

# Client Alert **Employment & Labor**

## *Updates on Title VII Sexual Orientation Discrimination and Essential Functions under the ADA from the Second Circuit*

### **Second Circuit Rules that Employees May Sue for Sexual Orientation Stereotyping under Title VII**

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On March 27, 2017, the Second Circuit revived the lawsuit of a gay, HIV-positive executive, who alleged that a subsidiary of Omnicom Group Inc. violated Title VII of the Civil Rights Act by permitting harassment and discriminatory conduct directed towards him because he failed to conform to gender stereotypes. In *Christiansen v. Omnicom Group, Inc.*, No. 16-748, Christiansen claimed that his direct supervisor repeatedly mocked him due to his sexuality and perceived effeminacy.

Specifically, he claimed that his supervisor drew sexually explicit drawings of him on an office whiteboard, as well as other inflammatory images and also made remarks about the connection between effeminacy, sexual orientation, and HIV status.

Christiansen filed suit under Title VII and state and local law, alleging discrimination based on HIV-positive status and failure to conform to gender stereotypes. The Southern District of New York dismissed his federal claims, holding that Title VII does not bar discrimination on the basis of sexual orientation under the Second Circuit precedent established in *Simonton v. Runyon* and *Dawson v. Bumble & Bumble*. The district court further determined that Christiansen's discrimination claims focused more on his sexuality than his effeminacy, which undercut his sex stereotyping argument.

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In reversing the district court's decision, the Second Circuit found that the district court erred on the sex stereotyping claim. The panel noted that the Supreme Court determined in *Price Waterhouse v. Hopkins* that sex discrimination does encompass "sex stereotyping," the mistreatment of employees because they do not conform to gender norms. The discrimination faced by Christiansen—ridicule due to being perceived as overly feminine and insufficiently masculine—constituted sex stereotyping under *Price Waterhouse*, and thus his claim was viable under Title VII.

Other circuit courts may follow suit and hold that Title VII protects against sexual orientation discrimination on the basis of stereotyping. The Seventh Circuit, for example, reheard the lawsuit of a professor who alleged that she was passed over for a promotion because she is a lesbian. The court indicated that it may find that Title VII protects against sexual orientation discrimination.

#### Employer Tip

The *Christiansen* decision establishes that stereotyping based on sexual orientation or gender norms may be deemed a violation of Title VII. Employers should analyze their current policies and practices and ensure that they protect against discrimination and harassment based on sexual orientation or sex or gender-based stereotypes and also be aware that many state laws, including those in New York and New Jersey explicitly prohibit this form of discrimination. Employers should also be diligent in training their managers to avoid subjective employment decisions on the basis of sexual orientation or stereotypes based on sex.

#### Second Circuit Dismisses ADA Claim Brought by Employee with Needlephobia

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On March 21, 2017, the Second Circuit held that Rite Aid could not reasonably accommodate a pharmacist's fear of needles. In *Stevens v. Rite Aid Corporation*, No. 15-277, the panel dismissed Stevens' claims of wrongful termination, retaliation and failure to accommodate under the Americans with Disabilities Act (the "ADA"), finding that he was unable to perform the essential functions of his job with or without accommodation. In doing so, the court overturned a jury verdict that awarded him \$2.6 million.

Rite Aid had implemented a vaccination certification policy for its pharmacists after Stevens' had been working for the company for 34 years. Stevens submitted medical documentation stating that he had trypanophobia, which caused him to faint or otherwise become sick in the presence of needles, and asked for an accommodation. Although

Rite Aid considered his request, it ultimately terminated Stevens for failure to complete the vaccination training. Stevens filed suit against Rite Aid, and a jury awarded Stevens \$2.6 million in damages at trial.

On appeal the Second Circuit analyzed whether Rite Aid was obligated to accommodate Stevens' phobia of needles. The court concluded that "[a] reasonable accommodation can never involve the elimination of an essential function of a job." The court determined that the company was allowed to include vaccinations as one of the job's essential functions, and thus, was allowed to terminate an employee for the inability to meet that function.

The panel rejected the accommodations that Stevens had requested. Although Stevens had argued that Rite Aid could have provided desensitization therapy, the court determined that providing medical treatment does not constitute a reasonable accommodation.

#### Employer Tip

Whenever an employer has notice that an employee may have a potential disability or medical condition, best practices is to engage in the interactive process. The *Rite Aid* decision shows that the interactive process may reveal that an employee may not be able to perform an essential job duty even with an accommodation. In that instance, the employer may not be liable for its inability to accommodate the employees. To further protect against claims of failure to accommodate, it is important for employers to identify essential functions of each position, create written job descriptions and ensure that they are uniformly implemented.

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The following attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert or other employment and labor issues.

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