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Legal Sidebar

Federal Agencies Disagree Whether Sexual Orientation Discrimination Is Prohibited by Title VII

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If an employer fires an employee because of sexual orientation, is that a form of unlawful discrimination "because of sex" under Title VII of the Civil Rights Act? After hearing oral argument on September 26, 2017, in *Zarda v. Altitude Express, Inc.*, the U.S. Court of Appeals for the Second Circuit (Second Circuit), sitting en banc, is poised to address this significant legal question against a backdrop of conflicting views from federal courts of appeals and two federal agencies.

While Title VII makes it unlawful to discriminate "because of such individual's race, color, religion, sex, or national origin," its statutory text does not expressly address "sexual orientation." In *Zarda*, the plaintiff argued that Altitude Express violated Title VII when it fired Donald Zarda because of his sexual orientation, after he told a client he was gay. His former employer responded that it fired him because of various complaints by a client. A panel of the Second Circuit held that Zarda's Title VII claim was foreclosed by earlier circuit precedent concluding that Title VII does not prohibit sexual orientation discrimination. The panel noted in its decision, however, that though a three-judge panel lacked the authority to overturn circuit precedent, the entire court sitting en banc could revisit it. Subsequently, the Second Circuit agreed to rehear the case en banc.

The Second Circuit's forthcoming en banc decision follows two conflicting decisions issued by the Eleventh and Seventh Circuits earlier this year on the same issue. In March, the Eleventh Circuit, in *Evans v. Georgia Regional Hospital*, held that Title VII does not prohibit discrimination based on sexual orientation (and subsequently denied a petition seeking rehearing en banc of that panel decision). In April, the Seventh Circuit, sitting en banc, came to the opposite conclusion and held in *Hively v. Ivy Tech Community College of Indiana* that Title VII *does* protect against sexual orientation discrimination. The Second Circuit also addresses the issue in light of opposing views offered by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), both of which filed *amicus curiae* briefs in *Zarda.* Though the EEOC and DOJ share responsibility for enforcing Title VII (the EEOC against private employers, DOJ against public sector employers, pursuant to 42 U.S.C. 2000e-5(f)(1)), the two agencies offered directly competing interpretations of the statute.

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In its brief, and at oral argument, the EEOC argued—at the Second Circuit's invitation to address the legal question in *Zarda*—that Title VII's prohibition against discrimination "because of sex" *includes* sexual orientation. Citing to *Hively* and a concurring opinion in that case, the EEOC stated in its brief that because actions taken on the basis of sexual orientation necessarily take into account the sex of the employee (and the sex of the employee's partner), discrimination based on sexual orientation constitutes discrimination "because of sex" under Title VII. The EEOC also contended that, because the Second Circuit has already recognized that Title VII's prohibition against race discrimination is violated when an employer adversely treats an employee based on the race of whom he *associates* with—for example, adversely treating a white employee because he has a black spouse—that precedent supports a reading of Title VII that makes it similarly unlawful to discriminate against an employee based on the sex of whom he associates with (*i.e.*, someone of the same sex). Finally, citing to the Supreme Court decision *Price Waterhouse v. Hopkins*, the agency maintained that if an employer relies on a "sex stereotype" of how men or women should behave when it fires an employee—such as the expectation that members of one sex should only be attracted to the opposite sex—that action is a form of sex discrimination prohibited by Title VII.

A month after the EEOC's filing, DOJ—appearing on its own initiative under Federal Rule of Appellate Procedure 29(a)(2)—filed its own brief arguing that Title VII *excludes* such protection, and notably, stating that although the EEOC enforces Title VII, "the EEOC is not speaking for the United States." DOJ emphasized that federal courts of appeals, including the Second Circuit, have—up until the Seventh Circuit's *Hively* decision—unanimously held that Title VII does not cover sexual orientation discrimination. That precedent reflects a correct understanding of the statute, DOJ contended, because a sex discrimination analysis examines whether one sex (biologically male or female) was treated adversely in comparison to the *opposite* sex, and not whether an employee of one sex is treated adversely in comparison to another employee of the *same* sex, as is the case with sexual orientation discrimination. DOJ also stated that Congress "ratified" this judicial understanding of Title VII when it amended Title VII in 1991, by which time several federal appellate courts had held that sexual orientation was *excluded* from coverage under Title VII. Attaching an addendum to its brief listing bills introduced from 1970 through the 2010s, none of which were enacted into law, DOJ stated that "Congress has made clear through its actions and inactions in this area that Title VII's prohibition of sex discrimination does not encompass sexual orientation discrimination." Whether it should do so, DOJ added, was a policy matter for Congress to decide, not the courts.

Noting these divergent views, and the unusual posture of two federal agencies appearing on opposite sides of the same issue, several judges at oral argument pressed DOJ counsel with questions concerning the EEOC's authority, and whether the Justice Department had conferred with the EEOC with respect to participation in the *Zarda* case. Indeed, as *Zarda* involves a Title VII action against a private employer, it is the type of case in which the EEOC would ordinarily participate as *amicus curiae*, as it did in both *Evans* and *Hively*. For the same reason, *Zarda* presents an unusual context for DOJ to appear, given its Title VII enforcement against public employers. DOJ counsel repeatedly asserted that it was "not appropriate" for him to disclose internal deliberations and process.

Regardless of how the Second Circuit resolves the issue, the Supreme Court may ultimately weigh in and address the scope of Title VII's prohibition against sex discrimination, as the plaintiff in *Evans* has since petitioned the Court to decide whether Title VII covers sexual orientation discrimination. The *Evans* petition, which was distributed for judicial conference on October 27, 2017, points to the circuit split created by the *Evans* and *Hively* decisions—and the "opposite positions" taken by "two federal agencies"—as bases for the Court to resolve "the intractable conflict over the scope of Title VII." If the Court grants the petition, it could define the scope of Title VII's prohibition against sex discrimination, and its decision could dictate how lower courts apply the statute. If it denies the petition, the pending Second Circuit decision will shape how lower district courts in the circuit apply Title VII's prohibition against sex discrimination with respect to sexual orientation.

Congress could also respond to the issue, including by amending the definitions section of Title VII to clarify whether sexual orientation discrimination is a form of sex discrimination (42 U.S.C. 2000e(k)) or by an amendment expressly including or excluding "sexual orientation" as a separate protected category under Title VII. Congress could also pass other legislation that addresses sexual orientation discrimination in the workplace.

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