

DIVERSITY AND EMPLOYMENT LAW

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IN THIS ISSUE

The authors discuss the current Federal Circuit Court split over whether Title VII's prohibition of sex discrimination encompasses sexual orientation discrimination and the Second Circuit Court of Appeals' recent decision to grant en banc review of this question in the case of Zarda v. Altitude Express.

Clarity on the Horizon? Another Appeals Court Grants *En Banc* Review of Sexual Orientation Discrimination under Title VII

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More clarity on whether Title VII prohibits discrimination on the basis of sexual orientation may be coming sooner rather than later, thanks to the Second Circuit Court of Appeals granting *en banc* review in the case of *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017). In April 2017, the Seventh Circuit Court of Appeals issued an *en banc* decision in the case of *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), which dramatically ramped up the debate on whether Title VII covers sexual orientation discrimination.

The Seventh Circuit (which includes Illinois, Indiana, and Wisconsin) issued the first federal circuit appeals decision holding that Title VII of the Civil Rights Act of 1964 protects employees against discrimination based on sexual orientation in *Hively v. Ivy Tech Community College*. However, in early 2017, two other Federal Circuit Court panels in the Second Circuit (which includes Connecticut, New York, and Vermont) and the Eleventh Circuit (which includes Alabama, Florida, and Georgia) reached the opposite conclusion in *Zarda v. Altitude Express* and *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), respectfully. This resulting “circuit split” creates an uneven interpretation of Title VII, and the Supreme Court may ultimately rule on the issue if it grants a writ of certiorari. However, some clarity on the subject may come sooner than expected. On May 25, 2017, the Second Circuit granted a petition for *en banc* review in *Zarda v. Altitude Express* to decide whether discrimination

based on sexual orientation is protected under Title VII. Unfortunately, the plaintiff, Donald Zarda, died during the pendency of the case and his estate is pursuing the matter on his behalf. If the Second Circuit does decide that sexual orientation is considered discrimination under Title VII, then it will be the second circuit court in the country to interpret the law this way. While Zarda will not see the rest of his case unfold, the rest of the country will be watching.

In *Zarda v. Altitude Express*, Zarda, a skydiving instructor employed by Altitude Express, alleged that his supervisor terminated him because he revealed his sexual orientation to a female customer. *Zarda*, 855 F.3d at 79. Zarda filed a Charge of Discrimination with the EEOC, which “issued a decision setting forth the agency’s view that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII,” under its 2015 *Baldwin v. Foxx* decision. EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). *Zarda*, 855 F.3d at 81. Afterwards, Zarda filed a lawsuit in the Eastern District of New York against his former employer alleging claims of employment discrimination under New York state law and federal law. *Id.* at 79. The district court granted summary judgment in favor of Altitude Express based on Second Circuit precedent that Title VII does not cover sexual orientation discrimination established in [Simonton v. Runyon](#), 232 F.3d 33, 36 (2d Cir. 2000). In order to rule in

Zarda's favor, *Simonton v. Runyon* would have to be overturned.

In *Simonton v. Runyon*, Dwayne Simonton sued the Postmasters General and the United States Postal Service under Title VII for sexual orientation discrimination and harassment. *Simonton v. Runyon*, 232 F.3d at 34. He alleged that co-workers told him things like, "go f--- yourself f--" and "suck my d---" because he was gay. *Id.* at 35. However, the Court refused to consider discrimination based on sexual orientation as sex discrimination under Title VII. *Id.* at 35. Simonton attempted to argue that he faced discrimination based on sexual stereotyping, relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), but was unsuccessful because he failed to plead sufficient facts and did not present the issue to the district court. *Simonton*, 232 F.3d at 37-38. Therefore, the Second Circuit held that Title VII does not protect discrimination based on sexual orientation, leaving Simonton remediless. *Id.*

As mentioned in *Simonton v. Runyon*, recall that the iconic United States Supreme Court case, *Price Waterhouse v. Hopkins*, established that Title VII's prohibition of discrimination based on sex included discrimination based on failure to conform to gender stereotypes. *Price Waterhouse*, 490 U.S. at 258. Thus, it is no surprise that in *Zarda v. Altitude Express*, Zarda framed his Title VII sexual orientation discrimination claim in the context of gender nonconformity, citing criticisms from his supervisor about Zarda wearing pink clothes

and painting his toenails, as well as alleging that his dating men did not conform to gender stereotypes. *Zarda*, 855 F.3d at 80-81. However, in its summary judgment ruling, the district court "limited its analysis" and did not analyze whether dating someone of the same sex is a failure to conform to gender stereotypes. *Id.* at 81. This resulted in the district court dismissing Zarda's Title VII claims because there was not a sufficient proximity between his gender non-conforming acts of wearing pink and donning nail polish and his ultimate termination. *Id.*

Zarda's state law claims continued to a jury trial, where the employer prevailed. *Id.* Under New York law, Zarda had to clear the high bar of proving "but-for" causation between his sexual orientation and his termination. *Id.* However, if Zarda's Title VII claim had survived summary judgment, then the jury instruction would have had a "less stringent 'motivating-factor' test for causation," as opposed to the difficult "but-for causation" and he may have prevailed. *Id.* at 82. After all, the Second Circuit noted, the jury very well could have concluded that his sexual orientation was one of the factors for his termination, but did not find that it was the sole but-for cause of his termination. *Id.*

Zarda appealed, petitioning the Second Circuit to reexamine its *Simonton v. Runyon* ruling and reverse the district court's summary judgment ruling, but the Second Circuit panel declined to revisit the summary judgment ruling because overturning circuit

precedent requires an *en banc* session. *Id.* This was the same ruling it had previously made in a similar case, *Christiansen v. Omnicom Group*, less than a month before. *Id.* (citing *Christiansen, v. Omnicom Group*, 852 F.3d 195,199 (2d Cir. 2017)). As such, the panel in *Zarda v. Altitude Express* affirmed the district court's decision, bound by its precedent. *Id.*

Zarda then petitioned the Second Circuit for *en banc* review, which the Second Circuit granted on May 25, 2017. The Second Circuit set the question posed for briefing as "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of...sex'?" and also invited interested parties to submit *amicus curiae* briefs. Oral argument is presently set for September 26, 2017 at 2:00 PM.

Also pending, is the case of *Evans v. Georgia Regional Hospital*, in which an Eleventh Circuit panel dismissed, based on its circuit precedent, the plaintiff's sexual orientation discrimination claims while preserving her gender non-conformity claims. *Evans*, 850 F.3d at 1258 (11th Cir. 2017). *Evans* filed a petition for *en banc* review on March 31, 2017 to reconsider the Eleventh Circuit's precedent on the sexual orientation piece, but no decision on the *en banc* petition has surfaced as of the date of this publication.

Zarda v. Altitude Express in the Second Circuit and *Evans v. Georgia Regional Hospital* in the Eleventh Circuit have the ability to drastically change the way courts

interpret Title VII. With another *en banc* decision on the horizon and the potential for more in the future, the issue may soon be presented to the U.S. Supreme Court. However, if the Second Circuit joins the Seventh Circuit in finding sexual orientation discrimination prohibited under Title VII as a form of sex discrimination, employers may see more clarity on this issue before the U.S. Supreme Court has an opportunity to address the issue.

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