UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: January 20, 2017 Decided: March 27, 2017)

Docket No. 16-748

ANONYMOUS,

Plaintiff,

MATTHEW CHRISTIANSEN,

Plaintiff-Appellant,

– v. –

OMNICOM GROUP, INCORPORATED, DDB WORLDWIDE COMMUNICATIONS GROUP INCORPORATED, JOE CIANCIOTTO, PETER HEMPEL, AND CHRIS BROWN,

Defendants-Appellees.

B e f o r e:

ROBERT A. KATZMANN, *Chief Judge*, DEBRA ANN LIVINGSTON, *Circuit Judge, and* MARGO K. BRODIE, *District Judge*.[*]

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[*] Judge Margo K. Brodie, of the United States District Court for the Eastern District of New York, sitting by designation.

Plaintiff-appellant Matthew Christiansen brought this action against his employer under, *inter alia*, Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*., alleging that he was subjected to various forms of workplace discrimination due to his failure to conform to gender stereotypes. The United States District Court for the Southern District of New York (Failla, *J*.) construed Christiansen's Title VII claim as an impermissible sexual orientation discrimination claim and dismissed it pursuant to *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). On appeal, Christiansen argues that we should reconsider our decision in *Simonton* and hold that Title VII prohibits discrimination on the basis of sexual orientation. This panel lacks the authority to reconsider *Simonton*, which is binding precedent. However, we hold that Christiansen's complaint plausibly alleges a gender stereotyping claim cognizable under the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Therefore, we **REVERSE** the district court's dismissal of Christiansen's Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

KATZMANN, *Chief Judge*, and BRODIE, *District Judge*, concur in a separate opinion.

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HOWARD J. RUBIN (Shira Franco and Judith Kong, *on the brief*), Davis & Gilbert LLP, New York, NY, *for Defendants-Appellees* Omnicom Group Incorporated, DDB Worldwide Communications Group Incorporated, Peter Hempel, and Chris Brown.

RICK OSTROVE, Leeds Brown Law, P.C., Carle Place, NY, *for Defendant-Appellee* Joe Cianciotto.

BARBARA L. SLOAN, Attorney, Equal Employment Opportunity Commission, Office of General Counsel, Washington, D.C. (P. David Lopez, General Counsel; Jennifer S. Goldstein, Associate General Counsel; and Margo Pave, Assistant General Counsel, Equal Employment Opportunity Commission, Office of General Counsel, Washington, D.C., *on the brief*), *for Amicus Curiae* Equal Employment Opportunity Commission, *in support of Plaintiff-Appellant*.

Lenora M. Lapidus, Gillian L. Thomas, Ria Tabacco Mar, and Leslie Cooper, American Civil Liberties Union Foundation, New York, NY; Erin Beth Harrist, Robert Hodgson and Christopher Dunn, New York Civil Liberties Union Foundation, New York, NY, *for Amici Curiae* American Civil Liberties Union; New York Civil Liberties Union; 9to5, National Association of Working Women; A Better Balance; American Association of University Women; California Women's Law Center; Coalition of Labor Union Women; Equal Rights Advocates; Gender Justice; Legal Momentum; Legal Voice; National Association of Women Lawyers; National Partnership for Women and Families; National Women's Law Center; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland; Women's Law Project, *in support of Plaintiff-Appellant*.

Peter T. Barbur, Cravath, Swaine & Moore LLP, New York, NY, *for Amici Curiae* 128 Members of Congress, *in support of Plaintiff-Appellant*.

Shannon P. Minter and Christopher F. Stoll, National Center for Lesbian Rights, San Francisco, CA, *for Amicus Curiae* National Center for Lesbian Rights, *in support of Plaintiff-Appellant*.

Michael D.B. Kavey, Brooklyn, NY; Omar Gonzalez-Pagan, Lambda Legal Defense and Education Fund, Inc., New York, NY; Gregory R. Nevins, Lambda Legal Defense and Education Fund, Inc., Atlanta, GA, *for Amicus Curiae* Lambda Legal

Defense and Education Fund, Inc., *in support of Plaintiff-Appellant*.

PER CURIAM:

Plaintiff-appellant Matthew Christiansen sued his employer, supervisor, and others affiliated with his company (collectively, "defendants") under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq*., Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*., and state and local law alleging that he was discriminated against at his workplace due to, *inter alia*, his HIV-positive status and his failure to conform to gender stereotypes. The United States District Court for the Southern District of New York (Failla, *J*.) dismissed Christiansen's federal claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and declined to exercise supplemental jurisdiction over his state and local claims. *See Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 612, 616–18, 622 (S.D.N.Y. 2016). In its decision, the district court concluded that *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), holding that Title VII does not prohibit discrimination on the basis of sexual orientation, precluded Christiansen's Title VII claim. *Christiansen*, 167 F. Supp. 3d at 618, 622.

Christiansen primarily appeals this aspect of the district court's decision.[1]

I. BACKGROUND

Christiansen, an openly gay man who is HIV-positive, worked as an associate creative director and later creative director at DDB Worldwide Communications Group, Inc., an international advertising agency and subsidiary of Omnicom Group, Inc. Christiansen's complaint alleged that his direct supervisor engaged in a pattern of humiliating harassment targeting his effeminacy and sexual orientation. According to Christiansen, in the spring and summer of 2011, his supervisor drew multiple sexually suggestive and explicit drawings of Christiansen on an office whiteboard. The most graphic of the images depicted a naked, muscular Christiansen with an erect penis, holding a manual air pump and accompanied by a text bubble reading, "I'm so pumped for marriage equality." J.A. at 16 ¶ 34.C; J.A. at 42. Another depicted Christiansen in tights and a low-cut shirt "prancing around." J.A. at 16 ¶ 34.A; J.A. at 40. A

[1] Christiansen also purports to challenge the district court's dismissal of his ADA claim for failure to comply with the statute of limitations. The district court, however, did not dismiss the ADA claim on this basis and instead concluded that Christiansen did not allege facts constituting discrimination under the ADA. *Christiansen*, 167 F. Supp. 3d at 613–17. We thus need not consider Christiansen's statute of limitations argument, and we affirm the district court's dismissal of Christiansen's ADA claim.

third depicted Christiansen's torso on the body of "a four legged animal with a tail and penis, urinating and defecating." J.A. at 16 ¶ 34.B; J.A. at 41. Later in 2011, Christiansen's supervisor circulated at work and posted to Facebook a "Muscle Beach Party" poster that depicted various employees' heads on the bodies of people in beach attire. J.A. at 13 ¶ 30. Christiansen's head was attached to a female body clad in a bikini, lying on the ground with her legs upright in the air in a manner that one coworker thought depicted Christiansen as "a submissive sissy." J.A. at 13 ¶ 30; J.A. at 43.

Christiansen's supervisor also made remarks about the connection between effeminacy, sexual orientation, and HIV status. The supervisor allegedly told other employees that Christiansen "was effeminate and gay so he must have AID[S]." J.A. at 15 ¶ 30. Additionally, in May 2013, in a meeting of about 20 people, the supervisor allegedly told everyone in the room that he felt sick and then said to Christiansen, "It feels like I have AIDS. Sorry, you know what that's like." J.A. at 17 ¶ 38. At that time, Christiansen kept private the fact that he was HIV-positive.

On October 19, 2014, Christiansen submitted a complaint to the Equal Employment Opportunity Commission ("EEOC") detailing the harassment

described above. After receiving a "Notice of Right to Sue" from the EEOC, Christiansen filed this lawsuit in the United States District Court for the Southern District of New York on May 4, 2015. Shortly thereafter, defendants moved to dismiss the complaint. In their motion to dismiss, defendants argued, *inter alia*, that Christiansen's claim under Title VII was a sexual orientation discrimination claim rather than a gender stereotyping claim and was thus not cognizable under *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

The district court agreed. In its decision, the district court described at length difficulties in distinguishing sexual orientation discrimination claims from gender stereotyping claims, specifically noting that negative views people hold of those with certain sexual orientations may be based on stereotypes about appropriate romantic associations between men and women. *See Christiansen*, 167 F. Supp. 3d at 619–20. Having reviewed the decisions of other district courts addressing this issue in the wake of *Simonton* and *Dawson*, the district court concluded that "no coherent line can be drawn between these two sorts of claims." *Id.* at 620. Nevertheless, the district court recognized that "the prevailing law in this Circuit—and, indeed, every Circuit to consider the question—is that

such a line must be drawn." *Id*. Although the district court considered several references to effeminacy in the complaint, it concluded that, as a whole, Christiansen's complaint did not allege that he was discriminated against because he did not conform to gender stereotypes, but because he was gay. *Id*. at 620–22. As a result, the district court held that Christiansen's claim was a sexual orientation discrimination claim that was not cognizable under Title VII pursuant to *Simonton* and *Dawson* and dismissed the claim under Rule 12(b)(6). *Id.* at 622.

II. DISCUSSION

"We review a District Court's grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim *de novo,* accepting the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014) (internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet this standard, a plaintiff must "plead[] factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). On appeal, Christiansen argues, supported by various *amici*, that we should reconsider our decisions in *Simonton* and *Dawson* in light of a changed legal landscape and hold that Title VII's prohibition of discrimination "because of . . . sex" encompasses discrimination on the basis of sexual orientation. Because we are "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court," *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004), "it [is] ordinarily . . . neither appropriate nor possible for [a panel] to reverse an existing Circuit precedent," *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009). We thus lack the power to reconsider *Simonton* and *Dawson*.

However, we disagree with the district court's conclusion that Christiansen failed to plausibly allege a Title VII claim based on the gender

stereotyping theory of sex discrimination articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which is also binding on this panel. In *Price Waterhouse*, the female plaintiff, a senior manager at an accounting firm, was described as "macho" and "masculine" and informed that "to improve her chances for partnership, . . . [she] should walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 231–32, 235 (internal quotation marks omitted). After her office declined to nominate her for partnership, she sued under Title VII alleging sex discrimination. *Id*. at 231–33. Six members of the Supreme Court held that adverse employment action rooted in "sex stereotyping" or "gender stereotyping" was actionable sex discrimination. *Id*. at 250–52 (plurality); *see also id*. at 258 (White, J., concurring); *id*. at 272–73 (O'Connor, J., concurring).

Here, as noted above, Christiansen's complaint identifies multiple instances of gender stereotyping discrimination. His complaint alleges that his supervisor described him as "effeminate" to others in the office, J.A. at 15 ¶ 30, and depicted him in tights and a low-cut shirt "prancing around," J.A. at 16 ¶ 34.A; J.A. at 40. The complaint further alleges that the "Muscle Beach Party" party poster, depicting Christiansen's head attached to a bikini-clad female body

lying on the ground with her legs in the air, was seen by at least one coworker as portraying Christiansen "as a submissive sissy." J.A. 13 ¶ 30. The district court acknowledged these facts but concluded that because Christiansen's complaint contained fewer allegations about his effeminacy than about his sexual orientation, the allegations about his effeminacy did not "transform a claim for discrimination that Plaintiff plainly interpreted—and the facts support—as stemming from sexual orientation animus into one for sexual stereotyping." *Christiansen*, 167 F. Supp. 3d at 621. The district court also opined that permitting Christiansen's Title VII claim to proceed "would obliterate the line the Second Circuit has drawn, rightly or wrongly, between sexual orientation and sex-based claims." *Id.* at 622.

The district court's decision draws attention to some confusion in our Circuit about the relationship between gender stereotyping and sexual orientation discrimination claims. Some district courts in this Circuit have viewed *Simonton* and *Dawson* as making it "especially difficult for gay plaintiffs to bring" gender stereotyping claims. *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011); *see also Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332–33 (N.D.N.Y.

2016) ("The critical fact under the circumstances is the actual sexual orientation of the harassed person."). Such cases misapprehend the nature of our rulings in *Simonton* and *Dawson*. While *Simonton* observed that the gender stereotyping theory articulated in *Price Waterhouse* "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine," 232 F.3d at 38, it acknowledged that, at a minimum, "stereotypically feminine" gay men *could* pursue a gender stereotyping claim under Title VII (and the same principle would apply to "stereotypically masculine" lesbian women). *Simonton* and *Dawson* do not suggest that a "masculine" woman like the plaintiff in *Price Waterhouse*, 490 U.S. at 235, has an actionable Title VII claim unless she is a lesbian; to the contrary, the sexual orientation of the plaintiff in *Price Waterhouse* was of no consequence. In sum, gay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals. *Simonton* and *Dawson* merely hold that being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim.

The gender stereotyping allegations in Christiansen's complaint are cognizable under *Price Waterhouse* and our precedents. Christiansen alleges that he was perceived by his supervisor as effeminate and submissive and that he was harassed for these reasons. Furthermore, the harassment to which he was subjected, particularly the "Muscle Beach Party" poster, is alleged to have specifically invoked these "stereotypically feminine" traits. *Simonton*, 232 F.3d at 38. The district court commented that much more of the complaint was devoted to sexual orientation discrimination allegations than gender stereotyping discrimination allegations[2] and that it thus might be difficult for Christiansen to withstand summary judgment or prove at trial that he was harassed because of his perceived effeminacy and flouting of gender stereotypes rather than because of his sexual orientation. Even if that were Christiansen's burden at summary judgment or at trial—and we do not hold here that it is—it is not our task at the

[2] This highlights an issue that may arise when a plaintiff alleges discrimination under Title VII as well as under state and local laws that *do* prohibit sexual orientation discrimination. *See, e.g.*, N.Y. Exec. Law § 296(1)(a); N.Y.C. Admin. Code § 8-107(1)(a). In such a case, one would expect a plaintiff to detail alleged instances of sexual orientation discrimination in violation of state and local law alongside alleged instances of gender stereotyping discrimination in violation of federal law. When evaluating such a complaint, courts should not rely on the mere fact that a complaint alleges sexual orientation discrimination to find that a plaintiff fails to state a separate claim for gender stereotyping discrimination, but should instead independently evaluate the allegations of gender stereotyping.

motion to dismiss stage to weigh the evidence and evaluate the likelihood that Christiansen would prevail on his Title VII gender stereotyping claim. Instead, we assess whether he has "state[d] a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). We hold that he has.[3]

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's dismissal of Christiansen's Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

[3] Defendants argue on appeal that Christiansen's Title VII claim is time-barred. Christiansen responds that the continuing violation doctrine and equitable estoppel apply to his claims. Because the district court did not reach the time-bar issue below, we will not decide it here in the first instance. Instead, we leave it to the district court to determine, on remand, whether Christiansen's claims are time-barred.