

SECOND CIRCUIT REVIEW

Expert Analysis

A Step Toward Protection From Sexual Orientation Discrimination Under Title VII

On March 27, 2017, the U.S. Court of Appeals for the Second Circuit in *Christiansen v. Omnicom*, No. 16-748, 2017 WL 1130183 (2d Cir. 2017), declined to overrule its own precedent holding that discrimination on the basis of sexual orientation is not prohibited by Title VII of the Civil Rights Act of 1964. The three-judge panel ruled that it was bound by the decisions of prior panels until such time as they are overruled by an en banc panel of the court or by the Supreme Court.

The court nevertheless reversed the district court and held that Christiansen had adequately pleaded gender stereotype discrimination under Title VII. In addition, Chief Judge Robert Katzmann authored a separate concurrence, arguing that sexual orientation discrimination is discrimination

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“because of such individual’s... sex” under Title VII, thus inviting a request for an en banc review.

‘Simonton’ and ‘Dawson’

The relationship between gender stereotyping claims and sexual orientation discrimination claims under Title VII has caused confusion in the courts for years. Although Title VII prohibits discrimination because of an individual’s “sex,” the prohibition has not been interpreted to encompass discrimination on the basis of sexual orientation.

In *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), a postal worker sued under Title VII after being harassed at work because of his sexual orientation. The Second

Circuit relied heavily on Congress’s refusal to extend Title VII protection and affirmed the district court’s holding that Title VII does not prohibit sexual orientation discrimination. The court also held that Dwayne Simonton failed to plead sufficient facts to consider sex stereotype discrimination, but noted that these claims could “not

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bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.” 232 F.3d at 38.

In *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), a hairstylist sued her former employer, alleging that her termination was due to gender stereotyping or sexual orientation discrimination.

The Second Circuit affirmed summary judgment in favor of the employer. The court echoed the reasoning of *Simonton* and held that sexual orientation discrimination is not prohibited under Title VII, and that the alleged gender stereotyping discrimination was based on stereotypes about sexual orientation, rather than gender.

'Christiansen'

The Second Circuit's per curiam opinion in *Christiansen* was issued by Judge Katzmann, Judge Debra Livingston, and District Judge Margo Brodie. After the district court dismissed Matthew Christiansen's Title VII claim, he asked the Second Circuit to overrule *Simonton* and *Dawson*. The court refused to do so without an en banc panel, but held that Christiansen sufficiently alleged a Title VII gender stereotyping claim.

Christiansen, an openly gay and HIV-positive man, worked as a creative director at an advertising agency. His complaint alleged that his supervisor harassed him because of his effeminacy and his sexual orientation. For instance, the supervisor drew sexually explicit drawings of Christiansen on the office whiteboard, including one depicting Christiansen naked with an erect penis, holding an air pump and saying "I am so pumped for marriage equality." Later, the supervisor circulated

a "muscle beach party" image that depicted various employees' heads on bodies of people in swimwear. Christiansen's head was on a bikinied female lying on the ground with her legs in the air. Then, without knowing Christiansen had HIV, on several occasions his supervisor told Christiansen and other employees that Christiansen had AIDS because he was gay.

Although the Second Circuit refused to overrule *Simonton* and *Dawson*, it reversed the district court and held that Christiansen

The Second Circuit's decision and concurrence in 'Christiansen' indicates a willingness to expand Title VII to prohibit sexual orientation discrimination, or at least to view gender stereotyping more broadly.

plausibly alleged gender stereotype discrimination, relying on a Supreme Court case that held that adverse employment action rooted in "gender stereotyping" was actionable sex discrimination under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Second Circuit focused on the various instances of Christiansen's supervisor portraying him as effeminate, such as the "muscle beach party" image. The district court had examined this issue, but had held that because most allegations involved sexual

orientation discrimination, allowing Christiansen's sex stereotyping claim would "obliterate the line the Second Circuit has drawn, rightly or wrongly, between sexual orientation and sex-based claims." 2017 WL 1130183 at *3.

The Second Circuit held that Supreme Court precedent requires that, at a minimum, "stereotypically feminine" gay men could pursue a Title VII claim, and if a plaintiff's actual sexual orientation were relevant, homosexual individuals would have less protection against gender stereotyping than heterosexual ones. The court clarified that *Simonton* and *Dawson* hold only that "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype" under Title VII. *Id.* Here, the Second Circuit held that Christiansen's supervisor perceived him as effeminate and submissive, and harassed him for that reason.

'Christiansen' Concurrence

In a separate concurrence joined by Judge Brodie, Judge Katzmann urged the Second Circuit to revisit *Simonton* and *Dawson* in light of a changed legal landscape, and argued that the language of Title VII already encompasses discrimination on the basis of sexual orientation as traditional sex discrimination, associational discrimination, and gender stereotyping.

First, Katzmann argued that sexual orientation discrimination is sex discrimination “for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex.” *Id.* at *5. The Supreme Court has held that treating a person in a way that but for that person’s sex would be different is sex discrimination. Katzmann argued that because sexual orientation is necessarily tied to sex, sexual orientation discrimination is sex discrimination. He analogized the counterargument that same sex couples are only similarly situated to other same sex couples to the rejected argument that criminalizing interracial marriage harms all races equally, and concluded that “if gay, lesbian, or bisexual plaintiffs can show that but for their sex, they would not have been discriminated against for being attracted to men (or being attracted to women), they have made out a cognizable sex discrimination claim.” *Id.* at *6

Second, Katzmann argued that sexual orientation discrimination is associational discrimination. He relied on Second Circuit precedent holding that when an employer discriminates because of an employee’s association with someone of another race, the employee suffers because of their own race in relation to their associate. Accordingly, it makes no sense to exclude the

association of a same-sex relationship from these protections. He concluded that “if it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples.” *Id.* at *7.

Third, Katzmann argued that sexual orientation discrimination is unlawful gender stereotyping, because such discrimination is inherently rooted in gender stereotypes and motivated by a desire to enforce heterosexually defined gender norms, specifically that men should date women and vice-versa. Numerous district courts have also found this distinction between gender stereotyping and sexual orientation discrimination to be “unworkable” and too intermingled with one another.

Finally, Katzmann admitted that *Simonton* was understandably influenced by Congress’s repeated refusal to expand Title VII protections. He argued, however, that there are idiosyncratic reasons that bills do not become law, often entirely unrelated to any particular provision. The Supreme Court has warned judges to not rely too heavily on the “hazardous basis” of subsequent legislative history and that it is a statute’s text that ultimately binds the courts.

Conclusion

The Second Circuit’s decision and concurrence in *Christiansen*

indicates a willingness to expand Title VII to prohibit sexual orientation discrimination, or at least to view gender stereotyping more broadly. Katzmann’s concurrence invites the Second Circuit to accept this issue en banc, although the Supreme Court is also likely to address the issue, especially now that the U.S. Court of Appeals for the Seventh Circuit has used similar reasoning as Katzmann to hold that sexual orientation discrimination is prohibited by Title VII. See *Hively v. Ivy Tech Cmty. Coll. of Indiana*, No. 15-1720, 2017 WL 1230393 (7th Cir. April 4, 2017).