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Title VII and Sexual Orientation – Front and Center at the Second Circuit on Inauguration Day

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As President-Elect Donald Trump moved into the White House on Inauguration Day last Friday, the excitement and political tensions were not confined to the nation's capital. LGBTQ rights supporters decorated with rainbow ties and socks filled the Second Circuit courtroom that morning to hear oral argument on a charged issue in *Matthew Christiansen v. Omnicom Group, Inc. et al.*, No. 16-748-cv.

In this case, Matthew Christiansen, a homosexual advertising executive, sued his employer, DDB Worldwide Communications Group Inc., for discrimination based on sexual orientation under Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination by an employer against an employee on the basis of "sex," but does not explicitly prohibit discrimination on the basis of "sexual orientation."

At the hearing, rather than rely on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) to argue that sexual orientation discrimination is *akin* to "sex" discrimination, Christiansen's counsel argued that the Second Circuit should "revisit" *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000)—a case that held that Title VII does not cover discrimination based on sexual orientation. *Id.* at 35. The EEOC similarly argued on behalf of Christiansen that *Simonton* is outdated, and moreover, that Title VII does in fact protect sexual orientation (citing its decision in *Baldwin v. Foxx*, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (EEOC July 16, 2015)).

Chief Judge Katzmann quoted Justice Scalia's opinion in *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, 79 (1998), which stated that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," when he asked counsel for Joe Cianciotto (Christiansen's supervisor) whether he believed sexual orientation was a "comparable evil" and a moral wrong. The entire courtroom, including myself, sat silently and eagerly waiting for counsel's response. Surprisingly, rather than skirt the question by stating that it is Congress' role to amend the Civil Rights Act of 1964 to include sexual orientation and not this Court's, counsel answered "yes" – it is a moral wrong.

This case shows that sexual orientation discrimination under Title VII is still a hot legal issue for employers to keep on their radar. If the Second Circuit, contrary to the Seventh Circuit's decision in *Hively v. Ivy Tech Community College*, determines that sexual orientation discrimination is covered under Title VII, the Supreme Court could be forced to rule on this circuit split. *See our past blog post on this subject.* Employers stay tuned.