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Zarda v. Altitude Express: Another Federal Court Breakthrough on Sexual Orientation Discrimination

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On Feb. 26, 2018, the Second Circuit issued an *en banc* opinion in *Zarda v. Altitude Express*, and joined the Seventh Circuit, the EEOC, and some lower federal courts in holding that Title VII of the Civil Rights Act of 1964 ("Title VII") protects employees from discrimination based on their sexual orientation. The opinion reverses a long history of cases that explicitly held that Title VII does not cover sexual orientation discrimination.

Title VII makes it unlawful for an employer to discriminate with respect to the terms and conditions of employment because of an employee's race, color, religion, sex, or national origin. Although the statute itself does not mention sexual orientation, the court in *Zarda* broke new ground in that circuit in holding that discrimination because of sexual orientation is a subset of sex discrimination.

The Facts Behind *Zarda v. Altitude Express*

The plaintiff in *Zarda*, a skydiving instructor named Donald Zarda, was terminated from his job after he told a client that he was gay. Following what was then settled precedent across all circuits, the district court, and later a three-judge panel on the Second Circuit, held that Zarda's claims were not covered under Title VII. The *en banc* court reversed, reasoning that sexual orientation is a function of sex and that sexual orientation discrimination necessarily involves sex stereotyping and discriminates against employees for associating with someone of a particular sex.

The Expansion of Title VII

The court was able to break with precedent and recognize coverage for sexual orientation because of a series of cases over several years that had expanded the scope of Title VII protections. The court noted that, at the time Congress enacted Title VII, it was not understood that even sexual harassment or a hostile work environment constituted actionable discrimination based on sex. Yet, since that time, the court explained, a series of cases had more thoroughly considered the definition of sex discrimination, and expanded its boundaries. (Lisa Banks and Hannah Alejandro explore this evolution in their article, Changing Definitions of Sex under Title VII.)

For example, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which involved a female plaintiff who was denied a partnership promotion because she did not wear makeup or dress femininely, the U.S. Supreme Court recognized that gender stereotyping of this type is related to sex. And, in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the Supreme Court recognized that Title VII protects individuals from harassment by members of the same sex. It reasoned that although "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII" the statute nevertheless covered "comparable evils." Id. at 79.

The EEOC Accepts Sexual Orientation as Sex Discrimination

The landmark Supreme Court cases that the Second Circuit relied on in *Zarda* provided its legal foundation, but a decision by the Equal Employment Opportunity Commission ("EEOC") provided the roadmap for the Second Circuit to get there. In *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015), the EEOC reversed course on its previously accepted approach and recognized that sexual orientation discrimination was, in fact, sex discrimination. The EEOC reasoned that sexual orientation cannot be defined without reference to sex and that an employment decision based on sexual orientation necessarily relies on the employee's sex. Further, it explained that discrimination based on sexual orientation targets employees for associating with someone of a particular sex. Courts had already determined that an employer could not discriminate against an employee for marrying or otherwise associating with someone of a different race, and the same principles applied to sex. Further, the EEOC reasoned, sexual orientation discrimination "necessarily involves discrimination based on gender stereotypes." The EEOC's thorough and deliberate analysis provided courts with a strong rationale to overturn harmful precedent that Title VII does not prohibit sexual orientation discrimination.

Disagreement Among the Appellate Courts

Following *Baldwin*, the Seventh Circuit was the first circuit court to recognize sexual orientation discrimination as a violation of Title VII when it decided *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) on April 4, 2017. In its momentous decision, the *en banc* court emphasized the EEOC's position in *Baldwin* and relied on the long line of cases that expanded the scope of actionable sex discrimination under Title VII.

The Seventh Circuit's decision, however, contrasted with *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1251 (11th Cir. 2017), an Eleventh Circuit panel decision issued less than one month earlier, on March 10, 2017. In that case, the plaintiff, a lesbian who presented herself with traditionally masculine traits claimed that she suffered harassment based on her sexual orientation and gender presentation. The district court had dismissed both theories, citing precedent for dismissing the sexual orientation claim and finding that she failed to state claim for discrimination based on her gender presentation. But the Eleventh Circuit held that her gender stereotyping claim should be considered in further proceedings. The plaintiff sought an *en banc* review by the Eleventh Circuit, which was denied, and later petitioned for certiorari before the Supreme Court, which denied the petition in December 2017.

With *Zarda*, the Second Circuit became the third circuit court to examine Title VII sexual orientation discrimination after the EEOC's decision in *Baldwin.* It widened the circuit split that arose with the decisions in *Hively* and *Evans*. These contrasting opinions provide a stronger rationale for the Supreme Court to consider the issue in the future. But, given its current composition, Supreme Court review is a risky prospect for LGBTQ rights.

LGBTQ Employees Face Further Challenges

In the meantime, plaintiffs will likely continue to assert discrimination claims based on all available theories: first that the discrimination was because of their sexual orientation, second that it was because of another trait related to sex such as failure to conform to gender stereotypes, and third, that it was because of their association with a member of the same sex.

At the same time, LGBTQ workers may face other obstacles to asserting their rights. Recently, courts across the country have entertained arguments that religious rights outweigh anti-discrimination protections for LGBTQ individuals. For example, in *E.E.O.C. v. RG & GR Harris Funeral Homes*, the Sixth Circuit recently reversed a district court opinion that held that the Religious Freedom Restoration Act ("RFRA") allowed a funeral home director to terminate a transgender employee for

failing to follow the business's sex-specific dress code. The Sixth Circuit held that in terminating the plaintiff, the funeral home discriminated against her because of sex, and that even if enforcing Title VII substantially burdened the funeral home director's religious rights, enforcement of Title VII was the least restrictive means of serving the government's compelling interest in eliminating workplace discrimination. (For further discussion on the RFRA and employees' rights, see my article with Ioana Cismas, Whose Right and Who's Right?)

Further, the Supreme Court is poised to decide, in *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, whether requiring a bakery to provide a wedding cake to a gay couple violated the baker's First Amendment rights to free speech and free exercise of religion. In light of these cases, it is clear that protections against sexual orientation discrimination remain in flux.