15-3775

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MELISSA ZARDA AND DONALD MOORE AS INDEPENDENT CO-EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Plaintiffs-Appellants,

— against —

ALTITUDE EXPRESS d/b/a SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF NEW YORK STATE UNITED TEACHERS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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AMICUS CURIAE BRIEF OF NEW YORK STATE UNITED TEACHERS

Corporate Disclosure Statement

Amicus curiae New York State United Teachers ("NYSUT") has no parent corporation(s), does not have shareholders, and does not issue stock.

Rule 35(b) Statement of Counsel[1]

The Court's decision, which held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et. seq.* does not extend to discrimination on the basis of sexual orientation, should be reversed. *Zarda v. Altitude Express*, 855 F.3d 76 (2d.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part. No party, party's counsel, or other person – other than *amicus curiae*, its members, or its counsel – has contributed money intended to fund preparing or submitting the brief.

Cir. 2017). Although the Court relied upon its own precedent, that precedent can no longer stand in light of more recent jurisprudence from across the nation, and this court, sitting *en banc*, can and should reverse it. Specifically, the Court's prior rulings in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d. Cir 2005) directly conflict with the recent authoritative decision of the Seventh Circuit. On April 4, 2017, the United States Court of Appeals for the Seventh Circuit sitting *en banc* reversed its precedent in *Hively v. Ivy Tech. Comm.Coll.*, 853 F.3d 339 (7th Cir. 2017), and held that sex discrimination under Title VII does include discrimination on the basis of sexual orientation. This question, whether Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination, is one of exceptional importance to the plaintiff and the *amicus*. Therefore, the Second Circuit should now join the Seventh Circuit and hold that sex discrimination under Title VII includes discrimination on the basis of sexual orientation.

Statement of Interest

The issue presented by this case is of great importance to the over 675,000 active public and private sector members of New York State United Teachers ("NYSUT"), all of whom are employees in New York who rely on Title VII for protection from employment discrimination. NYSUT represents employees who are teachers and other school-related professionals such as social workers, school secretaries, guidance counselors, teaching assistants and numerous other dedicated individuals within the schools. NYSUT further represents professors and other professional employees at State University of New York ("SUNY"), City University of New York ("CUNY"), at thirty-five community colleges and other institutions of higher learning. NYSUT additionally represents a wide range of employees in the private-sector, including teachers, nurses, aides, child-care providers, and other human services employees.

Because it represents so many employees covered by Title VII, NYSUT has a significant and substantial interest in ensuring that all of its members are afforded full protections under the law against illegal discrimination. Indeed, the NYSUT Constitution requires it to, among other things, expose and fight all forms of racism and discrimination. NYSUT also has an interest in guaranteeing that its members have access to the forum of their choice, in the event they do face such

discrimination. Finally, NYSUT has an interest in confirming that its members are able to pursue the full range of remedies available to those hurt by employment discrimination. These interests extend to NYSUT's lesbian, gay, and bisexual ("LGB") members.

The Court's decision on this matter will greatly impact the protections against illegal discrimination and the remedies available to hundreds of thousands of employees in New York that NYSUT represents as members. Accordingly, NYSUT respectfully submits this *amicus curiae* brief in support of Plaintiffs-Appellants.

ARGUMENT

THE COURT'S DECISION LEAVES NYSUT'S LGB MEMBERS WITHOUT THE FULL PROTECTION OF THE CIVIL RIGHTS ACT

The landmark Civil Rights Act of 1964 ("the Act") provides protection against discrimination on the basis of race, color, religion, national origin, and sex. Title VII of the Act makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual 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). Under the plain meaning of the Act, when making hiring, firing, or other

employment decisions, employers may not discriminate against their employees by taking into account their sex.

However, under this Court's precedent, LGB individuals who face sex-based discrimination at work do not have full recourse to assert a claim under Title VII. Those employees lack the same breadth of protection possessed by their heterosexual peers. Such employees face the risk of adverse employment action motivated by sex-based discrimination and have no recourse under the Act, solely because they are not heterosexual.

This reality contravenes the purpose of the Act: "to provide equality of employment opportunities." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Under the decisions issued by this Court, LGB individuals do not possess such equality, due to their inability to assert the rights guaranteed to them by the Act to the same extent as their heterosexual peers. Such equality cannot be achieved unless and until this Court's revisits its decisions in *Simonton* and its progeny, and affords LGB employees the full rights guaranteed to them by the Act.

A. Sexual Orientation Discrimination is Sex Discrimination

Discrimination on the basis of sexual orientation is, by definition, discrimination on the basis of sex. But, it is not actionable under this Court's decisions. It is impossible, however, to distinguish a claim of sexual orientation

discrimination from a claim of sex discrimination, because an individual's orientation necessarily requires reference to his or her sex.

For example, an individual attracted to men cannot be said to be gay or straight without knowledge and mention of his or her gender. Sex and sexual orientation are so entwined that one simply cannot be discussed or considered without reference to the other. An employer taking an adverse employment action against an employee on the basis of his or her sexual orientation is, clearly, also basing that decision on the employee's sex. Put simply, an action taken against a male employee attracted to other men that would *not* have been taken against a similarly-situated female employee member attracted to men is discrimination on the basis of sex because the only difference between the two employees is that one is male and the other is female. All forms of sex discrimination are prohibited by the Act and, therefore, an employer's discrimination on the basis of sexual orientation also should be actionable.

Notably, the Equal Employment Opportunity Commission ("EEOC") recently recognized that sex and sexual orientation are inescapably interconnected and cannot be considered in isolation. *Baldwin v. Foxx*, 2015 WL 4397641, at *4-*5 (E.E.O.C. July 15, 2015). Furthermore, the EEOC concluded that "allegations of discrimination on the basis of sexual orientation necessarily state a claim on the basis of sex." *Id.* at *7. This is because of the direct relation between sex

stereotypes of who a "real" man or woman should date. *See Baldwin*, at *8; *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

Other courts have similarly adopted the common sense conclusion that an adverse employment action motivated by sexual orientation discrimination is, fundamentally, discrimination on the basis of sex. *Hively v. Ivy Tech. Comm. Coll.*, 853 F.3d 339 (7th Cir. April 4, 2017)(*en banc*); *Philpott v. New York*, No. 16-cv-6778, 2017 WL 1750398 (S.D.N.Y. May 3, 2017); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F.Supp.3d 1334, 1341–47 (N.D. Fla. 2016); *U.S. Equal Employment Opportunity Commission v. Scott Medical Health Ctr. P.C.*, 217 F.Supp.3d 834 (W.D. Penn. Nov. 4, 2016); *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190, 1193-94 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1159-61 (C.D. Cal. 2015); *Boutillier v. Hartford Pub. Schs.*, No. 3:13CV1303 WWE, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014); *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1224 (D. Or. 2002). These courts have recognized that Title VII provides recourse for *all* employees victimized by sex discrimination.

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) Justice Scalia, writing for a unanimous Court, held that employees could assert a claim of sexual harassment against individuals of the same sex. *Oncale*, at 79. Specifically, the Court could "see no justification in the statutory language or [their] precedents

for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.* It has long been held that sexual harassment *is* sex discrimination prohibited by the Act. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986). According to the Supreme Court, claims under Title VII may result from interactions between members of the same sex. There is no reason, under the language of the Act or binding precedent, to only allow such claims to be asserted in cases of sexual harassment, rather than all forms of sex discrimination, including sex discrimination based on sexual orientation.

Unfortunately, this Court rejected that common sense argument in *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000). NYSUT urges the Court *en banc* to reconsider that decision. It is illogical that, under the Act, employees have recourse if they are victimized following rejection of sexual advances by a same-sex supervisor, but have no such recourse if that same supervisor discriminates against the employee for being in a same-sex relationship or being attracted to members of the same sex.

B. Sexual Orientation Discrimination is Sex Stereotyping

The protections under Title VII apply, of course, when there is direct evidence of sex discrimination, but they also apply to adverse employment actions motivated by the employee's failure to comply with sexual stereotypes. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that

employers may not rely upon such stereotypes when making employment decisions. In that decision, the Court reiterated its holding in *City of Los Angeles Dept. of Water & Power v. Manhart Stations* that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." 435 U.S. 702, n.13 (1978) (internal citations omitted) (emphasis added). The employee in *Price Waterhouse* asserted that her employer denied her a promotion on the grounds that she was "macho," used profanity, and otherwise exhibited traditionally "masculine" traits. *Price Waterhouse*, at 235. In holding that her claim was actionable, the Court concluded that it is "beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251. In other words, an employer who takes an adverse employment action against an employee on the basis that he or she does not conform with the employer's conception of how individuals of that sex should look, speak, or act is in violation of the Act's prohibition against sex discrimination.

In examining sex-stereotyping claims brought by employees, this Court has held that the question of what constitutes a stereotype "must be answered in the particular context in which it arises, and without undue formalization." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004). In

determining whether an adverse employment action resulted from prohibited sex-stereotyping, courts must look at the particularized facts surrounding the allegation to determine the motive behind the adverse action. *Id.* Clearly, the view that women cannot both be good mothers and hold jobs with long hours is discriminatory. *Id.*

Applying that rule here, it is plainly evident that adverse employment actions based on an employee's sexual orientation is necessarily based in that employee's failure to comport with a sex stereotype. Namely, that men should be attracted to women, and women should be attracted to men.

Yet LGB employees cannot assert a claim of sex stereotype discrimination to the same extent as their heterosexual colleagues. A heterosexual employee can put forth a claim that they have been discriminated against due to a real or perceived failure to comport with *any* trait stereotypically associated with his or her gender. For example, this Court found a valid claim of discrimination where supervisor commented on propensity of men to commit sexual harassment. *Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009).

Under this Court's existing precedent, LGB employees do not have the same broad right to allege sex stereotype discrimination as straight employees have, given that they cannot allege that their employee's adverse employment action was motivated by their non-compliance with gendered attraction stereotypes. In

Simonton v. Runyon, this Court held that under Title VII of the Act, a sexual orientation claim could not be "bootstrapped" into a sex stereotyping claim. 232 F.3d 33, 38 (2d Cir. 2000). *See also Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005). This is plainly incorrect; it conflicts with both the stated purpose of the Act and the decisions issued by this Court addressing sex stereotyping.

LGB employees and other employees, asserting sex stereotyping would not be "bootstrapping" their claims, but asserting rights under Title VII that belong to all employees, regardless of their sexual orientation. There is nothing in the Act to suggest that LGB individuals cannot claim discrimination due to their failure to comply with traditional stereotypes of gender attraction while, hypothetically, any other individual *can* claim discrimination due to a failure to comply with any other sex stereotype. Yet this is the result following this Court's decisions in *Simonton* and its similar cases. A heterosexual employee hurt by *any* sex stereotyping has a claim under Title VII, but an LGB employee is limited in the type of sex stereotyping he or she can allege.

Indeed, other courts have recognized the illogic and impracticality of drawing a line between discrimination based on nonconformity with gender-based sexual orientation norms and all other such norms. *E.g.*, *Hively*, at 346. The Seventh Circuit recently held that a claim alleging non-compliance with sexual

orientation stereotypes "is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing." *Id.*

Title VII plainly prohibits all adverse employment actions that rely upon consideration of sex stereotypes, including the stereotype that men and women should be attracted to members of the opposite sex. According to the Supreme Court, Congress intended the Act to combat the "*entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Manhart*, at 707 (internal citations omitted) (emphasis added). By extending stereotyping protection to those who do not conform to traditional standards of gender attractiveness, this Court would be fulfilling that Congressional purpose for employees subject to, or potentially subject to, discrimination due to that non-conformance.

C. Sexual Orientation Discrimination is Associational Discrimination

This Court's precedent also leaves LGB individuals without recourse under the Act if they are victimized by "associational discrimination," or discrimination not on the basis of the employee's own gender but, rather, on the gender of their romantic partner. This Court has recognized associational discrimination as actionable since 2008, when it found 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." *Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008). In that case, this Court reversed the decision of the district court that employees cannot assert a claim under Title VII when they allege discrimination on the basis of being in an interracial relationship. Specifically, it was held that such individuals *may* assert such a claim because the employee would not have faced such discrimination had they been a member of the same race as their spouse. *Id.* at 139.

Under *Simonton* and this Court's related decisions, a NYSUT member has no claim under the Act if he or she faces employment discrimination for being in a relationship with an individual of the same sex. The same standard applies to both race and sex-based claims brought under the Act. *See, e.g., Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 436, n.2 (2d Cir. 1999). Indeed, there is nothing in the language of the Act or in any relevant case law establishing any distinction between claims alleging racial discrimination and those alleging sex discrimination, and there is no justification for allowing associational discrimination claims on the grounds of race but not sex. The Act prohibits adverse employment action motivated by an employee's membership in a protected class, including both race and sex. 42 U.S.C. § 2000e-2(a)(1). There is no dividing line between race-based and sex-based claims, so there should be no

reason that the logic of decisions in race discrimination cases should not be equally applicable to those alleging sex discrimination.

The Act does not expressly prohibit discrimination on the basis of being in an interracial relationship, but such discrimination has been prohibited by this court since it issued its decision in *Holcomb*. The Act also does not expressly prohibit discrimination on the basis of being in a same-sex relationship, but this Court has not extended similar protection to that circumstance. This Court has not yet recognized that, under the Act and its own case law, there is no justification to extend protection against associational discrimination on the basis of race but not on the basis of sex.

This leaves LGB employees without the full protection guaranteed to them by the Act. Straight employees in interracial relationships are plainly protected from discrimination due to their non-conformance with traditional race-based norms of relationships. But LGB employees, who also do not conform to traditional relationship norms, are left without such protection. The Act, however, makes clear that employment discrimination is prohibited when based on either race *or* sex. The relevant provisions of Title VII apply to both race-based claims and sex-based claims. As such, NYSUT respectfully requests that the Court extend its holding from *Holcomb* to include associational discrimination on the basis of sex.

II. ALL NYSUT MEMBERS SHOULD HAVE EQUAL ACCESSS TO STATE AND FEDERAL FORA TO BRING CLAIMS OF SEX DISCRIMINATION

As discussed above, discrimination on the basis of sexual orientation is discrimination on the basis of sex prohibited under Title VII and, therefore, should be actionable. In fact, as noted above, the EEOC has already taken the position that "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin*, 2015 WL 4397641 *at 5. The EEOC correctly reached this determination because discrimination on the basis of sexual orientation typically involves stereotyping about the proper sex of who should be in romantic relationships.

Title VII protections should extend to all employees under a plain reading of the Act and subsequent decisions interpreting it. Now, LGB employees who face illegal discrimination in the workplace can only seek protections under Title VII if they assert a sex stereotyping claim. Thus, employers can blatantly argue that they discriminated against employees not due to a sex stereotype but due to their sexual orientation. Therefore, the law, as it stands, leaves LGB employees vulnerable to illegal adverse employment action without the reassurance that they are protected from that which Title VII aims to prevent.

Additionally, although employees can avail themselves of the state and local statutes covering sexual orientation discrimination, such as New York State

Human Rights Law ("NYSHRL"), N.Y. Exec. Law §297 *et. al.*, and New York City Human Rights Law ("NYCRHL"), N.Y.C. Admin. Code §8-120, there are differences amongst the statutes with respect to available remedies. Notably, punitive damages are not obtainable under the NYSHRL leaving employees outside of New York City without the ability to obtain such a remedy at all. LGB employees who have been discriminated against in their employment because of their sex should not be limited to a particular forum but should, instead, possess the same right to forum selection held by their heterosexual peers. NYSUT urges this Court to extend Title VII to cover sexual orientation discrimination, as such claims clearly fall within the coverage of discrimination "because of sex."

CONCLUSION

This Court should hold that sexual orientation discrimination is discrimination on the basis of sex and, therefore, prohibited by Title VII. Sexual orientation discrimination is sex discrimination on grounds contemplated by other courts and in the broad language of Title VII. The Court's unworkable precedent in *Simonton* should be overturned.

Dated: June 23, 2017
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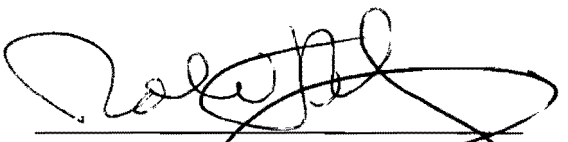
CERTIFICATION PURSUANT TO LOCAL RULES

Pursuant to Fed. R. App. P. 32(a)(7)(c), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 3,309 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(c)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: June 23, 2017



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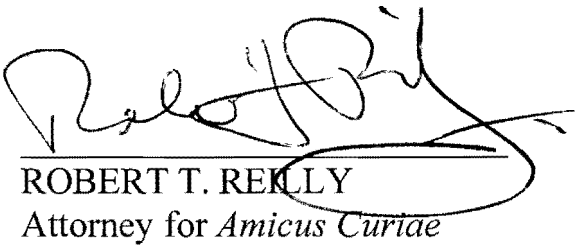
CERTIFICATE OF SERVICE

The undersigned certifies that on June 26, 2017, they electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's CM/ECF system. The undersigned certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 26, 2017



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