) citing Mead, 522 U.S. at 229, 234–35; City of Arlington, Tex. v. FCC, 133 S.Ct. 1863, 1874–75 (2013). Thus, the EEOC's commission decision in Foxx should be afforded deference insofar as its opinion resolves "ambiguities in statutes within [the] agency's jurisdiction to administer . . . [and] the agency [filled] the statutory gap in a reasonable fashion." Nat'l Cable & Tele. Comms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

Furthermore, as noted above in lengthy footnote 1, as well as Meritor, Title VII's legislative history does not address the meaning of the term "sex." Statutory terms are deemed "ambiguous" for Chevron purposes where no clear meaning can be divined after subjecting the text to traditional tools of statutory interpretation, including looking at the structure of the statute, drawing inferences of intent from statements of statutory goals, applying myriad canons of interpretation, and assessing statements from legislative history. K Mart Corp v. Cartier, Inc., 486 U.S. 281, 300 (1988). Where traditional tools of interpretation fail to divine definitive meaning, "ambiguity" is established. As such, the Supreme Court has repeatedly upheld that agency's interpretations pertaining to sex. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 679–83 (1983) (interpreting sex to include discrimination against men and to reach inequitable employer provided health benefits); Meritor, 477 U.S. at 65 (interpreting sex to include sexual harassment); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (interpreting sex to include gender and sex stereotyping); Oncale v. Sundowner Offshore

Servs., 523 U.S. 75, 78–79 (1998) (interpreting sex to include same-sex sexual harassment). Because the meaning of "sex" is ambiguous, Foxx satisfies the first step of Chevron.

B. Foxx Satisfies Chevron Step Two: Permissible Interpretation

Chevron step two is satisfied where the agency's interpretation is deemed to "reasonably effectuate Congress's intent for" the underlying statute and presents a tenable policy decision in light of statutory goals." Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007) citing Chevron, 467 U.S. at 845 ("If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," a court will not disturb that choice "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned."). See also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (noting deference at step two is afforded where the agency is deemed to have made a "reasonable policy choice" and quoting Chevron, 467 U.S. at 845).

As the Supreme Court has recognized elsewhere, Title VII's proscription of discrimination "because of . . . sex" reaches "reasonably comparable evils" that are captured by the statutory text even where they lie outside Congress' "principal" target at enactment. Oncale, 523 U.S. at 79 (Scalia, J.). Thus, although Congress did not expressly state that Title VII would reach male-on-male sexual harassment, the broad statutory proscription of all "discrimination because of . . . sex" necessarily captures it. Id. ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); see also Newport News, 462 U.S. at 697–81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal

problem that Title VII's prohibition of sex discrimination was enacted to combat). Moreover, the EEOC's interpretation of Title VII need not be the "best one" in order for it to be "reasonable." E.E.O.C. v. Commercial Office Products Co., 486 U.S. 107, 115 (1988) (affording Chevron deference and noting "it is axiomatic that the EEOC's interpretation of Title VII . . . need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be *reasonable* to be entitled to deference.") (emphasis added).

The reasonability of the interpretation of sex is made plain by the end of the decision where the Commission states,

> Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual 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. . . . Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.

Foxx at 6-7. There is nothing unreasonable about this interpretation and indeed it is self-evident. Furthermore, the Commission notes later in its decision that there is nothing in Title VII that protects "masculine women," "people in interracial relationships," women as "mothers," or non-religious people, but all of these categories are protected under Title VII. This analysis is unassailable, not just reasonable.

III. CHEVRON DEFERENCE SHOULD TRUMPS CIRCUIT AUTHORITY, AT LEAST WHERE THE AUTHORITY DID NOT ENGAGE IN A CHEVRON ANALYSIS

I have found two cases that mention in passing, but that do not discuss, a court's obligations under Chevron versus contrary circuit authority. In Nazif v. Computer Scis. Corp., 2015 U.S. Dist. LEXIS 78673 (N.D.Calif.2015), the district court noted the lack of circuit authority on a point for which there was agency authority in a footnote, p*17, n.5. The same is

true in Austin v. Jostens, Inc., 2008 U.S. Dist. LEXIS 83412 p*33 (D.Kan.2008). Both of these courts merely noted that there were no conflicts between Circuit and agency authority and did not analyze how to grapple with such a conundrum were it to exist. There is one decision, however, wherein the Ninth Circuit held on its own accord that Chevron deference trumped another form of statutory construction adopted by the Supreme Court in interpreting statutes pertaining to Indian Tribes. Confederated Salish & Kootenai Tribes v. United States, 343 F.3d 1193, 1198 (9th Cir. 2003). This decision is instructive insofar as the Ninth Circuit, without guidance from the higher court, decided that Chevron deference would trump other binding authority from the Supreme Court. So too must this Court decide whether newly created Chevron deference should trump Circuit authority that is obviously evolving. Further, I contend that Fowlkes v. Ironworkers Local 40, gives you that permission. The Circuit appointed counsel to the plaintiff in Fowlkes, whose case was dismissed because it had not been filed within ninety days (plus time for mailing) of the issuance of the right to sue letter. It allowed a healthy period of equitable tolling, however, noting that

> Fowlkes may have a colorable argument that filing a charge alleging discrimination based on his transgender status would have been futile. When Fowlkes filed his 2011 complaint, the EEOC had developed a consistent body of decisions that did not recognize Title VII claims based on the complainant's transgender status. . . . It was not until Macy v. Holder, published after Fowlkes filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute sex-based discrimination in violation of Title VII. . . . Thus, Fowlkes's failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had "taken a firm stand" against recognizing his Title VII . . . claims.

Fowlkes v. Ironworkers Local 40, 2015 U.S. App. LEXIS 10339, *17-18 (2d Cir. N.Y. June 19, 2015). The Circuit authority, indeed, had for the most part followed the earlier line of EEOC interpretation. See, e.g., Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) and Morales

v. ATP Health & Beauty Care, Inc., 2008 U.S. Dist. LEXIS 63540, *23 (D. Conn. Aug. 18, 2008) (citing Dawson). Now, all of the sudden, because of a new agency interpretation, a plaintiff is given the rare gift of an equitable tolling. This says something. This says that the Circuit looks to E.E.O.C. guidance in interpreting Title VII claims, and that you would be well advised to as well. Is the Circuit going to reverse you because you applied Chevron deference when it, too, is applying Chevron deference in a changing environment for sexual minorities? I don't see how a higher Court can insist that you afford deference under Chevron, yet simultaneously disregard it because of dated authority that does not afford Chevron deference. The Circuit, if this case reaches it, too, will have to give Chevron deference. As one commentator noted:

> Thus, if the Court's prior decision speaks in clear and unambiguous terms to the precise issue at hand, the prior decision should be controlling. But if the Court has not confronted the precise issue or if its holding is ambiguous, then the Court should uphold the agency's reasonable interpretation of the Court's precedent. This approach reconciles the values of stability, predictability, and rule of law underlying stare decisis with the advantages of flexibility and political accountability underlying Chevron.

Rebecca White, "The Stare Decisis "Exception" to the Chevron Deference Rule," 44 Florida Law Review 727-28 (1992). Chevron "broke new ground by invoking democratic theory as a basis for its deferential approach to judicial review." Thomas W. Merrill, "Judicial Deference to Executive Precedent," 101 Yale L.J. 969, 972-75 (1992) (discussing varying pre-Chevron methods used by the Supreme Court in determining when to defer to agency interpretation of statutes). As the Supreme Court has stated, "Precedent is not 'sacrosanct'; given a strong enough justification for overruling its precedent, the Court will not hesitate to do so." Patterson v. McClean Credit Union, 491 U.S.164, 172 (1989). The Second Circuit binds you to Chevron deference, New York

v. FERC, 783 F.3d 946 (2d Cir. 2015), and it recognized in Fowlkes, while not mentioning Chevron, that the agency's position has changed. Simonton cannot withstand Foxx, so you should recognize the change that is occurring and reinstate the Title VII claim.

IV. JUDICIAL ECONOMY MITIGATES IN FAVOR OF REINSTATING TITLE VII

During the conference, the Court noted that you would not prefer to allow the jury to deliberate on punitive damages, available under Title VII but not the New York Law, simply on the grounds of judicial economy. Nevertheless, I mention it again because with this new authority, it is almost certain that courts will adopt Foxx. It would be burdensome to everyone to retry a case on the grounds of punitive damages when, in the contingency that I am wrong - and I will not seek to execute a punitive damages judgment pending appeal, nor need we litigate attorneys' fees until a mandate issues - that we have to come back and do this all over again after five years of litigation and the death of the plaintiff. See, e.g., In Re: Nexium (Esomeprazole), slip op. (D.Mass July 30, 2015) (in discussing a trial, an experienced judge notes, "Like many judges, I reasoned that, since we were but a day away from submitting the case to the jury, the better part of valor lay in going to verdict and then unwinding it should I become convinced that the Defendants were entitled to judgment as matter of law."

CONCLUSION

Plaintiff asks that the Court reconsider the earlier order and reinstate the Title VII claim.

Dated: New York, New York
7 August 2015

/s/
Gregory Antollino, Esq.