An Emerging Trend? Second Federal Appellate Court Changes Course, Finds Title VII Extends to Sexual Orientation Discrimination

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Why It Matters

For years, courts across the country have held in uniform fashion that sexual orientation is not a protected class under Title VII of the Civil Rights Act of 1964. Just recently, however, the Second Circuit Court of Appeals in *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. Feb. 26, 2018), became the second federal appellate court in the span of less than a year to reverse course and explicitly hold that Title VII's protections extend to discrimination on the basis of sexual orientation. The *Zarda* decision is noteworthy, as the opinion substantially widens the current circuit split as to whether Title VII encompasses discrimination based on sexual orientation, further increasing the likelihood that the U.S. Supreme Court will take up the matter to issue a decisive ruling on the cognizability of sexual orientation discrimination claims under Title VII and provide a definitive resolution to this hotly contested issue of employment law.

The Second Circuit Ruling

Donald Zarda worked as a skydiving instructor for Altitude Express. Zarda filed suit against his employer alleging that he was terminated as a result of disclosing to a client that he was gay and for failing to conform to the "straight male macho stereotype," which — according to Zarda — constituted unlawful sex stereotyping in violation of Title VII. Initially, a panel of three Second Circuit judges ruled against Zarda, dismissing his sexual orientation discrimination claim on the basis that Title VII does not explicitly prohibit discrimination based on sexual orientation.

On review of the panel's decision, the full *en banc* Second Circuit reversed course and held that Title VII prohibits discrimination based on an individual's sexual orientation due to

its status as an impermissible form of "sex" discrimination. In reaching this conclusion, the Second Circuit relied on three primary lines of reasoning. First, the court looked to the text of Title VII and found that sexual orientation discrimination constitutes a subset of sex discrimination because the employer's disparate treatment is motivated, at least in part, on the employer's consideration of the worker's sex. In reaching this conclusion, the court highlighted the fact that because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Logically, then, because sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected under Title VII's prohibition against discrimination "because of…sex."

Second, the court found that sexual orientation discrimination constitutes a subset of sex discrimination under a theory of gender stereotyping, which prohibits employment decisions predicated on assumptions about how individuals of a certain sex can or should be, including to whom they should be attracted. In support of this conclusion, the court relied on the prior U.S. Supreme Court precedent holding that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females, and that discrimination based on a failure to conform to sex stereotypes constitutes a form of unlawful sex discrimination under Title VII. As such, the court concluded, because sexual orientation discrimination is necessarily rooted in gender stereotypes about the proper roles of men and women,

this particular form of disparate treatment runs afoul of Title VII's ban on gender stereotyping.

Lastly, the court found that sexual orientation discrimination constituted a subset of sex discrimination under a theory of associational discrimination, which posits that an individual who is discriminated against because of the protected characteristic of those with whom he or she associates is actually being disadvantaged because of his or her own traits. As such, sexual orientation discrimination violates Title VII's prohibition against associational discrimination because this particular form of discrimination is motivated by the employer's opposition to romantic association between members of particular sexes which, in turn, constitutes discrimination based on the employee's own sex.

Takeaways

With the *Zarda* ruling, the Second Circuit now becomes the second federal appellate court to expressly rule that Title VII extends to sexual orientation discrimination in the workplace. The *Zarda* decision comes on the heels of the landmark 2017 decision issued by the Seventh Circuit Court of Appeals in *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. Apr. 4, 2017), which marked the first federal appellate decision to favor a more expansive interpretation of Title VII that includes sexual orientation as a protected class. In addition, these two recent landmark rulings align with the position maintained by the EEOC since 2015, which holds that sexual orientation falls within the umbrella of Title VII's protections.

With that said, there is a clear split among both the federal appellate courts and our nation's federal

governmental agencies as to whether Title VII extends to encompass sexual orientation as a protection class. In this respect, the *Zarda* ruling conflicts with the current precedent maintained by nine federal appellate circuits, all of which maintain that Title VII does not include sexual orientation discrimination. The Department of Justice also holds a similar view of Title VII, finding sexual orientation to be excluded from the protections of the nation's federal anti-discrimination statute.

Combined, the clear divergence of opinions that currently exists as to the proper scope of Title VII has placed immense pressure on the U.S. Supreme Court to address the issue and hand down a decisive ruling on the cognizability of sexual orientation discrimination claims under Title VII. Importantly, the Second Circuit's *Zarda* decision makes it substantially more likely that the nation's highest court will ultimately accept review of the matter at some point in the future to provide a definitive answer regarding the scope of Title VII's protections which, in turn, will allow for consistent application of the law across all federal courts throughout the nation.

At the present time, however, the issue of whether discrimination based on sexual orientation constitutes actionable sex discrimination under Title VII remains in a state of significant uncertainty. While the majority federal courts of appeal continue to refuse to add sexual orientation to the list of protections afforded by Title VII, the combination of the recent *Hively* and *Zarda* opinions indicate that a momentous shift in the legal landscape as it relates to protections afforded to LGBT employees in the workplace may be right around the corner. Critically, in both decisions the Second and Seventh Circuits overturned prior, longstanding circuit precedent that held that Title VII did not extend to sexual orientation discrimination in the workplace. In addition, many states and municipalities have enacted their own statutory protections against sexual orientation discrimination. Moreover, the EEOC has clearly indicated its intent to focus on targeting and eliminating discrimination against LGBT individuals in the workplace as one of its top national priorities, as articulated in the EEOC's recently released 2018-2021 Strategic Enforcement Plan.

Taken together with the substantial shift in the cultural and social viewpoint of the nation as it relates to the issues of homosexuality, sexual orientation, and gender identity in recent years, it is clear that scope of what constitutes "sex" discrimination is evolving and expanding in rapid fashion. Ultimately, however, until a definitive ruling is issued by our nation's highest court, at least for the time being LGBT employees will continue to lack comprehensive affirmative protections across the country under federal law against discrimination in the employment setting.